Transcripts of Records

TRANSCRIPT OF RECORD.

379

SUPREME COURT OF THE UNITED STATES.

No. 288.

THE UNITED STATES, APPELLANT,

vs.

CHARLES M. TAYLOR, IN HIS OWN RIGHT AND AS ADMINISTRATOR OF IRENE M. TAYLOR, DECEASED.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 4, 1879.

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SUPREME COURT U.S.
FILED
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JAMES H. McKENNEY, CLERK

IN THE

Supreme Court of the United States.

No. 288.—October Term, 1881.

THE UNITED STATES, Appellant,

vs.

CHARLES M. TAYLOR, Administrator of Irene M. Taylor, Deceased, Appellee.

Brief and Argument for Appellee.

ALBERT PIKE,
LUTHER H. PIKE,
Attorneys for Appellee.

J. L. Pearson, Printer, 9th and D sts., Washington.

IN THE

Supreme Court of the United States.

THE UNITED STATES, APPELLANT, *vs.* CHARLES M. TAYLOR, AS ADMINISTRATOR OF IRENE M. TAYLOR, DECEASED, APPELLEE.	No. 288.

Brief and Argument for Appellee.

POINTS OF FACT.

1. Congress, by the 8th section of the act approved August 5th, 1861, declared that a direct tax of $20,000,000 should be annually laid upon the United States; and then thereby apportioned the same to the several states respectively.—(12 U. S. Stat., p. 294.)

2. The 13th section of the same act provided that the said tax should be assessed and laid on the value of all lands and lots of ground, with their improvements and dwelling-houses; which several articles, subject to taxation, should be enumerated and valued at the rate each of them should be worth in money on the 1st day of April, 1862.

3. The 33d section of the same act declared that the tax assessed should be a lien upon the lands and other real estate of the individuals who should be assessed for the same during two years after the time it should annually become due and payable.

4. The 36th section of the same act declared that when personal property could not be found sufficient to satisfy the tax and costs, the real estate should be sold, with a provision in these words:

"But in all cases where the property liable to a direct tax under this act may not be divisible, so as to enable the collector by a sale of part thereof to raise the whole amount of the tax, with all costs, charges, and commissions, the whole of such property shall be sold, and the surplus of the proceeds of the sale, after satisfying the tax, costs, charges, and commissions, shall be paid to the owner of the property, or his legal representatives; or, if he or they cannot be found, or refuse to receive the same, then such surplus shall be deposited in the treasury of the United States, to be there held for the use of the owner, or his legal representatives, until he or they shall make application therefor to the Secretary of the Treasury, who, upon such application, shall, by warrant on the treasury, cause the same to be paid to the applicant."—(12 U. S. Stat., p. 304.)

Several acts amendatory of and supplemental to the said act of August 5th, 1861, were passed. We copy only the portions of these that, in our judgment, bear upon the questions presented by this case for the court's consideration and determination.

5. By section 119, act of July 1, 1862, it was declared, that so much of said act of 5th August, 1861, "as imposes a direct tax of twenty millions of dollars on the United States, shall be held to authorize the levy and collection of one tax to that amount; and no other tax shall be levied, under and by virtue thereof, until the first day of April, eighteen hundred and sixty-five, when the same shall be in full force and effect."—(12 U. S. Stat., p. 489.)

6. By section 173, act of June 30, 1864, it was declared, among other things, "That no direct tax whatsoever shall be assessed or collected, under this or any other act of Congress heretofore passed, until Congress shall enact another law requiring such assessment and collection to be made; but this shall not be construed to repeal or post-

pone the assessment or collection of the first direct tax levied, or which should be levied, under the act entitled 'An act to provide increased revenue from imports, to pay interest on the public debt, and for other purposes,' approved August fifth, eighteen hundred and sixty-one, nor in any way to affect the legality of said tax, or any process or remedy provided in said acts, or any other acts for the enforcement or collection of the same in any state or states and territories and the District of Columbia; but said first tax, and any such process or remedy, shall continue in all respects in force, anything in this act to the contrary notwithstanding."—(13 U. S. Stat., p. 502.)

7. By section 4, act of March 3d, 1865, it was declared, "That any lien creditor (being a loyal citizen of the United States from the commencement of this rebellion, or alien subject of a friendly nation, who shall not have taken part against the United States in this rebellion) of a person whose lands or tenements shall have been sold by a board of tax commissioners and not redeemed, shall, after the period of redemption has elapsed, be entitled to payment, out of the balance of the proceeds of sale of such lands and tenements, after the same shall have been paid into the treasury of the United States, of the amount of his lien, if a sufficient sum shall be left for such purpose after the payment of all claims of the United States, together with the costs and expenses of sale, and the payment of all prior liens, under such rules and regulations, and after exhibiting such proof of his right, as the Secretary of the Treasury shall prescribe."—(13 U. S. Stat., p. 502.)

8. Block 37 in Little Rock, Arkansas, was, on 4th May, 1865, subject under said provisions of law to a direct tax of $37.00, which was assessed thereon to Matilda Johnson.—(Record, p. 6.)

9. This tax was so assessed to Matilda Johnson, though on said 4th May, 1865, and ever since March 4th, 1863, Irene M. Jordan was, and had been, the owner of said

block by purchase from said Matilda Johnson; the cause of the assessment being made to Mrs. Johnson being, that she appeared by the land records as the owner, in consequence of her deed to Mrs. Jordan not having been recorded until August 25th, 1866.—(Record, pp. 3, 5, 12.)

10. The board of direct tax commissioners for the district in which said block was situated, sold it on said 4th May, 1865, to one Meservey, because of the non-payment of said tax, etc., he paying therefor the price, $3,000, of which amount the United States were entitled to the sum of $70.50 on account of the tax, etc.—(Record, pp. 6, 12.)

11. Mrs. Jordan became, in 1865, the owner of the direct-tax-sale title by purchase for valuable consideration from Meservey's assignee.—(Record, p. 6.)

12. On the 10th December, 1873, Mrs. Johnson, by her formal instrument of writing of that date, recognized Mrs. Jordan, who had previously thereto become Irene M. Taylor, by her intermarriage with Charles M. Taylor, as the rightful owner of said block, and of the money in the treasury realized from said direct-tax sale thereof.—(Record, pp. 6, 12.)

13. On the 15th January, 1874, Mrs. Taylor and her husband made application to the Secretary of the Treasury for the supplus of the $3,000 realized from said direct-tax sale remaining after proper deductions on account of said tax, penalty, &c. This application was rejected 17th January, 1874.—(Record, p. 12.)

14. They, on the 8th December, 1875, brought suit in the Court of Claims, and on the 19th of May, 1879, recovered judgment for $2,929.50 as the amount of said surplus.

Points of Law.

The Secretary of the Treasury based his rejection of the claimants' application, upon the propositions that the said section 36, act of August 5th, 1861, had been modified by

the act of June 7, 1862, section 4 (12 U. S. Stat., p. 423); that the sale was made under this latter act, which contained no provision for the return of the money received beyond the amount of the tax, but provided for a forfeiture of the property, as a consequence of the failure to pay the tax, etc.

The points of defence presented to the Court of Claims were—

1st. That the claimants had not proven title.

2d. That Congress, by the acts of June 7, 1862, (12 Stat., 422,) of February 6th, 1863, (12 Stat., p. 640,) had made a complete disposition of the surplus, that was entirely inconsistent with that made by section 36, act of August 5th, 1861.

This was but an amplification of the secretary's objection.

That the Court of Claims had not jurisdiction of the cause—

(*a.*) Because the petition was not filed within 6 years after the claim first accrued.

(*b.*) Because the claimants' remedy under section 36, act August 5, 1861, was restricted to an application to the Secretary of the Treasury.

We suppose these same points of defence will be presented to this court, and so reply to each *seriatim.*

I.—As to the Claimants' Title to the Land.

(*a.*)—*As between them and Mrs. Johnson.*

It is the law of Arkansas, that a deed of land in that state delivered, passes the title as between the parties, although it is neither acknowledged nor recorded; and is good, though without date, as it takes effect from delivery.

Floyd vs. Ricks, 14 Arks., 286.

(*b.*)—*As between them and the United States.*

Had no person other than Mrs. Johnson preferred claim to redeem the land after sale or to the surplus about which

this controversy is waged, after time for redemption expired, the United States would have been estopped to deny that she was the owner of the property sold or rightful claimant to the surplus.

Had Mrs. Johnson preferred claim for this surplus, and another, claiming title to the property sold in hostility to hers, had preferred his adverse claim to this surplus, it is probable the United States could have insisted that such adverse claimant should establish his title as a plaintiff in an ordinary ejectment suit is required to establish his. In such a case, Mrs. Johnson standing defensive, would have been entitled to all the rights of a defendant in an ordinary ejectment suit.

But the claimants in this case claimed in privity with Mrs. Johnson. There was an entire absence of claim in hostility to their or Mrs. Johnson's title and right; and besides, Mrs. Johnson re-affirmed in most formal manner, and recognized Mrs. Taylor as the owner of the property and the rightful claimant to this surplus.

Under such circumstances, it would seem not to be necessary for the purpose of justice, or to effectuate the objects of the law, that the claimants' right to this surplus should be narrowed down by a strict construction.

But both the defendants and claimants, by their respective requests to the Court of Claims for findings of facts, asked that court to find as a fact proven, that Matilda Johnson was, in August, 1863, the owner in fee simple of the property, and the court so found.—(First finding.)

This finding is conclusive, unless impeached for some error in law appearing in the record.

United States vs. Smith, 94 U. S., 218.
United States vs. Pugh, 99 U. S., 272.

The testimony submitted by the claimants was amply sufficient to raise the presumption that on the day of the sale Mrs. Taylor was the owner of the property. If any evidence to the contrary existed, the burden was cast upon the United States to produce it. Until this presumption

in favor of the claimant is repelled, the law gives him the right, so far as this point in his case is involved, to the judgment he has obtained.

United States vs. Pugh, 99 U. S., 272.

II.—As to the Disposition of the Surplus intended by Congress.

The acts of August 5th, 1861, and June 7th, 1862, are to be construed together. The general object of both was the same, namely, the raising of revenue by a tax on land.

Bennett vs. Hunter, 9 Wallace, 333.

As the act of February 6th, 1863, section 7, (12 Stat., p. 640,) was but an amendment of section 7 of the act of June 7th, 1862, in some particulars, which, as we conceive, do not in anywise alter the act of June 7th, 1862, in its substantial relation to the questions under consideration, we submit that it is controlled by the decision of this court in Bennett vs. Hunter, and stands precisely as the act of June 7th, 1862.

The first clause of section 4, act of June 7th, 1862, did not work an actual transfer of the land to the United States.

Bennett vs. Hunter, 9 Wallace, 335.
Turner vs. Smith, 14 Wallace, 563.
Schenck vs. Peay, U. S. Cir. Ct. East. Dist. of Ark.

Notwithstanding the forfeiture declared in said section 4, act June 7th, 1862, a sale was required.

"The proceeding ending in a sale was simply a mode of compelling the discharge of his duty." The owner's duty to pay the tax when it was due.

De Treville vs. Smalls, 98 U. S., 525.

As for the 12th section of the act of June 7, 1862, relied upon by the defendants, it is only necessary for us to say that its provisions had reference to a matter entirely distinct and different from the disposition of the money

received from the direct-tax sales, over and above the tax, etc., unpaid.

That section referred exclusively to the leases and sales of property of which the United States should become proprietor or possessor at and under tax sales to be made by the several boards of direct-tax commissioners: the leases and sales spoken of in the 9th, 10th, and 11th sections of the act.

The Court of Claims set forth in its opinion upon this point of the controversy, the substance of the opposite views presented by claimants and defendants so fully and so fairly that we prefer to adopt what it said in reference thereto than to attempt to improve upon it.

But by the later act of March 3d, 1865, section 4, (13 Stat., p. 501,) Congress most positively recognized that the money realized from a direct-tax sale over and above the direct tax and its accretions due to the United States, was the money of the owner of the land sold.

We respectfully submit the following by way of argument upon this point of the law of the case.

The act of August 5th, 1861, (12 Stat., 304,) provided that, upon a sale of lands for the direct tax, costs, charges, and commissions, the surplus of the proceeds of sale after satisfying them, should be paid to the owner or his legal representatives; and if he or they could not be found, or refused to receive it, should be deposited in the treasury, to be there held for his or their uses until he or they should apply for it to the Secretary of the Treasury, who should thereupon, by warrant on the treasury, cause the same to be paid to the applicant.

If no one should bid the amount of the tax, and twenty per cent. additional thereon, then the collector was required to purchase the land in behalf of the United States; and in that case the owner was allowed to redeem, on certain terms, within two years.

The act of June 7, 1862, provided that, in states where insurrection existed, the whole tax for the state should be

1 I.—*Petition.*

United States Court of Claims, term, A. D. 1875.

CHARLES M. TAYLOR AND IRENE M. TAYLOR, his wife, *vs.* THE UNITED STATES.	No. 10729. Filed December 8, 1875.—J. R.

Charles M. Taylor and Irene M. Taylor, his wife, who are citizens of the United States, residing and having their post-office address at South Bend, in the county of Lincoln and State of Arkansas, and claim a certain sum of money in the Treasury of the United States, the property of the said Irene M. Taylor in her own right, that is to say, that portion of the money realized from the sale made on the 4th day of May, A. D. 1865, by the direct-tax commissioners of the United States for the insurrectionary district of Arkansas, of block or square numbered twenty-seven west of the Quapaw line in the city of Little Rock, in the county of Pulaski and State of Arkansas, under and by virtue of the provisions of the acts of Congress approved respectively the 5th day of August, A. D. 1861, and the 7th day of June, A. D. 1872, and of the acts amendatory thereof, that remained after satisfaction of the tax, penalty, costs, and interest on said tax for and on account whereof said sale was made, by this their petition to the honorable Court of Claims of the United States respectfully show:

That on the 4th day of March, A. D. 1863, Mrs. Matilda Johnson, being the then owner in fee simple in her own right of the said block or square numbered twenty-seven, for and in consideration of the
2 sum of fifteen thousand dollars to her paid by the said Irene M. Taylor, then Irene M. Jordan, widow of John A. Jordan, deceased, conveyed to the said Irene M. Taylor, by her then name of Irene M. Jordan, the said block or square in fee simple in her own right, and, in evidence thereof, on that day executed and on the 9th day of the same month delivered to her a deed therefor in due form of law, a duly-certified copy whereof, and of its certificates of acknowledgment and record, is herewith exhibited, marked "C. M. T., Exhibit A.." as part of this petition.

That said deed of conveyance was not recorded among the land records of the said county and State until the 25th day of August, A. D. 1866, so that on the 4th day of May, A. D. 1865, the said block or square appeared by said records as the property of the said Matilda Johnson.

That on the said 4th day of May, A. D. 1865, a direct tax of thirty-seven dollars, previously thereto assessed upon said block or square to the said Matilda Johnson, being then due and unpaid, Messrs. Hulings Cowperthwait and Enoch H. Vance, direct-tax commissioners, and constituting and being a board of such commissioners for the insurrectionary district of Arkansas, sold said block or square at public vendue to one William N. Meservey, the highest bidder thereat, for the sum, then paid, of three thousand dollars, which amount of money, less the said tax, the penalty imposed by reason of the non-payment of the tax, costs, and interest on said tax, was or should have been deposited by said commissioners in the Treasury of the United States to the credit of the said Matilda Johnson. And the said commissioners having so sold the said block or square, they, in evidence thereof, on the 11th day of May, A. D. 1865, executed and delivered in due form of law to the said Meservey their certificate of said sale, numbered fifty-seven.

That on the same 11th day of May, A. D. 1865, the said Meservey, for and in consideration of three thousand dollars to him paid by William O. Stoddard, assigned to him (Stoddard) all the right, title, interest, and claim in and to said block or square he had acquired under and by virtue of his purchase from said commissioners, and thereupon, in evidence thereof, delivered to the said Stoddard the said certificate of sale with his assignment endorsed thereon, witnessed by the said Cowperthwait and one Thomas Johnson.

That on the 19th day of June, A. D. 1865, the said Stoddard,
3 for and in consideration of three thousand five hundred dollars paid to him by the said Irene M. Taylor, assigned to her, by her then name, Irene M. Jordan, all the right, title, interest, and claim in and to said block or square he had acquired under and by virtue of his purchase from the said Meservey, and thereupon, in evidence thereof, delivered to her the said certificate of sale, with his assignment endorsed thereon, witnessed by the said Vance and one Charles P. Redmond.

That on the 8th day of August, A. D. 1865, the said Thomas Johnson, one of the subscribing witnesses to the said assignment made by Mesevey to Stoddard, appeared before James A. Hutchings, then an acting and duly commissioned justice of the peace in and for the said county of Pulaski and State of Arkansas, and made proof of said assignment; and on the same 8th day of August, A. D. 1865, the said Stoddard also appeared before said Hutchings and acknowledged his assignment to the said Irene M. Taylor; and thereupon, on that day, the said certificate, with said assignments and proof and acknowledgment thereof, evidenced by the certificates, with said Hutchings as such justice of the peace endorced thereon and attached thereto, was filed for record in the office of John W. Jay, clerk of the circuit court and ex-officio recorder in and for said county of Pulaski and State of Arkansas, and was by him on that day duly recorded among the land records of said county of Pulaski.

That said direct-tax commissioners' certificate, with said assignments and certificates of the said Hutchings of the proof and acknowledgment of said assignments, is now on file in the Treasury Department of the United States, at the city of Washington, in the District of Columbia, and under the control of the Secretary of that department.

That on the 18th day of February, A. D. 1868, the said Irene M. intermarried with the said Charles M. Taylor.

That on the 22d day of August, A. D. 1870, Robert J. T. White, then secretary of state of and for said State of Arkansas, certified, over the great seal of said State, that said James A. Hutchings was, on the said 8th day of August, A. D. 1865, a justice of the peace in and for said county of Pulaski, as aforesaid, which said certificate is also in in said Treasury Department and under control of said Secretary.

4 That on the 10th day of December, A. D. 1873, the said Matilda Johnson executed and delivered to the said Irene M. Taylor her asssignment in writing, in due form of law, of and to all the right, title, interest, and claim she had or was supposed to have in and to the said surplus of money realized from the direct-tax sale of said block or square numbered twenty-seven, which assignment is also in said Treasury Department and under the control of said Secretary.

That on the 15th day of January, A. D. 1874, the claimants and petitioners made application to the honorable Secretary of the Treasury of the United States to cause, by his proper warrant on the Treasury of the United States, said surplus to be paid to their attorneys for the use and benefit of the said Irene M. Taylor, to which application the Sec-

retary replied by letter to their attorneys, of date the 17th day of January, A. D. 1874, a duly-certified copy of which letter will be filed as part of the proof herein.

That the claimants and petitioners, regarding the letter as indicating but a qualified rejection of their said application, they, by their said attorneys, in March, A. D. 1875, applied to the then honorable Secretary of the Treasury for a further hearing on their said application, which he declined to grant them.

And in consideration of these facts the claimants and petitioners, Charles M. Taylor and Irene M. Taylor, his wife, pray that they may be heard to prove their said case against the United States, against whom they demand, no other person being owner of or interested in any part of their claim, the surplus of the money realized from said direct-tax sale of said block or square numbered twenty-seven, in said city of Little Rock, that remained after the satisfaction of said tax, penalty, costs, and interests on said tax, and is now in the Treasury of of the United States to the credit of the said Matilda Johnson.

And the petitioners pray that it may be by the court adjudged that they are legally entitled to said surplus, and that they may have judgment therefor against the United States; and as in duty bound they will ever pray, &c.

The post-office address of their attorneys, Messrs. Pike & Johnson, is Washington City, in the District of Columbia.

CHAS. M. TAYLOR.
IRENE M. TAYLOR.

5 STATE OF KENTUCKY,
County of Jefferson:

We, Charles M. Taylor and Irene M. Taylor, his wife, do solemnly swear that no assignment or transfer of the claim stated in the foregoing petition, or of any part thereof, has been made by us; that we are, as we do verily believe, justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets, and that we do verily believe all the facts therein stated, as the same are stated therein, to be true, and that, so far as stated of our own knowledge, they are true in substance and in fact.

CHAS, M. TAYLOR.
IRENE M. TAYLOR.

Subscribed and sworn to before me by Chas. M. Taylor and Irene M. Taylor, this August 6th, 1875.

[SEAL.] CH. M. THURSTON,
Clk Jeff. Co. Ct, Ky.

C. M. T., EXHIBIT A.

Matilda Johnson to Irene M. Jordan.

This deed of conveyance, made and executed at city of Little Rock, within the county of Pulaski and in the State of Arkansas, this fourth day of March, in the year of our Lord one thousand eight hundred and sixty-three, by and from Matilda Johnson, of the county and State aforesaid, of the first part hereto, unto and with Irene M. Jordan, party of the second part hereto:

Witnesseth that the said party of the first part, for and in consideration of the sum of fifteen thousand ($15,000) dollars by the said party of the second part, at and before the ensealing and delivery of these

presents, unto her in hand paid, the receipt whereof she doth hereby acknowledge, hath granted, bargained and sold, aliened, and conveyed, and doth hereby grant, bargain and sell, alien, and convey, unto the said party of the second part, the hereinafter-described lots or parcels of land, namely: Block or square numbered twenty-seven (27), and lots numbered six and seven (6 and 7) in block or square numbered forty-two (42), in the city of Little Rock, west of the Quapaw line, all being according to the survey and plan of said city remaining of record in the office of the clerk and ex-officio recorder of said county, together with all and singular the appurtenances to the said premises belonging.

6 To have and to hold the above-granted parcels of land and premises unto the said party of the second part, her heirs and assigns forever. And the said party of the first part, and her heirs, shall and will warrant and defend the same unto the said party of the second part, her heirs and assigns forever, against the lawful claims of all persons whatsoever.

In witness whereof the said party of the first part have hereunto set her hand and affixed her seal, at Little Rock aforesaid, the day and

[R. S. $1,500.]

MATILDA JOHNSON. [SEAL.]

Signed, sealed, and delivered in the presence of—
RICH'D H. JOHNSON,
THOS. NEWTON.

THE STATE OF ARKANSAS,
County of Pulaski:

On this 9th day of March, in the year of our Lord one thousand eight hundred and sixty-three, before me, the undersigned, clerk of the circuit court within and for the , in the county of Pulaski and State of Arkansas, appeared in person Mrs. Matilda Johnson, to me personally known as the person whose name appear' upon the within and foregoing deed of conveyance as the party grantor, and stated "that she had executed the same for the consideration and purposes therein mentioned and set forth," and I do so hereby certify.

In testimony whereof I have hereunto set my hand as such clerk, and affixed my seal hereunto, at Little Rock, in the county and State aforesaid, on the day and year last aforesaid.

[L. S.] THOS. H. WALKER, *Clerk.*

Filed for record 23d August, 1866, and recorded 25th August, 1866.
JOHN W. JAY,
Clerk, Ex-officio Recorder.

STATE OF ARKANSAS,
County of Pulaski:

I, James R. Roland, county clerk and ex-officio recorder, do hereby certify that the foregoing is a true and correct copy of the instrument therein set forth, and the same as appears of record in my office, on pages 666 and 667, record-book "G No. 2" of deeds.

Witness my hand and the official seal of my office, this 27th day of August, A. D. 1873.

[SEAL.] J. R. ROLAND, *Clerk,*
By J. A. EMERSON, *D. C.*

7 II.—*Traverse.—Filed Dec'r* 22, 1875.

And now comes the Attorney-General, on behalf the United States, and makes answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of three thousand dollars, or any other sum, says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimants have at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, denies the said allegation.

THOMAS SIMONS,
Assistant Attorney-General.

8 III.—*Plea of limitation.—Filed March* 20, 1878.

Now comes the defendants, by their Attorney-General, and say that the claimant herein should not further have or maintain their suit against the defendants, for the reason that the petition of the claimants was not filed in this court nor transmitted to it within six years after the claim therein set forth first accrued.

Wherefore the defendants ask judgment, &c.

THOMAS SIMONS,
Assistant Attorney-General.

9 IV.—*Motion to dismiss petition under Rule I.—Filed Mar.* 8, 1879.

The Attorney-General, on behalf of the United States, moves the court to dismiss the petition of the claimants, because the same was not filed in the court nor transmitted to it by the Secretary of the Senate nor by the Clerk of the House of Representatives, as provided by law, within six years after the claim therein set forth first accrued.

THOMAS SIMONS,
Assistant Attorney-General.

V.—*Motion to dismiss petition overruled.*

And now, to wit, March 18, 1879, it is ordered that the motion of the defendants to dismiss the petition herein be overruled.

10 VI.—*Suit revived in the name of the administrator.*

And now, to wit, April 29, 1879, Mr. Pike, for the claimant, filed mo tion suggesting the death of Irene M. Taylor, and asking that the suit be revived in the name of C. M. Taylor, administrator. Allowed.

11 VII.—*Findings of fact and conclusion of law.*

I.

Matilda Johnson, in March, 1863, was the owner in fee simple of block or square No. 27, in the city of Little Rock, Ark., and on the 4th day

of that month executed her deed in fee thereof to Irene M. Jordan. Before the commencement of this suit the said Irene M. Jordan intermarried with the claimant Charles M. Taylor, and since the commencement of this suit the said Irene M. Taylor has deceased and the said Charles M. Taylor has been duly appointed as the administrator of her estate.

II.

The said block No. 27 was subject to a direct tax of $37, which was, by the board of direct-tax commissioners duly appointed for the insurrectionary district of Arkansas, assessed thereon to Matilda Johnson, and the penalty thereon amounted to the sum of $18.50.

III.

Said direct tax standing unpaid on the 4th May, A. D. 1865, said direct-tax commissioners on that day, in order to secure the payment of said tax, exposed said square to sale, and sold the same at public auction to William N. Meservey, the highest bidder at said sale, at and for the sum of $3,000. At the time of said sale the interest on said tax at 10 per cent. amounted to $11.

IV.

Said direct-tax commissioners, on the 11th May, A. D. 1865, executed and delivered to said Meservey their tax-sale certificate No. 57, to evidence the assessment of said tax on said square to said Matilda Johnson, their sale of said square to enforce payment of said tax, and the purchase of said Merservey at said sale at and for the sum of $3,000.

V.

On the 11th May, A. D. 1865, said Meservey assigned to William O. Stoddard said direct-tax certificate No. 57, and all his right, title, and interest thereunder in and to said square No. 27, for the price of $3,000.

12 VI.

On the 19th June, A. D, 1865, said William O. Stoddard assigned to Irene M. Jordan said direct-tax certificate No. 57, and all his right, title, and interest thereunder in and to said square No. 27, for the price of $3,500.

VII.

William Walker, an agent of Matilda Johnson, on the 10th day of March, 1865, applied in writing to the direct tax commissioners for the district of Arkansas for leave to pay the tax and penalty charged upon blocks numbered 27 and 42, in the city of Little Rock, Ark., and did offer and tender therein to them the sum of $77.70, being the amount of taxes and penalties charged upon said blocks, declaring and making it known that Matilda Johnson was seized at that writing of said lots in fee simple absolute.

VIII.

The following communication was addressed by Matilda Johnson to the direct-tax commissioners on the date given:

LITTLE ROCK, ARK'S, 1*st July*, 1865.

To the board of tax commissioners of the United States for the district of Arkansas, Little Rock, Ark's:

The undersigned, Matilda Johnson, having taken the oath of amnesty prescribed by the President of the United States, hereby applies to redeem the whole of block 27 and the whole of block 42 (west of the Quapau line), and also to redeem 6 acres of ground in Johnson's addition (E. Q. L.), all in Little Rock, Arkansas, all of which real estate, it seems, was sold by said commissioners on the 4th day of May, 1865, in consequence of the non-payment of the taxes, interest, penalty, and costs charged thereon under the acts of Congress of the United States of America in force on the 7th day of January, 1865, and designated in the annexed notice of that date. The act of Congress of Feb. 6, 1863, and the acts designated in the annexed notice having been in force at the time the taxes, &c., were fixed on said real estate, it is believed constituted the system governing the collection of taxes fixed under said laws, and the right to redeem said real estate sold for taxes, &c., so fixed, it is claimed, is governed solely by the laws aforesaid, which were in force when the taxes were fixed; and therefore, under said laws, to the entire exclusion of the provisions of the act of 3d March, 1865, this application is made to redeem said real estate, upon which the commissioners had fixed the taxes, &c., on the 7th January, 1865, long before the passage of the act of 3d March, 1865, as shown by the annexed notice, to wit:

"OFFICE UNITED STATES TAX COMMISSIONERS,
"DISTRICT OF ARKANSAS,
"*Little Rock, Ark., Jan'y 7th*, 1865.

"Notice is hereby given that the United States direct tax levied and assessed on the State of Arkansas by an act of Congress entitled 'An act provide increased revenue from imports, to pay interest on the public debt, and for other purposes,' approved August 5th, A. D. 1861, and by an act entitled 'An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes,' ap-
13 proved June 7th, 1862, has, in pursuance of the provisions of said acts, been duly assessed and apportioned on the several lots, tracts, and parcels of real estate situate and lying within the limits of the city of Little Rock and its several additions, and the undersigned are now ready to receive payment of the tax, interest, and penalty levied and apportioned thereon.

"HULINGS COWPERTHWAIT,
"ENOCH H. VANCE,
"*Commissioners for the Collection of the Direct Tax for Dist. Ark.*
"Office, Beebee building.
"JAN. 1, 1865."

The whole amount of taxes, costs, interest, and charges I hereby tender to redeem said real estate, and ask that the lawful money so tendered may be received, and my said property fully redeemed from said sale.

MATILDA JOHNSON.

Done in the presence of us witnesses on the date above written:
AMELIA C. NEWTON,
M. C. EASTMAN.

IX.

The following affidavit was subscribed and sworn to by Matilda Johnson:

STATE OF ARKANSAS,
County of Pulaski, ss:

Mrs. Matilda Johnson, of the city of Little Rock, in said county and State, being duly sworn according to law, deposes and says that in August, A. D. 1863, she was the owner of a one-story brick dwelling-house, elegantly furnished, on block No. 27 in said city of Little Rock, which house contains seven rooms, five store-rooms, kitchen and servants' room, besides several closets, and, in addition, also, unattached to the main dwelling, a one-story brick house for servants, containing two rooms, all of which, together with a brick carriage-house and a frame stable and carriage-house, on the date aforesaid, she placed in the care of Judge William Walker and his wife, during her temporary absence from Little Rock; which said house and premises, she is informed, were taken possession of by Brig. Gen'l Davidson, U. S. Army, on the 17th day of September, A. D. 1863, and used by him as his headquarters in the city of Little Rock; and that after said house and grounds were vacated by Gen'l Davidson they were immediately taken possession of by Brig. Gen'l Carr, U. S. Army, and used and occupied by him as his headquarters; and, also, that when vacated by him, the said Gen'l Carr, the said premises were immediately taken possession of by Brig. Gen'l Salomon, and were by him occupied as aforesaid until Wednesday evening, July 19th, A. D. 1865; and that she is also informed that two tax commissioners of the United States for the collection of the direct tax of the district of Arkansas, to wit, Hulongs Cowperthwait and Enoch H. Vance, published a notice as follows:

"OFFICE U. S. TAX COMMISSIONERS,
"DISTRICT OF ARKANSAS,
"*Little Rock, Ark's, Jan'y 7th,* 1865.

"Notice is hereby given that the United States direct to be levied and assessed on the State of Arkansas, by an act of Congress entitled 'An act to provide increased revenue from imports, to pay inter-
14 est on the public debts, and for other purposes,' approved August 5, A. D. 1861, and by an act entitled 'An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes,' approved June 7th, 1862, has, in pursuance of said acts, been duly assessed and apportioned on the several lots, tracts, and parcels of real estate situate and lying within the limits of Little Rock and its several additions, and the undersigned are now ready to receive payment of the tax, interest, and penalty levied and apportioned thereon.

"HULINGS COWPERTHWAIT,
"ENOCH H. VANCE,
"*Commissioners for the Collection of the Direct Tax for Dist. Ark's.*

"Office, Beebe building."

And that she is also informed that the said William Walker, as her agent, in whose care said premises were left, and who, with his family, had been dispossessed of her said premises by verbal order of Gen'l Davidson, did, at the office of said tax commissioners, within less than

sixty days from the date of the said notice of said tax commissioners, tender and offered to pay to the said above-named commissioners the full amount of tax, interest, and penalty levied and apportioned on said block 27, embracing her homestead, and on all of her other real estate in the city of Little Rock, and that said commissioners, as she is informed, in violation of law and by arbitrary assumption of power, did refuse to receive from her said agent the tax, interest, and penalty levied and apportioned on her said property in Little Rock; and she also states that the said dwelling-house and buildings embraced on block 27 constituted her homestead since March, A. D. 1836, being more than twenty-nine years; and she also states that she is informed that the said two tax commissioners published a notice as follows, to wit:

"*Sale of lands for unpaid U. S. direct taxes in insurrectionary districts in the State of Arkansas.*

"OFFICE U. S. DIRECT TAX COMMISSIONERS,
"DIST. OF ARK'S,
"*Little Rock, April 1st*, 1865.

"Notice is hereby given that the several tracts or lots of land situated in the city of Little Rock and its several additions thereto, in Pulaski County, in the State of Arkansas, hereafter described, have become forfeited to the United States by reason of the non-payment of the direct taxes charged thereon under the act entitled 'An act to provide increased revenue from imports, to pay interest on the public debt, and for other purposes,' approved August 5th, 1861, and an act entitled 'An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes,' approved June 7th, 1862; and that the same will be sold at public auction, on the 4th day of May, A. D. 1865, at the State House at Little Rock, co. of Pulaski, in the State of Arkansas.

"The following is a description of said lands forfeited as aforesaid, together with the amount of the said tax, and finally charged upon each of said tracts of land respectively."

The said lands forfeited as stated in the notice of said commissioners are all here omitted except the property taxed to Mrs. Matilda
15 Johnson, to wit, the whole of block 27, and the whole of block 42, and six acres in Johnson's addition, E. Q. L.

The quota of tax on block 27 was stated in said notice to be..	$37 00
And the penalty thereon.....	18 50
Making the whole amount.....	$55 50
And the quota of tax on block No. 42.....	$14 80
And the penalty thereon.....	7 40
Making the whole amount.....	$22 20
And the quota of tax on the six acres in Johnson's addition to be.....	$14 80
And the penalty thereon.....	7 40
Making the whole amount	22 20

After the descriptions of the lands represented to be forfeited and to be sold the commissioners added the following, to wit:

"The above sale will commence on Thursday morning, May 4th, 1865, at 10 o'clock, in front of the west wing of the State House (United States court-room), and be continued in the order of the advertised list of property to be sold, beginning with those under letter A.

"Terms cash.

"H. COWPERTHWAITE,
"ENOCH H. VANCE,
"*U. S. Direct Tax Commissioners, District of Arkansas.*"

Mrs. Matilda Johnson states that she was informed that the said William Walker not only offered, as hereinbefore stated, to pay the tax, interest, and penalty on her homestead and other property in Little Rock, as hereinbefore described and designated, *written* less than sixty days from the 7th day of Jan'y, 1865, and was then not permitted by said commissioners to pay the same, but that said William Walker also again applied to pay the tax, interest, and penalty on her said homestead and other property in Little Rock hereinbefore designated after the same had been advertised for sale by said commissioners and described in their notice dated April 1st, 1865, which notice had hereinbefore been designated, and that the said commissioners again refused to permit the taxes, interest, and penalty to be paid on her said homestead and other property in Little Rock; but on the 4th day of May, 1865, in pursuance of their published notice, hereinbefore stated, sold at public auction her said homestead, embraced on blocks 27, Wm. N. Meservey, for the sum of three thousand dollars, and sold block 42, for twelve hundred dollars, to C. C. Bliss, and sold the said six acres in Johnson's addition, E. L. Q. to C. C. Bliss, for sixteen hundred dollars; that the two tax commissioners hereinbefore named issued in favor of the said Wm. N. Meseway their certificate No. 57, dated the 11th day of May, 1865, showing that he had, on the 4th day of May, 1865, purchased block 27, and the said Wm. N. Meseway, on the 11th day of May, 1865, duly assigned the said certificate of purchase to Wm. O. Stoddard, for the consideration of three thousand dollars, and the said Wm. O. Stoddard, on the 19th day of June, 1865, assigned the said certificate of purchase to Irene M. Jordan, for the consideration of thirty-five hundred dollars; that within sixty days from the sale of her homestead and other property in Little
16 Rock by the said tax commissioners she applied in person at their office, and tendered lawful money of the United States fully sufficient in amount to redeem her said homestead and her other property sold for taxes by said commissioners as hereinbefore designated.

She also exhibits to the commissioners the oath of amnesty she had taken, showing that she was a loyal citizen of the United States, and that she was prepared and ready to comply with the requirements of all the laws on the subject of redemption of said property which was in force at the time the said tax was assessed and apportioned upon the same, but that she has not up to this time been permitted by said commissioners to redeem her said homestead, or any of the other of her property sold by said commissioners for taxes; that she has not had the available means to buy from the persons who hold the certificates of purchase her said homestead and other property; that when she left her home in August, 1863, with her daughter, for the southwestern part of the State of Arkansas she had not the least intention of abandoning her homestead and other property; that when she left her said home-

stead she left all her furniture in her house, with other personal property, and also some of her house servants on the premises, with the intention of returning in a short period to her home, and occupying the same again; but that she learned that her homestead was occupied by officers of the United States Army, and therefore she did not return as early as she would have done had they not occupied her place of residence.

That no rent had been received by her or tendered to her, or any one in her behalf, for the use of the said premises and furniture as aforesaid; that no voucher or receipt of any kind had been received by her, or any one in her behalf; that she has never disposed of her claim against the government for the use of said premises and furniture as aforesaid from the 17th day of September, 1863, to the fourth day of May, 1865, when her homestead was, as she verily believes, illegally and unjustly sold by said tax commissioners for taxes, and for the use of the furniture of said homestead from the 4th day of May, 1865, to the 19th day of July, 1865, when the officers of the United States Army vacated the premises; that she considered that said premises were worth two hundred and fifty dollars monthly from the 17th day of September to the 4th day of May, 1865, and that from the 4th day of May, 1865, to the 19th day of July, 1865, she should be allowed a reasonable compensation for the use, by officers of the United States Army, of the furniture which belonged to her in said house and premises; that during the occupancy of the premises by the United States officers the house and furniture were damaged considerably, and a portion of the furniture taken away and not returned; that she is a loyal citizen of the United States, and is seventy-two years of age; that she is the widow of the late Benjamin Johnson, who was district judge of the United States for the district of Arkansas from the year 1836 until he died, in the year 1850; and that she has no available means of support at present for herself and family except the amount due her for rent of the said premises.

That in addition to the foregoing declaration and statements made under oath, although she had heretofore taken the oath of amnesty prescribed by the President of the United States, she adds below the oath prescribed in General Order No. 48, dated Quartermaster-Gen'l's Office, Washington, D. C., Nov. 1st, 1864, to wit:

"I, Matilda Johnson, do solemnly swear that I will support, protect, and defend the Constitution and Government of the United States, and the Union of the States themselves, against all enemies, whether domes-
17 tic or foreign; that I will bear true faith, allegiance, and loyalty to said Constitution and Government; that I will faithfully support and abide by all acts of Congress passed and all proclamations of the President made during the existing rebellion with reference to slaves, so long and so far as not modified or held void by Congress or by decision of the Supreme Court of the United States; that I will faithfully perform all the duties which may be required of me by law; and, further, that I do this with a full determination, pledge, and promise, without any mental reservation or evasion whatsoever. So help me God.

"MATILDA JOHNSON.

[R. S. 5 cts.]

"Subscribed and sworn to before me, David R. Lamb, judge of the

county and probate courts of Pulaski County, State of Arkansas, at Little Rock, Arkansas, this 28th day of July, A. D. 1865.

"DAVID R. LAMB,

"*Judge of the County and Probate Courts of Pulaski County, Arkansas.*"

X.

On the 23d August, A. D. 1866, the deed made by Matilda Johnson to Irene M. Jordan, on the 4th March, A. D. 1863, was filed for record in the office of the recorder of deeds in and for the county of Pulaski, State of Arkansas, and was there recorded on the 26th August, A. D. 1866, in record book "G" No. 2, page 666.

XI.

On the 10th day of December, A. D. 1873, Matilda Johnson, for valuable consideration, assigned to said Irene M. Jordan, by her then name of Irene M. Taylor, all and any the rights, title, interest, and claim she had in and to the surplus of the $3,000 realized from said direct-tax sale remaining after deductions made on account of said direct tax, expense of said direct-tax sale, etc.

XII.

The said tax commissioners received purchase money from different purchasers at different sales, and, after paying from the general fund such expenses as the law permitted them to pay, turned the remainder of the money over to the Treasury in bulk. The whole amount of the tax and penalty and of all the costs, charges, and commissions which should be deducted from the amount realized from said sale is $70.50, and the amount of the surplus of the proceeds of the sale, after satisfying said tax, cost, charges, and commissions, is $2,929.50.

XIII.

On the 15th January, A. D. 1874, the claimants, by their attorneys, made application to the Secretary of the Treasury for the surplus of the $3,000 realized from said direct-tax sale remaining after deductions made on account of said direct tax, the expenses of said direct-tax sale, etc.

XIV.

On the 17th January, A. D. 1874, the Secretary of the Treasury rejected claimant's said application.

18 CONCLUSION OF LAW.

That, for the reasons given in the opinion of the court, the claimant is entitled to recover the sum of $2,929.50.

VIII.—*Opinion of the court.*

OPINION.

DAVIS, J., delivered the opinion of the court:

On the 4th May, 1865, the direct-tax commissioners of the United States for the insurrectionary district of Arkansas sold at public sale a

parcel of land with a house on it in Little Rock, for non-payment of a direct tax assessed thereon to Mrs. Matilda Johnson, in whom the title of record was vested. The amount of the tax was $37, and there was in addition a penalty of $18.50, making an aggregate of $55.50 due to the United States. The property sold for $3,000, all of which went, either directly or indirectly, into the Treasury of the United States. This suit is brought to recover the surplus over tax, penalty, costs, and commissions.

The act of August 5, 1861, authorized a direct tax of $20,000,000 to be annually laid upon the United States. Of this $261,886 was apportioned to the State of Arkansas. Due provisions were made for the assessment and collection of the tax within each state, and for the sale of real estate for non-payment of the tax assessed upon it. It was also provided that "the surplus of the proceeds of the sale, after satisfying the tax, cost, charges, and commissions, should be paid to the owner of the property, or his legal representatives, or if he or they could not be found, or should refuse to receive the same, then such surplus should be deposited in the Treasury of the United States, to be there held for the use of the owner, or his legal representatives, until he or they should make application therefor to the Secretary of the Treasury, who, upon such application, should, by warrant on the Treasury, cause the same to be paid to the applicant."

Had legislation rested here, and had the tax upon the claimant's land been assessed and collected under the provisions of this law alone, the present dispute, probably, would not have arisen. The deposit of the surplus in the Treasury would have been held for the use of the owner, and on proper application therefor a warrant would have been issued for its payment.

But the course of the war made it impossible to execute this law in the districts occupied by the armed forces of the enemy. To remedy this, Congress, on the 7th of June, 1862, passed a law entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," by which a special machinery was created for the collection of this tax in the insurrectionary districts, of which it is needless to say Arkansas was one. Within the loyal territory the tax had been assumed by the respective States. The new law authorized the creation of tax commissioners for each State in insurrection, and empowered these officers with the necessary authority to assess and collect the tax. By the seventh section of the act they were authorized to sell real estate for non-payment of the taxes assessed upon it. Some amendments were made to this section by the act of February 6, 1863, and it was under the act as amended that the sale in this case took place. As the amendments did not affect the disposition of a possible surplus, they are immaterial in the view we take of the case. It is not disputed that all things necessary to give validity to the sale itself were done.

The claimant maintains that the act of 1862 and its amend-
19 ments made no provision for the payment of the proceeds of the sale into the Treasury; and he argues that, inasmuch as it could not be contemplated that the tax commissioners should retain the proceeds to their own use, the mandatory provisions of the act of 1861, which we have cited, must have continued in force.

He fortifies this argument, in the first place, by appealing to the opinion of the Supreme Court in Bennett v. Hunter (9 Wall., 326), wherein it is said that "the acts of 1861 and 1862 are to be construed together. The general object of both was the same, namely, the raising of revenue

by a tax on land. The first prescribed a mode of collection where the authority of the general government was acknowledged and no serious obstacle existed to the execution of the law; the second directed the mode of collection where this authority had been overthrown by insurrection but had been sufficiently re-established to make collection, to some extent at least, practicable. * * * The primary purpose of the act was undoubtedly revenue, to be raised by collection of taxes on lands." From this the claimant argues that there could be no revenue from the tax if the proceeds of sales to enforce it were not paid into the Treasury; and he says that we must go to the act of 1861 to find a provision requiring the proceeds to be deposited there.

In the second place, he contends that a tax law which authorizes a sale of the property for non-payment of the tax, and the receipt by the government of the whole value resulting from the sale, without liability to account to the owner for any surplus which may remain after payment of the tax and the legal penalty for non-payment and the costs of collection, is virtually a forfeiture of the property itself. He argues that Congress could not have intended this inequitable result; and, since the Supreme Court has already decided that the two statutes are to be construed together as a revenue law, he further contends that we must look to the act of 1861 not only to find how the proceeds of the sale are to reach the Treasury, but also what is to be done with the surplus when it gets there.

The defendants' counsel answered this by showing that the statute gave the owner of property sold for non-payment of taxes a right of redemption which, though it might be brief and onerous, precluded the idea of forfeiture or confiscation. He also referred to the twelfth section of the act of June 7, 1862, which provides that the proceeds of leases and sales shall be paid into the Treasury of the United States, and that one-fourth of them are to be subsequently paid over to the governor of the State wherein the lands are situated, or his authorized agent when the insurrection should be put down and the people should elect a legislature and State officers who should take an oath to support the Constitution. He argued from this that the law has made a complete disposition of the surplus, which is entirely inconsistent with the theory of the claimant's case.

The claimant replied that the ninth section of the act of 1862 authorized the United States to take possession of and lease all lands whose owners should have abandoned them and gone to aid the rebellion, provided the same should be sold for non-payment of taxes and bid in by the United States; and that the eleventh section of the act made provisions, at the pleasure of the President, for the sale of such lands instead of a lease of the same. He contended that the provisions of the twelfth section, on which the defendants' counsel relied, referred only to the leases which were authorized by the ninth section and the sales which were authorized by the eleventh section, and had no reference to
20 general sales for non-payment of taxes made under the provisions of the amended seventh section.

In this brief summary of the positions taken on each side, in the interesting discussion of this question, we have necessarily omitted many of the illustrations from the statutes with which counsel fortified their respective contentions. We have carefully considered the subject, and are with the claimant on this point. The Supreme Court has settled for us in advance that the statutes of 1861 and of 1862 are to be construed together as a revenue law. If follows that the provisions of the act of 1861 which are applicable to the subjects affected by the law

of 1862, and which are not replaced by corresponding provisions in that law, remained in force after the passage of the law of 1862, and were applicable to the property subjected to the law of 1862 as well as to the property which remained exclusively subject to the law of 1861.

This view, if correct, leaves us to determine only whether the twelfth section of the act of 1862 relates to the proceeds of all tax-sales, or only to the proceeds of sale of lands abandoned by owners who had gone to aid the rebellion, and which are sold for taxes and bid in by the United States.

The seventh and eighth sections of that act terminate the consideration of the subject of the assessment and collection of taxes, of the sale of property for the non-payment of taxes, and of the rights of redemption of the same so far as they are treated in the statute. The ninth section proceeds to the treatment of quite another subject—the "other purposes" named in the title of the act—and the ninth, tenth, and eleventh sections are exclusively occupied with provisions respecting the leases and sales of property of which the United States may become proprietor or possessor under operation of tax-sale. When, therefore, the twelfth section, in immediate context with these sections, speaks of "the proceeds of said leases and sales," the natural grammatical inference is that it refers to the leases and sales authorized by the sections immediately preceding. It would be a strained construction to apply this language to sales authorized by the seventh section, which could be justified only on the supposition that no other provision could be found for passing that money into the Treasury. In view of the fact that the forced construction insisted on by the defendants works out an inequitable forfeiture of the entire property for non-payment of a tax which forms but a small part of its value, while the logical result of the opinion in the 9th Wallace works out substantial justice, we have no hesitation in holding that the disposition of the proceeds of the sale of the claimant's property is governed by the provisions of the act of 1861.

The defendants further contend, however, that even if the claimant's rights are to be measured by the statute of 1861, he has no standing in court, first, because the statute gives him no remedy here; and, second, because his remedy, if he has one, is barred by the statute of limitations. We will briefly examine these two inconsistent propositions.

In Knote's case (95 U. S., 156) the Supreme Court says that the jurisdiction of this court "is limited to claims founded upon a law of Congress, or upon a regulation of an executive department, or upon a contract, express or implied, with the government. The claim here presented [that is, in Knote's case] rests upon a supposed implied contract to pay to the claimant the money received as the proceeds of the forfeited property. To constitute such a contract there must have been some consideration moving to the United States, or they must have received the money charged with a duty to pay it over." It is a necessary corollary from this that when the United States do receive money
21 charged with a statutory duty, as in this case, to pay it over, an implied contract exists to pay the money over in the manner provided by the statute.

The next question is a more difficult one. The statute of 1861, as we have seen, provides that the surplus shall be held in the Treasury until the owner or his legal representative makes application for it, when it shall be paid to him. If the statute implies a contract to pay to the owner at once upon the deposit of the money so that he can maintain an action for it without previous demand upon the Secretary of the Treasury, this suit is clearly brought too late. If, on the contrary, he

cannot come here before the Secretary of the Treasury has heard him and decided against him, then his cause of action accrued on the refusal of the Secretary of the Treasury, and his suit is not barred by the statute. Though the question is not free from doubt, we take the latter view and hold that the suit is not barred by the statute of limitations. We are the more ready to do this that the amount involved is less than $3,000.

But one more question remains on the merits. The defendants maintain that, admitting the claimant's good status in court, and that the statute of 1861 is the law governing his case, the facts show no title in him to the alleged surplus. Mrs. Matilda Johnson, from whom the claimant's title is derived, was the widow of a former judge of the United States for the district of Arkansas, and there is nothing to lead us to question her title to the property at the time when she conveyed it to her daughter, Mrs. Jordan. We have no doubt of the delivery of the deed to the daughter, nor that it was properly put on record. All these circumstances operated as a transfer of the property. This transfer is fortified by a subsequent conveyance from Mrs. Johnson of the right to receive the surplus from the tax-sale. By the subsequent intermarriage of Mrs. Jordan with Mr. Taylor, her death, and his administration upon her property, his title is complete.

It follows from this that the court is of opinion that claimant is entitled to recover. Judgment will be entered in his favor for $2,929.50.

22 IX.—*Final judgment.*

At a Court of Claims held at the Capitol, in the city of Washington, on the 19th day of May, A. D. 1879, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Charles M. Taylor, in his own right and as administrator of Irene M. Taylor, have and recover of and from the United States the sum of two thousand nine hundred and twenty-nine dollars and fifty cents ($2,929.50).

23 X.—*Application for appeal and order allowing same.*

From the judgment rendered in the above-entitled cause on May 19th, 1879, in favor of claimant, the defendants, by their Attorney-General, on the 28th day of July, 1879, make application for, and give notice of, an appeal to the Supreme Court of the United States.

A. D. R.

THOMAS SIMONS,
Ass't Attorney-General.

Filed July 28, 1879.

AT CHAMBERS.

Allowed.

C. D. DRAKE,
Chief Justice.

24 In the Court of Claims.

CHARLES M. TAYLOR, IN HIS OWN RIGHT AND as administrator of Irene M. Taylor, *vs.* THE UNITED STATES	No. 10729.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the

above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the final judgment of the court, of the application of the defendants for the allowance of appeal to the Supreme Court of the United States, and of the order allowing same.

In testimony whereof I have hereunto set my hand, and affixed the seal of said court, at Washington, this twentieth day of September, 1879.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 288. The United States, appellants, vs. Charles M. Taylor, in his own right and as administrator of Irene M. Taylor, deceased. Court of Claims. Filed 4th October, 1879.

REC. 288—2

O

In the Supreme Court of the United States.

OCTOBER TERM, 1881.

THE UNITED STATES, APPELLANTS, *v.* CHARLES M. TAYLOR, IN HIS OWN RIGHT AND AS ADMINISTRATOR OF IRENE M. TAYLOR, DECEASED.	No. 288

BRIEF FOR APPELLANTS UNDER RULE 20.

In the Supreme Court of the United States.

OCTOBER TERM, 1881.

THE UNITED STATES, APPELLANTS, *v.* CHARLES M. TAYLOR, IN HIS OWN right and as administrator of Irene M. Taylor, deceased.	No. 288.

BRIEF FOR APPELLANTS UNDER RULE 20.

This action is for the recovery from the United States of the proceeds of a tax sale, under the act of June 7, 1862, of certain land in the State of Arkansas, of which it is alleged that Irene M. Taylor was the owner.

The findings of fact show that the land in question was sold by the commissioners on the 4th of May, 1865, for $3,000 (III, p. 6), all of which went into the treasury; that the costs, taxes, &c., chargeable thereto amounted to $70.50 (XII, p. 12); that the property was in March, 1863, owned by Mrs. Matilda Johnson, who, on the 4th of that month executed a deed to Irene M. Taylor (I, pp. 4 and 5), and that the deed was entered for record on the 23d August, 1866 (X, p. 12). Upon these facts the court below held as a matter of law that Irene M. Taylor was the owner of the property on the 4th May, 1865, and that her administrator was entitled to receive the surplus ($2,929.50) from the Treasury.

The appellants assign for error the refusal of the court below to dismiss the petition.

BRIEF.

Two questions present themselves for consideration—

First. Whether surplus proceeds of a sale under the act June 7, 1862 (12 Stat., 422), with its amendments of Feb. 6, 1863 (12 Stat., 640), and March 3, 1865 (ch. 87 13 Stat., 501), should be returned to the owner.

Second. Has the Court of Claims jurisdiction of a claim for such proceeds where the filing of the petition and the application to the Secretary were both more than six years after the sale?

I

This controversy arises from the omission from the act of June 7, 1862 (12 Stat., 422 for the collection of direct taxes in insurrectionary districts), of the provision of the act of August 5, 1861 (12 Stat., 292), for returning to the owner of lands the surplus proceeds of lands sold.

In Bennett *v.* Hunter (9 Wall., 326) it has been held that these two statutes are to be construed together, but it does not appear that the court in that case applied the doctrine further than to characterize the act of 1862 as a revenue statute.

The statute of 1862 forms a complete system in itself for the collection in the insurrectionary districts of the $20,000,000 annual tax, and we think will be found on scrutiny to require for its successful operation no other support from the earlier statute than the section which lays and apportions the tax. Instead of the assessors, assistant assessors, and collectors for each collection district into which the President would divide the States

and the Territories (sec. 9, act of 1861) section 5 of the act 1862 created three tax commissioners for each State in insurrection. Instead of a valuation by the assessors (secs. 13 to 28, act of 1861) the tax was, by sec. 1 of the act of 1862, to be apportioned in accordance with the state assessment in force January 1, 1861, or, if that was unattainable, by the tax commissioners.

Section 36 of the act of 1861 was superseded in the insurrectionary districts by section 7 in the act of 1862. Both treat of advertisement, notice, sale and redemption; but the provision in section 36 for the return of the surplus to the owner is not found in section 7 nor elsewhere in the act of 1862. We think that as to the rights of the owner after a regular and legal sale resort should be had only to the acts of 1862, 1863, and 1865.

In Bennett *v.* Hunter, the chief justice says (p. 335) "the primary object of the act [of 1862] was undoubtedly revenue to be raised by the collection of taxes assessed upon lands. It is true that a different purpose appears to have dictated the provisions relating to redemption after sale and to the disposition of the lands purchased by the government; a policy which had reference to the suppression of the rebellion rather than to revenue." This punitive purpose, entirely absent from the act of 1861, appears throughout the acts of 1862, 1863, and 1865. The provisions of the latter acts "were necessarily adapted to the peculiar circumstances in which it was [they were] to be executed and were in most respects more stringent than those of the former." (Same opinion, p. 334.)

Under the act of 1861 (section 36), the owner could redeem the property and apply and receive the surplus; but the act of 1862 confers only the right of redemption.

The court below holds that the right to receive the surplus given by the act of 1861 remains, and can be exercised as to a sale under the act of 1862.

The best proof that such was not the purpose of Congress is the utter absence in the act of 1862 and its amendments of any mention of the right to receive the surplus and of any restrictions upon its exercise. On the other hand, the right of redemption, which, under the act of 1861 (section 36), could be exercised by the owner without any conditions, except that within two years after date of sale he should pay the purchase price, with interest, at the rate of 20 per cent. per annum, is, under the later acts, a very restricted privilege. The applicant for redemption under the act of 1862 had to appear before the commissioners in his proper person (section 7) within 60 days after sale, and, if a citizen, must take an oath to support the Constitution, and if a lien holder, or having an interest other than that of ownership, must have been loyal. An owner who failed to apply within the 60 days (section 8) might apply within a year, but then would have to prove to the satisfaction of the commissioners that he had not aided or abetted the rebellion after the passage of the act. By section 7 of the act of March 3, 1865 (13 Stat., 502), no owner could redeem unless, in addition to the oath already prescribed, he should "swear that he has not taken part with the insurgents in the present rebellion, or in any way given them aid or comfort, and satisfy the commissioners that the said oath is true."

It would be an anomaly if an owner engaged in actual hostilities, unwilling to leave the rebel ranks for the purpose of appearing in person, unable to swear that he had never given aid and comfort, and unwilling

to take the amnesty oath, while debarred from the right of redemption, should retain in full vigor, untrammeled by any conditions and unlimited as to time, the right to take from the Treasury of the United States the proceeds of that property which he lost by reason of his inability or unwillingness to comply with the conditions of redemption. It is true the act of 1862 is a revenue statute, but as relates to the rights of the owner after he has permitted a sale, the reason and the spirit of the law, to wit, "the policy which had reference to the suppression of the rebellion rather than to revenue" should prevail.

An examination of the two statutes shows a difference in system, and demonstrates that the omission from the act of 1862 of any provision for the return to the owner of the surplus was intentional.

Under the act of 1861 the owner who redeemed paid to the collector, for the use of the purchaser, the full amount of the *purchase price* with interest, and the owner, in order to be made whole, thereupon demanded and received the surplus from the collector, or from the Secretary of the Treasury if the surplus had been deposited in the Treasury. On the other hand, under the act of 1862 (section 7, p. 424), the redeemer only paid to the tax commissioners the tax and penalty; after redemption the *purchaser*, not the owner, received back from the commissioners the purchase price upon surrender of his certificate. "*Mutata legis ratione mutatur et lex.*"

To enable the claimant to redeem under the law which required him to pay the whole purchase price, he applied for and obtained the surplus. But when he could

redeem by paying only the tax and penalty, the necessity for a return to him of the surplus had passed away. Upon claimant's theory a loyal owner might have redeemed by simply paying, under the act of 1862, the tax and penalty, and then under the act of 1861 demand in addition to his property the surplus which had been paid into the Treasury.

A more rational interpretation is, considering the jealous care with which Congress guarded against redemption by the enemies of the United States, that it intended by the act of 1862 to give the owner no option, but confine him to the right of redemption, and force him out of the rebellion by compelling him to appear in person and take the oath of amnesty. To permit him to claim the surplus under the act of 1861 would defeat that purpose of the act of 1862 which animates its every section.

The act of 1862 has not left the proceeds unprovided for. By act of 1861 the surplus was to be *deposited* in the Treasury. By section 12 of the act of 1862 (p. 425), the proceeds of said leases and sales shall be *paid* into the Treasury, and one-half to be paid over to the State for certain purposes after the suppression of the insurrection. By this language must have been meant the proceeds of tax sales as well as of direct sales, for, by section 13 of the act of March 3, 1865 (13 Stat., 503), the fees allowed to the commissioners and received by them, in excess of $400, are required, after payment of clerks, to be "paid as the proceeds of the sales of land sold by them are required to be paid."

The claimant contends that "*said leases and sales*" in secion 12 of the act of 1862 applies only to lands bought by the United States at the tax sale and conveyed by them subsequently to purchasers.

But no lands vested in the United States for the purpose of such sale (section 9), except those which the owners had failed to redeem. Congress has interpreted those words in section 12 to apply to the proceeds of a tax sale by providing (section 7 of the act of 1863, 13 Stat., 502), "That in any case in which lands shall be redeemed after sale made by the board of commissioners and after the money received by them on the sale of such lands *has been paid* into the Treasury," the Secretary of the Treasury shall repay the purchaser.

It is difficult to understand why Congress on the one hand should donate to the people of the States for educational and humanitarian purposes one-half the proceeds of land which passed through two sales, withholding from the owner the excess of the second sale over tax, penalty, and commissions, and, on the other hand, have the surplus of a *tax sale* deposited and held for the owner.

The argument of claimant that the act of 1862 made no provision for the payment of the proceeds of the sale into the Treasury, and that therefore we must look to the act of 1861 to find anything which would interfere with the commissioners' retaining the proceeds for their own use, is fully met by the condition of the bond prescribed by section 5 of the act of 1862, that the commissioners shall "account for and pay over all moneys and other property coming into their hands."

Even if claimant is correct in contending that the one-fourth to the governor and the one-fourth to the State (section 12) relates only to leases and sales of lands which vested in the United States at the tax sale, he still must show an affirmative right to sue.

There is a striking analogy between this act and the captured and abandoned property act. Both were war measures; both took the property of friend and foe alike; the one afforded an opportunity to the owner to recover the *res*, the other to recover the proceeds, and both imposed the condition of loyalty upon recovery. They were passed by the same Congress, and it is no violent presumption that it meant, in the one case as in the other, to take *for the use of the United States* the proceeds of property whose owners persisted in their disloyalty and failed to comply with the terms upon which the property could be restored. In the case of Haycraft (22 Wall., 81) this court held that a claimant for the proceeds of captured and abandoned property was limited in his right of action to the statute under which his property was taken, and could not call to his aid the general statute conferring jurisdiction upon the court of claims. Applying that principle, I contend that the claimant's rights in the present case are to be ascertained from the act under which his property was sold, and that he may not resort to the act of 1861 for a remedy not conferred by the act of 1862.

II.

On the 4th May, 1865 this property was sold. Matilda Johnson on the 1st July, 1865, applied to the commissioners to redeem it*; on the 10th December, 1873, Mrs. Johnson made and claimant's intestate accepted an as-

* The care with which Mrs. Johnson seeks to place the property outside the operation of the act of 1865 (VIII finding, p. 7) indicates that the refusal of the commissioners to allow redemption was based upon her inability to satisfy them that she had not given aid and comfort to the rebellion.

signment of Mrs. Johnson's claim for the surplus proceeds; on the 15th January, 1874, claimant's intestate made application to the Secretary of the Treasury for the surplus, which application was rejected on the 17th January, 1874. The petition in this case was filed December 8, 1874, and the United States filed a plea of the statute of limitations. The court below considered the question not free from doubt, but were the more ready to hold the claim not barred because the United States would have a right of appeal and the claimants would not.

In the case of Kendall *v.* The United States (14 C. Cls. R., 122, 374), the Court of Claims compares section 1069 Revised Statutes with ordinary statutes of limitation, and substantially holds that it is a statute restricting jurisdiction rather than a statute of limitation.

By section 1069 the petition must be filed within six years after *the claim first accrues*, otherwise the claim *shall be forever barred;* it enumerates certain disabilities and adds, "but no other disability than those enumerated shall prevent any claim from being barred."

The statute 21 James I, ch. 16, provides "that all actions of trespass, * * * debt, * * * shall be commenced and sued within the time and limitation hereafter expressed, and not after, that is to say, * * * within —— years next after the cause of such action or suit and not after."

This statute has been the model for every statute of limitation with which American courts have had to deal except the one before us, and it seems clear that Congress by expressing itself in language so different from that which had scarcely received a verbal change in 240 years meant to eliminate the whole controversy as to when a

right of action accrued, and let claimant's right to demand and not his right to sue be the date from which the statute would run.

He may not have had a right to file a petition until after demand and refusal, but that he must make the demand and file his petition within six years after his *claim* accrues is emphasized by the word "*first*" in section 1069. The case might be different if the delay had resulted from procrastination on the part of the officers of the United States (as in United States *v.* Lippitt, 100 U. S., 663), but here it was claimant's own neglect in allowing nearly nine years to elapse before making demand.

S. F. PHILLIPS,
Acting Attorney-General.

JOHN S. BLAIR,
For the United States.

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OFFICE SUPREME COURT U. S.
FILED
NOV 2 1881
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States

OCTOBER TERM, 1881.—No. 71.

ELISHA P. LORING *vs.* WILLIAM B. FRUE.

ADDITIONAL ASSIGNMENTS OF ERROR, AND POINTS BY MR. EDMUNDS, OF COUNSEL FOR PLAINTIFF IN ERROR.

I.

It was error to charge the jury that—"If, on the other hand, it was paid over to Mr. Loring, and the portion of it which belonged to Mr. Frue was held by him on joint account for Mr. Frue, to be drawn on by Mr. Frue as any other money which he might deposit with him, then there may be a recovery in this action depending upon the other facts which will hereafter be presented," as set forth in folio 169.

II.

It was error to charge the jury that—"Now I instruct you that if the whole or any part of this money was the plaintiff's, no matter through whom he received it, and that it was received by the defendant under the arrangement suggested—that is, under the agreement that he would convert it into stocks for the plaintiff, and transfer the stocks to the plaintiff, and he has failed after demand to so transfer said stocks—then to the extent that plaintiff's money has not been so used, he may recover in this action. Counsel will perceive that I use the term 'after demand.' I am not at all sure that it was necessary to

be used. It seems to be conceded that the stocks were demanded, and I put it in here. I do not know that it was necessary as a legal proposition. You will notice the instructions in these two propositions: first, the plaintiff cannot recover as to this sum, or any part of it, unless the whole or some part of it was his own, and that in any event his recovery must be limited to the part which belonged to him. If it belonged to him, Noble, and the Hodgsons jointly—if it was their money—he cannot in this action, in which he sues alone, recover any part. If any part of it belonged to him separately, to that extent he may recover, provided the defendant received it to be invested by him in stocks which he had agreed to transfer, or caused to be transferred to the plaintiff, and which he has not transferred. If it was a part of this agreement when he received the plaintiff's money, or if he made this agreement while the money was in his hands, that he would not only invest the money in stocks, but that he would transfer the stocks to the plaintiff, I think the plaintiff may recover in this action, if the defendant has not performed his whole agreement. If he has simply invested plaintiff's money in stocks, and if he has not caused the stocks to be transferred to the plaintiff, he cannot rely upon his broken contract as a defense to the plaintiff's demand to have his money returned. He has in such case not used the money of the plaintiff as he agreed to use it, and in contemplation of law might still use it for the plaintiff, and must account for it in this action," as set forth in folio 170, p. 90, of the Record.

III.

It was error to charge the jury that—"If the investment was made with his consent, or he subsequently ratified it, if the evidence satisfies you that Loring promised the plaintiff personally, or through Palmer, to invest the money from him and to transfer stock purchased for the plaintiff to him,

and he has failed to make the transfer—I mean this: there is some testimony to the effect that when the moneys were sent forward through Palmer to Loring to be invested in the lands, stocks, or whatever you may call them, connected with the Kearsarge or the Ossipee, that there was some agreement on the part of Loring to invest that money in these stocks and to transfer the stocks to Mr. Frue, and I have told you that if you find any such agreement whilst the money was in his hands, he cannot discharge himself from that obligation by simply investing the money in stocks, but must perform his whole contract—he must either deliver over to Mr. Frue the stocks, or must account to him for the money," as set forth in folio 172 and first part of 173, page 92 of the Record.

IV.

It was error to charge the jury that—"The plaintiff's right to recover rests entirely upon the theory that the money was to be paid to Loring individually, to be invested in stocks which were to be transferred to the plaintiff, but which money he did not so invest, or if he did so invest he failed to transfer the stocks," as set forth in folio 175 of the Record.

V.

It was error to charge the jury that—"If he placed his money with Loring to be invested in stocks, and Mr. Loring agreed with him personally to invest the money in stocks, and he has not performed that agreement by investing the money in stocks and transferring them to the plaintiff, the plaintiff either may recover in this form of action the money which he had advanced Loring, less the amount which Loring has accounted for, or he might, if he had chosen, have sued Loring for the value of the stocks," &c., as set forth in folio 176 of the Record.

VI.

There was error in refusing to admit in evidence the bill in equity offered by the defendant, as appears in folio 164 of the Record, said bill appearing in folios 230–237 of the Record.

ADDITIONAL POINTS.

A. No recovery could be had in this action for money had and received, on the evidence.

1. All the money came lawfully into the hands of the defendant, and there was no pretence of embezzlement or misappropriation. There was no evidence, or claim even, that this money was ever demanded by the plaintiff from the defendant.

2. The money having been used as the plaintiff claimed it ought to have been, and the alleged default being an omission to transfer the stock to which the plaintiff was entitled, the defendant held no *money* to the plaintiff's use, and could only be compelled either to transfer the stock or pay its value in an action for damages. (Chitty's Pleadings, p. 362 *et seq.*)

B. The plaintiff having received a part of the stocks, (Rec., fols. 45, 67, 72, and 103,) he could not, in any event, recover on the money counts without rescinding the contract and tendering a return of the stocks and demanding his money; of which there was no evidence or claim.

C. The whole case shows that the affair was a joint undertaking or enterprise between the plaintiff, the defendant,

Palmer, and other parties, and there was nothing to go to the jury on any other case. This action is not adapted to settling the claims of the plaintiff in such a transaction. (Chitty's Pleadings, p. 45.)

D. The bill in chancery offered in evidence by the defendant should have been allowed to go to the jury to be weighed as part of the *conduct* of the plaintiff, or as an admission of what the true nature of the transaction was. He admitted on the stand (Rec., fol. 96) that it was brought by his order, although he did not know what in particular it stated. Evidence otherwise competent cannot be rejected by the court on the statement of the party affected by it, that he did not know what was stated, or explaining the conduct imputed to him. All that is for the jury to weigh. Under these circumstances, the bill in question was admissible. (Greenleaf's Ev., vol. 1, sec. 212; Ib., vol. 3, secs. 274, 275, and notes.)

Geo. F. Edmunds
for Appellee

apportioned and levied on the lands therein, which should thereby become charged respectively with their respective portions of the tax, and it, together with the penalty of 50 per cent., should be *ipso jure* a lien thereon.

The owner might relieve his land from the tax by paying it within 60 days after the commissioners should have fixed the amount. If he did not, the title of, in, and to it was to become *forfeited* thereupon to the United States; *and upon the sale thereof*, as provided for, should *vest* in the United States or the purchaser at such sale, in fee simple, free and discharged of all prior liens, incumbrances, right, title, and claim whatsoever.

The commissioners were to sell the land, in case of non-payment of tax, penalty, and charges, and strike it off to the United States, at and for the gross amount of these, and no more. Consequently in that case the United States would hold no surplus for the owner. But if any one should bid more, and pay the amount of his bid, the commissioners were to give him a certificate of purchase, which should be evidence of title; and redemption was allowed only within 60 days.

The Secretary of the Treasury decided, on the 17th of January, 1874, that the act of 1861 *had been modified* by that of 1862, under which latter act the sale in this case had been made.

That is true; *but the modification extended only to the mode of selling and the time for redemption.* The latter statute is an affirmative one, and repeals only so much of the former as is clearly inconsistent with its provisions. The two are *in pari materia*, and to be read as one act, the provisions of the latter displacing the provisions of the former inconsistent with them.

There is nothing in the latter act inconsistent with the provision of the former as to the surplus, in case of purchase by a third person. What the former act provides as to this is untouched by the latter act, and *not* modified by it. It contains, the secretary said, no provision for the re-

turn of money received beyond the amount of the tax. It contains no provision repealing the provision in that regard of the original act, and does not repeal it by implication. And the fact that it says nothing on the subject should have led the secretary to just the contrary conclusion.

The United States carefully provided that if the land should be struck off to them, there should be no claim against them in behalf of the owner; for they provided that for them, no more than the amount owed for the tax, penalty, costs, and interest should be paid. But they did not declare that if a third person should bid more, and so become the purchaser, the surplus should be theirs.

Forfeitures are not favored by the law, and penal laws cannot have a liberal or favorable construction.

The law of 1862, the secretary said, provides for a forfeiture of the property, as a consequence of the failure to pay the sum due.

This was a very narrow, technical, and illiberal construction of the law, and so palpably eroneous as not to permit us to believe that the question was examined by the secretary himself. It will not do to construe statutes in that way.

The statute of 1862 first declared that the tax and its accretions should be a lien on the land. They were *charged* on the land, and the United States were entitled to sell the land for payment of them, if the owner failed to pay. They had an interest in the land to that amount, as a mortgagee has. If the party failed to pay by the time fixed, the title was forfeited, *i. e.*, the United States could foreclose. They did not become *owners* by this "forfeiture," because the law, in one and the same breath, says the *title* shall thereupon become forfeited to the United States, and, *upon the sale, shall vest* in the United States *or* purchaser in fee simple. If it vested in the United States by the sale, there was no surplus for the owner. If it vested in the purchaser, what had *that* to do with the surplus paid into the treasury by him? The owner could redeem within sixty days. By

the former act, in two years. Under the former the title passed precisely as it did under the latter.

If it passed to the United States by the "forfeiture," why was it provided, how *could* it be provided, that, if no one bid the whole amount due, or a larger sum, the land should be *struck off* to the United States for that sum? That means, of course and *ex necessitate*, that the United States should be deemed to bid that sum and to buy at that price. But no one can buy what is already his own.

The United States had a right to the sum due, and no more. They agreed to bid that sum if no one else would, and held a lien on the land for it and no more; and they declared that they would bid no more. All that has no connection with the surplus as to which the law of 1861 made provision. That surplus could only exist when some third person bid and paid a larger sum: and the law of 1862 says not one word as to that surplus. The United States do not claim it. They have no right to it, and pretend to no right to it. And certainly the act of 1862 does not declare it forfeited to the United States. It does no more than provide that the United States shall have a lien, and the power to sell upon default of payment, agreeing that they will bid, if no one else will, the whole sum due, and no more. That is not legislation in regard to the surplus. It is confined to what should go before and end with the sale; and as to any surplus, it leaves the law of 1861 untouched.

In Bennett vs. Hunter, 9 Wallace, 326, (in 1869,) the Supreme Court of the United States had settled the meaning of the language used by the act of 1862. The counsel for the plaintiff in error, aided by the Attorney-General and Assistant Attorney-General, endeavored to convince the court that to declare the *title* forfeited to the United States clearly meant that it was divested out of the defaulting owner, and devolved upon the United States. The forfeiture, they thought, vested the title in the United States as sovereign. They then sold as sovereign, bought

not as sovereign, and the title vested in them as purchasers.

That was very ingenious nonsense. The court held that the forfeiture meant that the title became *subject* to be vested in the United States, and upon public sale became *actually* vested in them or in the other purchaser, but not before such sale.

The truth is, that the forfeiture declared by the law was exactly equivalent to a decree of foreclosure, directing sale at a certain day, in case of non-payment. Nobody ever imagined that such a decree transferred the title.

The act of February 6, 1863, (12 Stat., 640,) provided that the commissioners might bid not more than two-thirds of the appraised or assessed value. What difference could it make to the United States whether they bid more or less, if they were to keep the land and the money bid for it, also, no matter how much they might bid? The limitation to two-thirds of the assessed value could not have been made for any other reason or purpose than that the United States, becoming purchaser like a third person under the act of 1861, should not become liable to the owner for any more than such two-thirds, less the taxes and accretions. If they were not to account for the surplus, precisely as if a third person had made their bid and paid the two-thirds into the treasury, they might as well have bid the amount of the national debt as two thirds of the value.

They meant to make the land bring two-thirds its assessed value, bidding that for it if necessary. For what purpose? To get the surplus over and above tax and accretions, for their own use and benefit? or, to prevent the sacrifice of the land for a little sum, to the ruin of the owner? If they were not to account to him for the surplus, in case they purchased, there would have been no reason for doing it, if a stranger bid two-thirds or more, and this was paid into the treasury. And if they were not to account in the latter case, the object of the law was a very ignoble one; which ought not to be imputed to the legislator, if by any reasonable construction it can be avoided.

It is much more sensible, reasonable, natural, and creditable to consider the law as saying, the Republic wants only what is due and charged on the land on account of the tax and its accretions. But it will be inhuman to permit speculators to purchase for that insignificant sum, and get acres for cents; and they must at least pay two-thirds of the assessed value. If they will not, we will bid that, take the land and pay the owner what remains of that amount, after deduction of what is due us; as we agreed by the act of 1861 to account for such surplus if a stranger bid more than the sum due us.

That is an honest and decent construction. The other makes the law a shame and disgrace, cruel, inhuman, and indecent; and is clearly against the intention, as it is clearly against the sound rules of construction.

Besides, section 173, of the act of 30th June, 1864, (13 Stat., 304,) expressly continues in force all process and remedy for the enforcement and collection of tax, in all former laws, treating them as all *in pari materia*, and nothing in the first repealed unless inconsistent with some provision of the later ones.

The rules of construction of statutes and in regard to repeals by implication are too familiar to the honorable court for us to need to quote them and cite authorities. They were settled twenty or more centuries ago by the Roman Jurists, for they were and are simply the deductions of reason from the principles of natural justice. The United States promised that they would hold the surplus in all cases for the owner's use, and pay it to him upon his request, at any time. This promise they have never revoked. It could not be revoked, unless expressly or by necessary implication. It *is* not revoked expressly; and there is no such implication. If they meant to revoke it, they could have said so in unmistakable terms. In a stipulation, the words, if ambiguous, are always taken most strongly against the stipulator; because, the law says, it was in his power to speak more plainly.

To endeavor to find such an intention, where it is not clear, where there is room for doubt, would be a judicial iniquity. It is not permissible. But here the intention is clearly the other way. The rules of construction oppose it, and the honor of the country requires that the provisions of the law of 1861 as to the surplus should be decided not to have been touched by any subsequent legislation.

As we have above said, Congress, by the later act of March 3d, 1865, sec. 4, most positively recognized that the surplus of the money realized from a direct-tax sale was the money of the owner of the property, the sale of which produced it.

Mark the language of the section! "That any lien creditor . . . . . of a person whose lands or tenements shall have been sold . . . . . and not redeemed, shall, after the period of redemption has elapsed, be entitled to payment, out of the balance of the proceeds of sale of such lands and tenements, *after* the same shall have been paid into the treasury of the United States, of the amount of his lien, if a sufficient sum shall be left for such payment after the payment of *all claims* of the United States, together with the costs and expenses of sale, and the payment of all prior liens," &c.

The payments provided for by this section were to be out of the *balance* of the proceeds, *after* the same should be paid into the treasury.

Why such balance, and how was it to be arrived at? And why, *after* its payment into the treasury, satisfaction of all claims of the United States and lien creditors *of the person whose lands, &c., had been sold?*

If Congress had intended that, by the forfeiture declared by section 4, act of June 7th, 1862, the lands of delinquent owners should become the property of the United States, so that the sale of it should be a sale of the property of the United States, and the money realized from such sale should be, as a necessary consequence, the money of the

United States, it is passing strange that Congress, by this latter act, should have provided for payment, out of its own money, not only any and all claims the United States might have against the persons whose lands had been so forfeited, but also the claims of lien creditors of such a person.

Such an opinion of the Congress of the United States would be very absurd, when we reflect upon the status of the French Spoliations Claims and the balance of the Geneva Award Fund yet under the control of that distinguished and patriotic body.

III.—As to the Jurisdiction of the Court of Claims.

(*a.*)—*That the claim was not one cognizable by that court.*

The Court of Claims has jurisdiction of the following matters:

"All claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, and all claims that may be referred to it by either house of Congress."

U. S. Rev. Stats., sec. 1,059.

"Every claim against the United States, cognizable by the Court of Claims, shall be forever barred, unless the petition, setting forth a statement, is filed in the court . . . within six years after the claim first accrues."

Ib., sec. 1,069.

The defendant's first point of objection to the jurisdiction of the Court of Claims, to wit, that claimants were restricted by the act of 1861 to an application to the Secretary of the Treasury, was but an assertion that the claim preferred by them to that court was one not cognizable by it.

"Whatever is enjoined by a statute to be done, creates a duty on the party which he is bound to perform. The whole theory and practice of political and civil obligations rest upon this principle. . . . . And to deny that it is a duty . . . . is to deny the authority of the statute itself;

for a duty is nothing more than a civil obligation to perform that which the law enjoins."

"And if there exists a duty sufficient to raise a promise, then it is sufficient to sustain an action."

Bullard vs. Bell, 1 Mason, C. C., 298–9.

Surely Congress, by the 36th section of the act of August 5, 1861, enjoined, by language as plain and forcible as could well have been used, that these things should be done by and on behalf of the United States, viz:

1st. That the surplus of the proceeds of sale should be paid to the owner of the property sold, or to his legal representatives, he or they being found and willing to receive it.

2d. That, if such owner or legal representatives could not be found, or, if found, and he or they should refuse to receive it, then it should be deposited in the treasury of the United States.

3d. That this treasury should hold said surplus for the use of such owner or his legal representatives, until he or they should make application to the secretary for it.

4th. That the secretary, upon such application, should, by warrant on the treasury, cause said surplus to be paid to the applicant.

It would seem to be very absurd for one to say that Congress enjoined these things to be done but did not thereby create or impose any duty to do the .

Congress either created or imposed such duty, or indulged in a mere idle waste of words. But as we are precluded, by a decent respect for the law-making power of the nation, from entertaining even a suspicion that it intended to indulge in a waste of words, we must hold that it created and imposed the duty to do the thing enjoined.

Was that duty sufficient to raise a promise that would sustain an action if broken, and as upon an implied contract?

We think that the duty imposed in this instance was so sufficient.

It cannot be gainsaid, that it is clear, from the provisions of this 36th section of the act of August 5, 1861, and of the later act of March 3, 1865, section 4, that it was not the intention of Congress that the title to the surplus of these proceeds of sale should be divested absolutely out of the original owner of the property sold; that it was their intention that such surplus should go into the treasury without change of ownership, and with the restoration of it distinctly and positively pledged upon an application for it, made by such original owner or his legal representatives.

There is not the slightest difference between the principle on which this surplus of direct-tax sale proceeds is held in the treasury, and that on which the proceeds of sales of captured and abandoned property was there held.

It is true, that in the act in respect to captured and abandoned property, there was the express declaration that the claimant to the proceeds of a sale of such property could, within two years after the suppression of the rebellion, prefer his claim therefor to the Court of Claims.

But this express recognition of the right to sue in the Court of Claims did not at all affect the principle on which the proceeds were held in the treasury, as demonstrated by the reasoning of this court in Kline's case, 13 Wall., 136, and Padelford's case, 9 Wall., 537; for the substantive point decided in these two cases was, that when money was held in the treasury, not as the property of the United States, but of an individual, and with a pledge of its restoration to that individual, there existed a duty on the part of the United States to pay it to him, that created a contract between them which could be enforced within the time specified.

The promise and pledge in the case of the surplus of these direct-tax sales was both more positive and more ample than that made in reference to the proceeds of sales of captured and abandoned property.

In the case of the surplus of the proceeds of direct-tax sales, the United States promised that they would hold the surplus in all cases for the owner's use, and pay it to him upon his request, at any time, even though he at one time refused to receive it, and though he should wage suit at law in an effort to have the tax sale declared null and void.

In both the Padelford and Kline cases, this court declared that the government was a trustee holding the claimant's property for his benefit.

It would seem, that for the same reason the government was trustee in those cases, it is trustee in this, holding this claimant's property for his benefit.

The case of Knote, (95 U. S., 156,) more strongly supports this claimant's proposition that his claim was one cognizable by the Court of Claims than either Padelford's or Kline's.

The proceeds in Knote's case arose from a sale made under the confiscation act of July 17th, 1862, (12 Stat., 589,) that had been passed by Congress with the intent that such proceeds should be applied and used for the support of the army of the United States; of course, by and through a divestiture of the title of the original owner of the property sold.

This court stating, that Knote's claim rested upon a supposed implied contract to pay to the claimant the money received as the proceeds of the forfeited property; then defined what constituted such a contract as would make the claim predicated upon it one cognizable by the Court of Claims.

Said the court: "To constitute such a contract, there must have been some consideration moving to the United States, or they must have received the money, charged with a duty to pay it over; or the claimant must have had a lawful right to it when it was received," &c.

In the present case the declarations embodied in the 36th section of the act of August 5, 1861, and in section 4, act

of March 3, 1865, are the most ample evidence that the United States received this surplus charged with a duty to pay it over to Mrs. Taylor or her legal representatives, and that she had a lawful right to it when they received it.

And the Court of Claims rightly adjudged that the United States received this surplus charged with a statutory duty to pay it over in the manner provided by the statute, and so there was an implied contract that made the case cognizable by that court.

(*b.*)—*That the Court of Claims was without jurisdiction, as the petition is alleged not to have been filed within six years after the claim first accrued.*

It being clear that the claim was one cognizable by the Court of Claims, it only remains to consider when it first accrued within the purview of that provision of the law that declares that petitions must be filed in the Court of Claims within six years after the claims first accrue.

This court has defined the word claim, in the amended Court of Claims act, to mean a money demand on contract.

United States vs. Alire, 6 Wall., 27.

This of course includes the proposition that the money can be demanded only in conformity with the terms of the contract.

In respect to the surplus of the proceeds of these direct-tax sales, the promise of the United states was explicit, that they would hold it in all cases for the owner's use, and pay it to him upon his request, at any time.

The government has never revoked or limited this promise.

The government having fixed no limit of time in which applications should be made to the Secretary of the Treasury, it was competent for the claimant to prefer his at any time.

"It is as much the duty of the government as of individuals to fulfill its obligations."

The obligation of the government in respect to this surplus was to hold it for the owner's use, and pay it to him upon his demand.

The government was entitled to every presumption that, upon such demand made, it would recognize and discharge its obligation; and certainly Congress never intended that the government should be held to stand as repudiator of that obligation, until demand made upon, and a refusal by it to pay in response to it.

A demand was necessary to put the government in default.

We believe it to be the universal law in respect to individuals, that courts are not open to suitors until there is breach of contract or repudiation of duty; until they have right of action because of such breach or repudiation.

This court has repeatedly held that the rules of law applicable to individuals are to be applied to the United States.

United States vs. State Bank, 96 U. S., 36.

Had the claimant filed his petition in the Court of Claims without having made his application to and received refusal from the Secretary of the Treasury, it is our belief that that court, governed by a just respect for the co-ordinate branch of the government, would have refused to consider it, telling the claimant that it could not assume that the government had repudiated its obligation, nor would until demand made upon the secretary, and he had refused to comply with it.

In other words, it would have told the claimant that until such demand and refusal he had no right of action.

We respectfully submit that Congress used the expression "claim first accrues," as the exact equivalent of the expression "right of action first accrues," and intended it to have the same legal signification.

We think this view is sustained by what was said by this court in United States vs. Clark, 96 U. S., pp. 43–4.

And, if Congress intended the expression "claim first accrues" to have the meaning we have above stated, then the claimant in this instance had no right of action against the United States until the 17th of January, 1874, when the Secretary of the Treasury rejected the claimant's application for this surplus, and declared an adverse possession on the part of the United States.

The statute of limitations only begins to run from the time the plaintiff's right of entry or of action accrues.

Webster vs. Cooper, 14 How., 488.
Richardson vs. Curtis, 3 Bl. C. C., 385.

The statute does not begin to run in favor of a trustee, who has received money for his *cestui que trust*, until a demand and refusal.

Taylor vs. Benham, 5 How., 233.
Babcock vs. Wyman, 19 How., 289.

Was the government anything more or less, in respect of this surplus, than a gratuitous bailee of the owner of it, charged with the duty of safely keeping it for his use until he should make application for it, and of thereupon paying it over to him?

If not, and if transactions with the government are to be construed by the rules which govern agreements between individuals, then we have in point—

National Bank vs. Graham, 100 U. S., 699.

All which is respectfully submitted.

ALBERT PIKE,
LUTHER H. PIKE,
Attorneys for Appellee.

14-223

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~316.~~ 71

ELISHA T. LORING, PLAINTIFF IN ERROR,

vs.

WILLIAM B. FRUE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED OCTOBER 23, 1878.

SUPREME COURT OF THE UNITED STATES

No. 316.

ELISHA T. LORING, PLAINTIFF IN ERROR,

vs.

WILLIAM B. FRUE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Michigan, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of the United States for the eastern district of Michigan, before you, between William B. Frue, as plaintiff, and Elisha T. Loring, as defendant, a manifest error hath happened to the great damage of the said Elisha T. Loring, the defendant, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly,
2 you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the thirteenth day of August, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] ADDISON MANDELL,
Clerk of Circuit Court of the United States for the Eastern District of Michigan.

3, 4 (Indorsed:) Supreme court of the United States. Elisha T. Loring, plaintiff in error, v. William B. Frue, defendant in error. Writ of error. Filed Aug. 13, 1877, A. Mandell, cl'k. C. I. Walker, attorney for plaintiff in error.

5 The United States of America to William B. Frue, of Detroit, in the State of Michigan, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Michigan, wherein Elisha B. Loring, of Boston, in the commonwealth of Massachusetts is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Noah H. Swayne, one of the associate justices of the Supreme Court of the United States, this 6th day of August, in the year of our Lord one thousand eight hundred and seventy-seven.

N. H. SWAYNE,
Asso. Jus. Sup. Court U. S.

6 On this 13th day of August, in the year of our Lord one thousand eight hundred and seventy-seven, personally appeared Edwin C. Hinsdale before me, the subscriber, Addison Mandell, com-

missioner of the circuit court of the United States for the eastern district of Michigan, and makes oath that he delivered a true copy of the within citation to Sidney D. Miller, esq., the attorney of record of William B. Frue, named in the within citation.

Sworn to and subscribed before me this 13th day of August, 1877.

ADDISON MANDELL,
Comm'r of Circuit Court U. S.
Eastern District of Michigan.

STATE & EASTERN DISTRICT OF MICHIGAN:

Edwin C. Hinsdale, being duly sworn, says that on the thirteenth day of August, A. D. 1877, he delivered a copy of the within citation to Sidney D. Miller, esq., by delivering the same to him personally; that said Sidney D. Miller is the attorney of record for William B. Frue, plaintiff in a certain cause lately pending in the circuit court of the United States for the eastern district of Michigan, in which cause Elisha T. Loring is defendant.

EDWIN C. HINSDALE.

Subscribed & sworn to this 13th day of August, A. D. 1877, before me.

ADDISON MANDELL,
Commissioner of Circuit Court U. S.
Eastern District of Michigan.

(Indorsed:) 5115. Circuit court U. S. eastern dist. of Mich. William B. Frue vs. Elisha T. Loring. Citation & proof of service. Filed Aug. 13, 1877. A. Mandell, cl'k.

7 Pleas before the judges of the circuit court of the United States for the eastern district of Michigan in the sixth circuit, at the district court room in the city of Detroit, of the term of June, in the year of our Lord one thousand eight hundred and seventy-seven, in the case wherein William B. Frue is plaintiff and Elisha T. Loring is defendant.

Be it remembered that on the 4th day of March, A. D. 1873, said defendant, by his attorney, Alfred Russell, came into this court and filed a transcript of record and proceeding in said cause in the circuit court for the county of Houghton, in the State of Michigan, said cause having been rendered into this court under and virtue of the statutes of the United States in such case made and provided; which transcript of record is in the words and figurges following, to wit:

Transcript of record from Houghton circuit court.

STATE OF MICHIGAN,
County of Houghton, ss:

William B. Frue, being duly sworn, deposes and says that he is the plaintiff in the annexed writ of attachment named; that Elisha T. Loring, the defendant in said annexed writ named, is indebted to
8 this deponent, plaintiff as aforesaid, upon contract, express and implied, in the amount of one hundred and fifteen thousand dollars, as near as this deponent can estimate such amount, over and above all legal set-offs; and this deponent further says that said amount is now due him from said defendant. This deponent further says that the said Elisha T. Loring, defendant as aforesaid, is not a resident of the State of Michigan, and has not resided therein for three months and

upwards immediately preceding the time of making this affidavit, to wit, that said defendant has not resided in said State for three months and upwards immediately preceding the 17th day of October, A. D. 1872.

(Sig'd) WM. B. FRUE.

Subscribed & sworn to before me this 17th day of October, A. D. 1872.

[L. S.] J. W. RAYMOND,
Notary Public Houghton County, Mich.

9 *Circuit court attachment.*

The circuit court for the county of Houghton.

STATE OF MICHIGAN,
County of Houghton, ss:

In the name of the people of the State of Michigan, to the sheriff of the county of Houghton, greeting:

You are commanded to attach so much of the lands, tenements, goods, chattels, moneys, and effects of the defendant, Elisha T. Loring, not exempt from execution, wheresoever the same may be found within the county of Houghton, as will be sufficient to satisfy the demand of William B. Frue, plaintiff, and costs of writ, and safely keep the same, to satisfy any judgment that may be recovered by the plaintiff in this attachment.

And in case you shall seize any property of said defendant in said county, but not sufficient to satisfy said demand and costs, then you are hereby further commanded to seize other property of said defendant subject to attachment, sufficient, with that seized in said county of Houghton, to satisfy said demand and costs, wherever the same may be found in the State of Michigan.

You are also commanded to summon the defendant, if to be found within said county of Houghton, or in any other county of the State of Michigan where you may have seized property under and by virtue of this writ, to appear before the circuit court for the county of Houghton, at the court-house in the village of Houghton, on Tuesday, the 3d day of December, 1872, at 10 o'clock in the forenoon of said day, to answer the plaintiff, and of this writ make due return.

Witness the honorable James O'Grady, circuit judge, at the village of Houghton, this 17th day of October, in the year of our Lord one thousand eight hundred and seventy-two.

ALEX. POPE, *Clerk.*

HUBBELL & CHADBOURNE,
Attorneys for Plaintiff.

10 (Indorsed:) No. . The circuit court for the county of Houghton Wm. B. True vs. Elisha T. Loring. Writ of attachment. Filed Dec'r 19, 1872. Alex. Pope, clerk. Hubbell & Chadbourne, plaintiff's att'y.

11 STATE OF MICHIGAN,
County of Houghton, ss:

I hereby certify and return to the circuit court for the county of Houghton the following as my doings upon the writ of attachment hereto annexed, to me directed and delivered, out of and under the seal

of said court, in a cause wherein William B. Frue is plaintiff and Elisha T. Loring is defendant, to wit, in pursuance of the commands of said writ, on the 11th day of November, A. D. 1872, I filed for record in the office of the register of deeds of said county a true copy of said writ, certified by me, and attached thereto a copy of the inventory of the lands seized and attached by me by virtue of said writ, which inventory I made on said last-mentioned day. On the 12th day of November, A. D. 1872, I caused lands in said inventory to be appraised by Thomas W. Edwards and Richard M. Hoar, two disinterested freeholders of said county, they having been first duly sworn by me to make a true appraisal of all the lands seized and inventoried by me as appraised, which inventory and appraisal, signed by me and by said appraisers, are annexed hereto and returned herewith as a part of my doings. I do further certify and return that I made diligent search for Elisha T. Loring, the defendant in said writ named, in the said county of Houghton, and was unable to find him.

BARTHOLOMEW SHEA,
Sheriff.

Fees, $5.00; paid appraisers, $1.50.
Dated December 20, 1872.

12 COUNTY OF HOUGHTON, *ss:*

I do hereby certify that, by virtue of the annexed writ of attachment, to me directed and delivered, and remaining in my hands, I have this day seized and taken the following property and effects: All the right, title, and interest of Elisha T. Loring in and to the following-described lands in the county of Houghton and State of Michigan, said interest being an undivided one-tenth ($\frac{1}{10}$), as I am informed, to wit:

Description.	Section.	In.	Township.	North of	Range west.	Appraised at	$ Cents.
S. E. of N. W. ¼	8	"	49	" "	33 "	" "	20 00
S. W. ¼ of S. W. ¼	8	"	49	" "	33 "	" "	20 00
S. E. ¼	8	"	49	" "	33 "	" "	80 00
S. E. ¼ of S. W. ¼	8	"	49	" "	33 "	" "	20 00
S. W. ¼ of N W. ¼	8	"	49	" "	33 "	" "	20 00
S ½	4	"	49	" "	33 "	" "	160 00
S. ½ of N. E. ¼	4	"	49	" "	33 "	" "	40 00
N. E. ¼	8	"	49	" "	33 "	" "	80 00
N. ½ of N. W. ¼ & S. W. ¼ of N. W. ¼	12	"	49	" "	33 "	" "	60 00
N. W. ¼ of N. W ¼ & E. ½ of N. W ¼	14	"	49	" "	33 "	" "	60 00
N. ½ of N. W. ¼ and N. W. ¼ of N. E. ¼	22	"	49	" "	33 "	" "	60 00
N. E. ¼ of N. E. ¼ & S. ½ of N. E. ¼	22	"	49	" "	33 "	" "	60 00
W. ½ of S. W. ¼ & S. W. ¼ of N. W. ¼	14	"	49	" "	33 "	" "	60 00
13 N. E. ¼ of N. E. ¼ & S. ½ of N. E. ¼	20	"	49	" "	33 "	" "	60 00
N. ½ of N. W. ¼ & N. W. ¼ of N. E. ¼	20	"	49	" "	33 "	" "	60 00
N. W. ¼	4	"	49	" "	33 "	" "	80 00
N. E. fr'l ¼ and S. E. ¼ and E. ½ of W. ½	6	"	49	" "	33 "	" "	240 00
S. E. ¼ of W. f'l ½, and W. ½ of N. E. ¼, and S. E. ¼ of N. E. ¼	18	"	49	" "	33 "	" "	60 00
N. E. ¼ and S. E. ¼	24	"	50	" "	34 "	" "	20 00
N. E. ¼ and S. E. ¼	36	"	50	" "	34 "	" "	20 00
N. E. ¼	12	"	49	" "	34 "	" "	80 00
S. W. ¼ of N. E. ¼	26	"	50	" "	34 "	" "	20 00
S. W. ¼	2	"	50	" "	34 "	" "	80 00
E. ½ of S. E. ¼ & S. W. ¼ of S. E. ¼ of	12	"	50	" "	34 "	" "	60 00
N. ½ of N. W. ¼	8	"	49	" "	33 "	" "	40 00
W. fr'l ¼ of W. fr'l ½	6	"	49	" "	33 "	" "	80 00
N. W. fr'l ¼ of N. fr'l ¼	2	"	49	" "	33 "	" "	20 00
N. fr'l ¼ of N E. fr'l ¼	4	"	49	" "	33 "	" "	40 00
W. ½ of S. E. ¼ and N. E. ¼ of S. E. ¼ of	28	"	50	" "	33 "	" "	60 00
W. ½ of S. W. ¼ and N. E. ¼ of S. W. ¼	20	"	50	" "	33 "	" "	60 00
N. W. fr'l ¼ and E. ½ of S. E. ¼	18	"	50	" "	33 "	" "	120 00
N. ½ of S. W. ¼	8	"	49	" "	33 "	" "	40 00
W. ½ of S. E. ¼ of lots Nos. 1 & 2	12	"	49	" "	34 "	" "	70 00

Description.	Section.	In.	Township.	North of	Range west.	Appraised at	$ Cents.
14 S. W. ¼ of	36	"	50	" "	34 "	" "	80 00
N. W. ¼ "	36	"	50	" "	34 "	" "	80 00
S. W. ¼ of	24	"	50	" "	34 "	" "	80 00
N. W. ¼ "	24	"	50	" "	34 "	" "	80 00
N. W. ¼ "	12	"	49	" "	34 "	" "	80 00
S. W. ¼ "	2	"	50	" "	34 "	" "	80 00
S. ½ of S. W. ¼, and N. E. ¼ of S. W. ¼, and N. W. ¼ of S. E. ¼	20	"	49	" "	33 "	" "	80 00
W. ½ of N. E. ¼ and S. E. ¼ of N. W. ¼	12	"	49	" "	33 "	" "	60 00
E. fr'l ½ N. W. fr'l ¼ & W. fr'l ½ & N. E. fr'l ¼ of	2	"	50	" "	34 "	" "	80 00
S. ½ of N. W. ¼ and N E. ¼ of S. W. ¼ of	22	"	49	" "	33 "	" "	60 00
N. ½ of N. ½	30	"	49	" "	33 "	" "	80 00
S. ½ of N. W. ¼ and N. W. ¼ of S. W. ¼	20	"	49	" "	33 "	" "	60 00
N. W. ¼ of	26	"	50	" "	34 "	" "	80 00
N. E. ¼	2	"	49	" "	34 "	" "	80 00
S. E. ¼	2	"	49	" "	34 "	" "	80 00
S. E. ¼	26	"	50	" "	34 "	" "	80 00
N. E. ¼ of N. W. ¼ & S. E. ¼ and S. ½ of S. W. ¼ of	32	"	50	" "	33 "	" "	140 00
N. W. ¼ of S. W. ¼	28	"	50	" "	33 "	" "	20 00
N. E. ¼	18	"	50	" "	33 "	" "	80 00
S. ½ of S. ½ and S. ½ N. E. ¼ and N. E. ¼ S. W. ¼	4	"	50	" "	33 "	" "	100 00
S. E. ¼ & N. E. fr'l ¼ & E. ½ of W. ½ of	2	"	49	" "	33 "	" "	200 00

15, 16 Also all the right, title, and interest of the said Elisha T. Loring in and to the following described lands in the county of Houghton and State of Michigan, said interest being an undivided three quarters ($\frac{3}{4}$), as I am informed, to wit:

N. ½ of NW. ¼ and NW. ¼ of SW. ¼ of section 23 in T. 56 N., R. 33 west, appraised at 9,000.00.

Also, all the right, title, and interest of the said Elisha T. Loring in and to the following described lands in the county of Houghton and State of Michigan, said interest being an undivided one-seventh ($\frac{1}{7}$), as I am informed, to wit:

Description.	Section.	In	Township.	North of	Range west.	Appraised at	$ Cents.
N. E. ¼	9	"	54	" "	34 "	"	571 43
N. W. ¼ of N. W. ¼	10	"	54	" "	34 "	"	142 85
S. E. ¼ of S. E. ¼	4	"	54	" "	34 "	"	142 85

Also, all the right, title, and interest of the said Elisha T. Loring in and to the following described land in the county of Houghton and State of Michigan, said interest being the whole, as I am informed, to wit, lot No. 3, in section 34, township No. 55 north, of range 34 west, appraised at $2,500.00 cts.

(Sig'd) BARTHOLOMEW SHEA,
Sheriff.

We, the undersigned freeholders, residing in the county of Houghton, having been first duly sworn by the sheriff of said county to make a true appraisement of all the property seized by him by virtue of the annexed writ of attachment, do appraise the several articles and parcels of property so attached at the sums respectively placed opposite such parcels in the forgoing inventory.

Dated Houghton, Nov. 12, 1872.

RICHARD M. HOAR.
THOMAS W. EDWARDS.

17 In the circuit court for the county of Houghton.

STATE OF MICHIGAN,
County of Houghton, ss :

William B. Frue, plaintiff herein, by Hubbell & Chadbourne, his attorneys, complains of Elisha T. Loring, defendant herein, having been duly summoned to answer said plaintiff of a plea of trespass on the case upon promises.

For that whereas the defendant, on the seventeenth day of October, A. D. 1872, in said county of Houghton, was indebted to the plaintiff in the sum of one hundred and fifty thousand dollars, for the price and value of goods then and there sold and delivered by the plaintiff to defendant, at his request.

And in a like sum for the price and value of work then and there done, and materials for the same, provided by the plaintiff for the defendant, at his request.

And in a like sum for money then and there lent by the plaintiff to the defendant, at his request.

And in a like sum for money then and there paid by the plaintiff for the use of the defendant, at his request.

And in a like sum for money then and there received by the defendant for the use of the plaintiff.

And in a like sum for money then and there found to be due from the defendant to the plaintiff on an account stated between them.

And thereupon, the said defendant afterwards, and on the day and year aforesaid, in consideration of the premises respectively, then and there promised the plaintiff to pay him the said several sums of money respectively, on request; yet the said defendant hath disregarded his said promises and hath not (although often requested so to do) paid any of the said sums of money, or any part thereof, to the plaintiff's damage of two hundred thousand dollars; and therefore he brings suit, etc.

HUBBELL & CHADBOURNE,
Plaintiff's Attorneys.

18 (Indorsed:) No. . The circuit court for the county of Houghton. Wm. B. Frue vs. Elisha T. Loring. Narr. Hubbell & Chadbourne.

19 STATE OF MICHIGAN,
County of Houghton, ss :

I, Alex. Pope, county clerk of the county of Houghton aforesaid, and of the circuit court thereof, do hereby certify that the annexed and forgoing is a true and correct transcript of all the process, pleadings, and papers on file in my office in the cause pending in said court wherein William B. Frue is plaintiff and Elisha T. Loring is defendant, and that I have compared the said transcript with the original process, pleadings, and papers now on file in my office in said cause, and that the same is a true and correct transcript from and of the whole of said originals.

In witness whereof I have hereunto set my hand and affixed the official seal of said court, at Houghton in said county, this 27th day of February, A. D. 1873.

(S'g'd) ALEX POPE,
County Clerk.

Filed in open court March 4, 1873.

A. MANDELL, *Clerk.*

21, 22 Afterwards, to wit, on the 20th day of March, A. D. 1873, said defendant, by Alfred Russell, his attorney, came into this court and entered his appearance in said cause in the words following, to wit:

WILLIAM B. FRUE
vs.
ELISHA T. LORING.

MARCH 20, 1873.

On filing precipe in this cause, and on motion of Alfred Russell, attorney for defendant, it is ordered that the appearance of said defendant be and the same is hereby entered by said Russell, as his attorney.

Entered by order of—

ALFRED RUSSELL,
Att'y for Def't.
Pr. A. MANDELL, *Clk.*

Afterwards, to wit, on the 31st day of March, A. D. 1873, said defendant came into the court aforesaid, by his said attorney, and filed an additional transcript of record and proceedings in said cause in the said circuit court for the county of Houghton, which additional transcript is in the words and figures following, to wit:

23, 24 *Additional transcript from Houghton circuit court.*

STATE OF MICHIGAN,
County of Houghton, ss:

William B. Frue, being duly sworn, deposes and says that he is the plaintiff in the annexed writ of attachment named; that Elisha T. Loring, the defendant in said annexed writ named, is indebted to this deponent, plaintiff as aforesaid, upon contract, express and implied, in the amount of one hundred and fifteen thousand dollars, as near as this deponent can estimate such amount, over and above all legal sett-offs, and this deponent further says that said amount is now due him from said defendant.

This deponent further says that the said Elisha T. Loring, defendant as aforesaid, is not a resident of the State of Michigan, and has not resided therein for three months and upwards immediately preceding the time of making the affidavit, to wit, that said defendant has not resided in said State for three months and upwards immediately preceding the 17th day of October, A. D. 1872.

WM. B. FRUE.

Subscribed & sworn to before me, this 17th day of October, A. D. 1872
[SEAL.] J. W. RAYMOND,
Notary Public, Houghton County, Michigan.

25 **Circuit court attachment,*

STATE OF MICHIGAN,
County of Houghton, ss:

The circuit court for the county of .

In the name of the people of the State of Michigan, to the sheriff of the county of Houghton, greeting:

You are commanded to attach so much of the lands, tenements, goods

chattels, moneys, and effects of the defendant, Elisha T. Loring, not exempt from execution, wheresoever the same may be found within the county of Houghton, as will be sufficient to satisfy the demand of William B Frue, plaintiff, and costs of writ, and safely keep the same, to satisfy any judgment that may be recovered by the plaintiff in this attachment.

And in case you shall seize any property of said defendant, in said county, but not sufficient to satisfy said demand and costs, then you are hereby further commanded to seize other property of said defendant, subject to attachment, sufficient, with that seized in said county of Houghton, to satisfy said demand and costs, wherever the same may be found in the State of Michigan.

You are also commanded to summon the defendant, if to be found within said county of Houghton, or in any other county of the State of Michigan, where you may have seized property under and by virtue of this writ, to appear before the circuit court for the county of Houghton, at the court house in the village of Houghton, on Tuesday, the 3d day of December, 1872, at 10 o'clock in the forenoon of said day, to answer the plaintiff. And of this writ make due return.

Witness the honorable James O'Grady, circuit judge, at the village of Houghton, this 17th day of October, in the year of our Lord one thousand eight hundred and seventy-two.

ALEX. POPE, *Clerk.*

HUBBELL & CHADBOURNE,
Attorneys for Plaintiff.

26 (Indorsed:) No. . The circuit court for the county of Houghton. Wm. B. Frue vs. Elisha T. Loring. Writ of attachment. Filed Dec. 19, 1872. Alex. Pope. clerk. Hubbell & Chadbourne, plaintiff's att'ys.

27 STATE OF MICHIGAN,
County of Houghton, ss :

I hereby certify and return to the circuit court for the county of Houghton the following as my doings upon the writ of attachment hereto annexed, to me directed and delivered out of and under the seal of said court in a cause wherein William B. Frue is plaintiff and Elisha T. Loring is defendant, to wit. In pursuance of the commands of said writ, on the 11th day of November, A. D. 1872, I filed for record in the office of the register of deeds of said county a true copy of said writ certified by me, and attached thereto a copy of the inventory of the lands seized and attached by me by virtue of said writ, which inventory I made on said last mentioned day. On the 12th day of November, A. D. 1872, I caused lands in said inventory to be appraised by Thomas W. Edwards and Richard M. Hoar, two disinterested freeholders of said county, they having been first duly sworn by me to make a true appraisal of all the lands seized and inventoried by me as aforesaid, which inventory and appraisal signed by me and by said appraisers are annexed hereto and returned herewith as a part of my doings.

I do further certify and return that I made diligent search for Elisha T. Loring, the defendant in said writ named, in the said county of Houghton, and was unable to find him.

BARTHOLOMEW SHEA, *Sheriff.*

Fees $5.00. Paid appraisers 1.50.
Dated December 20, 1872.

28 COUNTY OF HOUGHTON, *ss:*

I do hereby certify that by virtue of the annexed writ of attachment to me directed and delivered and remaining in my hands, I have this day seized and taken the following property and effects: All the right, title, and interest of Elisha T. Loring in and to the following described lands in the county of Houghton and State of Michigan, said interest being an undivided ($\frac{1}{10}$), as I am informed, to wit:

Description.	Section.	in	Township.	North of	Range west.	Appraised at	$ C'ts.
S. E. ¼ of N. W. ¼	8	"	49	" "	33 "	" "	20 00
S. W. ¼ of S. W. ¼	8	"	49	" "	33 "	" "	20 00
S. E ¼	8	"	49	" "	33 "	" "	80 00
S. E. ¼ of S. W. ¼	8	"	49	" "	33 "	" "	20 00
S. W. ¼ of N. W. ¼	8	"	49	" "	33 "	" "	20 00
S. ½	4	"	49	" "	33 "	" "	160 00
S. ½ of N. E. ¼	4	"	49	" "	33 "	" "	40 00
N. E. ¼	8	"	49	" "	33 "		80 00
N. ½ of N. W. ¼ and S. W. ¼ of N. W. ¼	12	"	49	" "	33 "	" "	60 00
N. W. ¼ of N. W. ¼ and E. ½ of N. W. ¼	14	"	49	" "	33 "	" "	60 00
N. ½ or N. W. ¼ and N. W. ¼ of N. E. ¼	22	"	49	" "	33 "	" "	60 00
N. E. ¼ of N. E ¼ and S. ½ of N. E. ¼	22	"	49	" "	33 "	" "	60 00
W. ½ of S. W. ¼ and S. W. ¼ of N. W. ¼	14	"	49	" "	33 "	" "	60 00
29 N. E. ¼ of N. E. ¼ & S. ½ of N. E. ¼	20	"	49	" "	33 "	" "	60 00
N. ½ of N. W. ¼ and N. W. ¼ of N. E. ¼	20	"	49	" "	33 "	" "	60 00
N. W. ¼	4	"	49	" "	33 "	" "	80 00
N. E. fr'l ¼ and S. E. ¼ and E. ½ of W. ½ of	6	"	49	" "	33 "	" "	240 00
S. E. ¼ of W. fr'l ½ & W. ½ of N. E. ¼ & S. E. ¼ of N. E. ¼	18	"	49	" "	33 "	" "	60 00
N. E. ¼ & S. E. ¼	24	"	50	" "	34 "	" "	20 00
N. E. ¼ and S. E. ¼	36	"	50	" "	34 "	" "	20 00
N. E ¼	12	"	49	" "	34 "	" "	80 00
S. W. ¼ of N. E. ¼	26	"	50	" "	34 "	" "	20 00
S. W. ¼	2	"	50	" "	34 "	" "	80 00
E. ½ of S. E. ¼ & S. W. ¼ of S. E. ¼	12	"	50	" "	34 "	" "	60 00
N. ½ of N. W. ¼	8	"	49	" "	33 "	" "	40 00
W. fr'l ½ of W. fr'l ¼	6	"	49	" "	33 "	" "	80 00
N. W. fr'l ½ of N. fr'l ¼	2	"	49	" "	33 "	" "	20 00
N. fr'l ½ of N. E. fr'l ¼	4	"	49	" "	33 "	" "	40 00
W ½ of S. E. ¼ and N. E ¼ of S. E. ¼	28	"	50	" "	33 "	" "	60 00
W. ½ of S. W. ¼ & N. E. ¼ of S. W. ¼	20	"	50	" "	33 "	" "	60 00
N. W. fr'l ½ and E. ½ of S. E. ¼	18	"	50	" "	33 "	" "	120 00
N. ½ of S. W. ¼	8	"	49	" "	33 "	" "	40 00
W. ½ of S. E. ¼ of lots Nos. 1 & 2	12	"	49	" "	34 "	" "	70 00
30 S. W. ¼ of	36	"	50	" "	34 "	" "	80 00
N. W. ¼ of	36	"	50	" "	34 "	" "	80 00
S. W. ¼ of	24	"	50	" "	34 "	" "	80 00
N. W. ¼ of	24	"	50	" "	34 "	" "	80 00
N. W. ¼ of	12	"	49	" "	34 "	" "	80 00
S. W. ¼	2	"	50	" "	34 "	" "	80 00
S ½ of S. W. ¼ & N. E. ¼ of S. W. ¼ & N. W. ¼ of S. E. ¼	20	"	49	" "	33 "	" "	80 00
W. ½ of N. E. ¼ & S. E. ¼ of N. W. ¼	12	"	49	" "	33 "	" "	60 00
E fr'l ½ of N. W. fr'l ¼ & W. fr'l ½ of N. E. fr'l ½ of	2	"	50	" "	34 "	" "	80 00
S. ½ of N. W. ¼ & N. E ¼ of S. W. ¼	22	"	49	" "	33 "	" "	60 00
N. ½ of N. ½	30	"	49	" "	33 "	" "	80 00
S. ½ of N. W. ¼ & N. W. ¼ of S. W. ¼	20	"	49	" "	33 "	" "	60 00
N. W. ¼	26	"	50	" "	34 "	" "	80 00
N. E. ¼	2	"	49	" "	34 "	" "	80 00
S. E. ¼	2	"	49	" "	34 "	" "	80 00
S. E. ¼	26	"	50	" "	34 "	" "	80 00
N. E. ¼ of N. W. ¼ & S. E. ¼ & S. ½ of S. W. ¼	32	"	50	" "	33 "	" "	140 00
N. W. ¼ of S. W. ¼	28	"	50	" "	33 "	" "	20 00
N. E. ¼	18	"	50	" "	33 "	" "	80 00
S. ½ of S. ½ & S. ½ of N. E. ¼ & N. E. ¼ of S. W. ¼	4	"	50	" "	33 "	" "	100 00
31 S. E. ¼ and N. E. fr'l ½ & E. ½ of W. ½ of	2	"	49	" "	33 "	" "	200 00

Also all the right, title, and interest of the said Elisha T. Loring in and to the following described lands in the county of Houghton and State of Michigan, said interest being an undivided three-quarters ($\frac{3}{4}$), as I am informed, to wit:

N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ and N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of sec. 23, in T. 56 N., R. 33 west, appraised at 9,000.00.

Also all the right, title, and interest of the said Elisha T. Loring in and to the following described lands in the county of Houghton and State of Michigan, said interest being an undivided one-seventh ($\frac{1}{7}$), as I am informed, to wit:

Description.	Section.	in	Township.	North of	Range west.	Appraised at	$ Cents.
N. E. $\frac{1}{4}$	9	"	54	" "	34 "	" "	571 43
N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$	10	"	54	" "	34 "	" "	142 85
S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$	4	"	54	" "	34 "	" "	142 85

Also all the right, title, and interest of the said Elisha T. Loring in and to the following described land in the county of Houghton and State of Michigan, said interest being the whole, as I am informed, to wit:

Lot No. 3 in section 34, township No. 55 north, of range 34 west, appraised at $2,500.00 cents.

BARTHOLOMEW SHEA, *Sheriff.*

32 We, the undersigned freeholders, residing in the county of Houghton, having been first duly sworn by the sheriff of said county to make a true appraisement of all the property seized by him by virtue of the annexed writ of attachment, do appraise the several articles and parcels of property so attached at the sums respectively placed opposite such parcels in the foregoing inventory.

Dated Houghton, Nov. 12, 1872.

RICHARD M. HOAR.
THOMAS W. EDWARDS.

33 *Declaration.*

In the circuit court for the county of Houghton.

STATE OF MICHIGAN,
County of Houghton, ss:

William B. Frue, plaintiff herein, by Hubbell & Chadbourne, his attorneys, complains of Elisha T. Loring, defendant herein, having been duly summoned of a plea of trespass on the case upon promises.

For that whereas the defendant, on the seventeenth day of October, A. D. 1872, in said county of Houghton, was indebted to the plaintiff in the sum of one hundred and fifty thousand dollars, for the price and value of goods then and there sold and delivered by the plaintiff to the defendant at his request.

And in a like sum for the price and value of work then and there done, and material for the same, provided by the plaintiff for the defendant at his request.

And in a like sum for money then and there lent by the plaintiff to the defendant at his request.

And in a like sum for money then and there paid by the plaintiff for the use of the defendant at his request.

And in a like sum for money then and there received by the defendant for the use of the plaintiff.

And in a like sum for money then and there found to be due from the defendant to the plaintiff on an account stated between them.

And thereupon the said defendant, afterwards, and on the day and year aforesaid, in consideration of the premises respectively, then and there promised the plaintiff to pay him the said several sums of money respectively, on request; yet the said defendant hath disregarded his said promises and hath not (although often requested so to do) paid any of the said sums of money, or any part thereof, to the plaintiff' damage of two hundred thousand dollars, and therefore he brings suit, etc.

HUBBELL & CHADBOURNE,
Plaintiff' Attorneys.

34 (Indorsed:) No. 311. The circuit court for the county of Houghton. William B. Frue vs. Elisha T. Loring. Narr. Feb'y 27, A. D. 1873. Alex. Pope, clerk.

35 STATE OF MICHIGAN:

Circuit court for the county of Houghton.

WILLIAM B. FRUE
vs. } In attachment.
ELISHA T. LORING.

To the honorable the circuit court for the county of Houghton:

The petition of Elisha T. Loring, of Boston, Massachusetts, respectfully shows:

1. That your petitioner is the defendant in this suit, and that the same was brought by William B. Frue, plaintiff, on or about the 17th day of October, 1872, in the circuit court for the county of Houghton, and that the said plaintiff is and was at the time of bringing this suit a citizen of the State of Michigan, and that your petitioner is and was at the time of the bringing of this suit a citizen of the State of Massachusetts.

2. And your petitioner further respectfully shows that the said plaintiff claims in the affidavit for attachment in this suit, as against your petitioner, the sum of one hundred and fifteen thousand dollars, and that the matter in dispute in this suit therefore exceeds the sum of five hundred dollars, exclusive of costs.

And your petitioner further respectfully represents that this suit has not yet been tried, but that the same is pending for trial in
36 the circuit court for the county of Houghton, and that your petitioner desires to remove this suit before the trial thereof into the next circuit court of the United States, to be held in the eastern district of Michigan, in pursuance of the provisions of law as contained in the act of Congress approved September 24th, one thousand seven hundred and eighty-nine, entitled "An act to establish the judicial courts of the United States," and that he is ready and willing to give such good and sufficient security as this court may direct for his doing all acts and things required to be done by the said provisions of law, upon a removal of a suit into the United States court, and he offers herewith his bond executed by John J. Bayley, of the city of Detroit, as surety, in the penal sum of one hundred and fifteen thousand dollars, conditioned that your petitioner shall enter in the next circuit court of the United States

to be held in the eastern district of Michigan, on the first day of its session, copies of all process in this court.

And your petitioner therefore prays that the said bond may be accepted as good and sufficient surety, according to the said provisions of law, and that the said suit may be removed into the next circuit court of the United States to be held in the eastern district of Michi-
37 gan, pursuant to the statute of the United States in such case made and provided, and that no further proceedings may be had therein in this court.

And your petitioner will ever pray, &c., now on this day of the filing of this petition having entered his appearance in this cause.

ELISHA T. LORING,
Petitioner.

BALL & CHANDLER,
Att'y for Pet.
ALFRED RUSSELL,
Of Counsel.

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk:

Elisha T. Loring, the petitioner in the foregoing petition, being duly sworn, deposes and says that he has read the petition subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true; and further says not.

ELISHA T. LORING.

Subscribed & sworn to this 14th day of January, 1873, before me.
[L. S.] BENJ. H. CUMER,
Commissioner for Michigan at Boston.

ALFRED RUSSELL & BALL & CHANDLER,
Att'ys for Defendant.

Filed Feb'y 17th, 1873.

ALEX. POPE, *Clerk.*

38 Circuit court for the county of Houghton.

WILLIAM B. FRUE
vs.
ELISHA T. LORING.

The clerk will please enter the appearance of Alfred Russell and Messrs. Ball & Chandler as attorneys for the defendant in the above-entitled cause.

Dated Feb'y 17th, 1873.

ALFRED RUSSELL AND
BALL & CHANDLER.

To the clerk of said court.

The circuit court for the county of Houghton.

WILLIAM B. FRUE
vs. In attachment.
ELISHA T. LORING.

And now comes Alfred Russell and Messrs. Ball & Chandler, attor-

neys for the defendant in the above entitled cause, and move the court that an order may be granted removing said cause to the circuit court of the United States for the eastern district of Michigan, on filing the affidavit and bond required by law.

Dated Feb'y 17th, A. D. 1873.

ALFRED RUSSELL &
BALL & CHANDLER,
Att'ys for Defendant.

Filed Feb'y 17, 1873.

ALEX. POPE, *Clerk.*

39 STATE OF MICHIGAN:

Circuit court for the county of Houghton.

WILLIAM B. FRUE
vs.
ELISHA T. LORING. } Attachment.

We, Elisha T. Loring, of Boston, in the State of Massachusetts, as principal, and John J. Bayley, of the city of Detroit, as surety, are held and firmly bound unto William B. Frue, of Houghton Co., in the State of Michigan, in the sum of one hundred and fifteen thousand dollars, lawful money of the United States of America, to be paid to the said William B. Frue, his successors or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated the 14 day of January, 1873.

Whereas a suit in attachment was brought on or about the 17th day of October, 1872, in the circuit court for the county of Houghton, by the said William B. Frue against the said Elisha T. Loring, and the same is now pending for trial in said circuit court and is removable in the circuit court of the United States for the eastern district of Michigan, under the act of Congress approved September 24th, 1787, entitled "An act to establish the judicial courts of the United States," and whereas the said Elisha T. Loring has filed his petition in the said circuit
40 court for the removal of said suit into the next circuit court of the United States for the eastern district of Michigan:

Now, therefore, the condition of the above obligation is such that if the above bounden Elisha T. Loring, or his legal representatives, shall enter or cause to be entered in the circuit court of the United States for the eastern district of Michigan, on the first day of its actual session next ensuing after the order of the said circuit court for the county of Houghton, for the removal of said suit into said United States circuit court, to wit, on the 4th day of March, 1873, copies of all process in said suit, then the above obligation to be void; otherwise to remain in full force and virtue.

ELISHA T. LORING. [L. S.]
JNO. J. BAYLEY. [L. S.]

STATE OF MICHIGAN,
County of Wayne:

John J. Bayley, the surety in the foregoing obligation named, being duly sworn, deposes and says that he is a resident of the State of Michigan, and a householder therein, and is worth the sum of one hundred

and fifteen thousand dollars over all his just debts and liabilities, and exclusive of property exempt from execution.

JOHN J. BAYLEY.

Subscribed & sworn to before me this 8th day of February, 1873.

JOHN B. STOUTENBURGH,
Notary Public, Wayne County, Michigan.

41 HOUGHTON, *March* 25, 1873.

At a regular term of the circuit court for the county of Houghton, commenced and held at the court-house in the village of Houghton, in said county, on Tuesday the twenty-fifth day of March, in the year of our Lord one thousand eight hundred and seventy-three.

Present honorable James O'Grady, circuit judge.

WILLIAM B. FRUE }
vs. }
ELISHA T. LORING. }

Upon reading and filing the petition of the above-named Elisha T. Loring, defendant herein, for the removal of this suit into the circuit court of the United States for the eastern district of Michigan, in pursuance of the laws of the United States relating to the removal of suits from the State courts, and upon the security offered by said defendant according to the requirements of said laws, and on motion of Alfred Russell, esq., and Messrs. Ball and Chandler, attorneys for the said defendant, it is hereby ordered that the said security be accepted and the said suit be removed into the next circuit court of the United States to be held in the said eastern district of Michigan, and that no further proceedings be had in said suit in this court.

(S'g'd) JAMES O'GRADY,
Circuit Judge.

42 STATE OF MICHIGAN,
County of Houghton, ss :

I, R. H. Brelsford, clerk of the circuit court for the county of Houghton aforesaid, do hereby certify that the annexed and foregoing are true and correct transcripts of all process, pleadings, and files in the cause therein entitled, and of the order of removal entered therein by the circuit court for the county of Houghton ; that I have compared the same with the originals thereof, now of record in my office, and that the same are true and correct transcripts therefrom and of the whole of such originals.

In witness whereof I have hereunto set my hand and affixed the seal of the said court, this twenty-sixth day of March, A. D. one thousand eight hundred and seventy-three, at Houghton, Michigan.

[L. S.] R. H. BRELSFORD, *Clerk.*

STATE OF MICHIGAN,
County of Houghton, ss :

I, James O'Grady, circuit judge of the twelfth judicial circuit of the State of Michigan, and sole presiding judge of the circuit court for the county of Houghton aforesaid, do hereby certify R. H. Brelsford, whose name is subscribed to the foregoing certificate, is now, and was at the time of subscribing the same, clerk of the said circuit court, duly ap-

pointed and qualified and authorized to make the same, and that said attestation is in due form.

JAMES O'GRADY,
Circuit Judge.

Filed in clerk's office March 31, 1873.

A. MAUNDELL, *Clerk.*

43 Afterwards, to wit, on the 16th day of May, A. D. 1873, said plaintiff came into said court and filed a stipulation in the words following, to wit:

Consent for substitution of att'y.

The circuit court of the United States for the eastern district of Michigan.

WILLIAM B. FRUE
vs.
ELISHA T. LORING.

Removal from the circuit court for the county of Houghton.

We hereby consent that Sidney D. Miller, esq., be substituted for us as attorney for the plaintiff in the above-entitled cause.

Dated Houghton, April 28, 1873.

HUBBELL & CHADBOURNE,
Pl'ff's Att'ys.

And therefore on said 16th day of said May, an order of substitution was entered in said court in the words and figures following, to wit:

Order of substitution.

WILLIAM B. FRUE
vs.
ELISHA T. LORING.

MAY 16, 1873.

On filing consent of Hubbell & Chadbourne, attorneys for plaintiff, and on their motion, it is ordered that Sidney D. Miller, esq., be
44 and he hereby is substituted as attorney for plaintiff in the place and stead of said Hubbell and Chadbourne.

HUBBELL & CHADBOURNE,
Att'ys for Pl'ff.

Afterwards, to wit, on the 17 day of May, A. D. 1873, said defendant came into the court aforesaid, by Alfred Russell, his attorney, and filed his plea to the declaration in the words following, to wit:

Plea.

The circuit court of the United States for the eastern district of Michigan.

WILLIAM B. FRUE
vs.
ELISHA T. LORING.

The defendant comes and demands a trial of the matters set forth in the plaintiff's declaration.

ALFRED RUSSELL,
Attorney for Defendant.

45, 46 *Venire.*

Therefore, to try the issue above joined, let a jury come thereof, by whom, &c., who neither, &c., because as well the said plaintiff as the said defendant have put themselves on that jury.

Nonsuit.

And the jurors of that jury of whom mention is made, to wit, J. Dudley Mason, Willard King, William R. Post, Abraham Whiting, Nicholas P. Watts, John S. Griffin, John D. Williams, John Peters, Peleg Swan, Daniel Welsh, John Collier, and Miron B. Smith, who were on the 11th day of June, A. D. 1874, duly elected, tried, and sworn well and truly to try the issue joined in this cause, and hear the evidence adduced and the arguments of counsel; and thereupon the plaintiff, by his attorney, comes into the court aforesaid and voluntarily submits and consents to become nonsuit.

Judgment.

It is therefore ordered judgment of nonsuit, and that the defendant recover of the said plaintiff his costs of this suit to be taxed, and leave is granted to said plaintiff to move to set aside this judgment.

47 Afterwards, to wit, on the 17th day of October, A. D. 1876, the said plaintiff, by his attorney, came into the court aforesaid and entered and filed a motion to set aside said nonsuit; which motion is in the words and figures following, to wit:

Mo. to set aside nonsuit.

The circuit court of the United States for the eastern district of Michigan.

WILLIAM B. FRUE
vs.
ELISHA T. LORING.

And now comes the said plaintiff by Sidney D. Miller, his attorney, and moves the court to set aside the judgment of nonsuit heretofore on the 16th day of June, A. D. 1874, entered in said cause, and to place said cause upon the docket for trial at the next term of this court.

This motion is based upon the files and records of said cause, and upon the stenographer's minutes of the testimony taken upon the former

trial of said cause. This motion will be called up for argument on Tuesday, Oct'r, 24th inst.

SIDNEY D. MILLLER,
Attorney for Plaintiff.
WILLIAM P. WELLS,
G. V. N. LOTHROP,
Of Counsel.

DETROIT, *Oct. 17th*, 1876.

48 *Order setting aside nonsuit.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment at the district court-room in the city of Detroit on Tuesday, the thirty-first day of October, in the year one thousand eight hundred and seventy-six.

Present: Hon. Holmer H. Emmons, circuit judge, & Hon. Henry B. Brown, district judge.

WILLIAM B. FRUE
vs. } 5115.
ELISHA T. LORING.

The motion to set aside the nonsuit heretofore entered in this cause again coming on to be heard, the same having been heard in part on the thirtieth day of October instant, the arguments of counsel for the respective parties are concluded and the matter submitted, and the same having been duly considered by the court, it is now ordered that said nonsuit be, and the same is hereby, set aside, with leave to put the case on the docket for trial at the next ensuing November term of this court.

Afterwards, to wit, on the 26th day of December, A. D. 1876, the said defendant came into court, by C. J. Walker as his attorney, and filed a motion to set aside order of Oct. 30th, 1876; which motion & proof of service of a copy thereof are in the words & figures following, to wit:

49 Circuit court of the United States for the eastern district of Michigan.

WILLIAM B. FRUE
vs. } No. 5115.
ELISHA T. LORING.

And now comes said defendant and moves the court to set aside the order made in this cause on the 31st day of October, A. D. 1876, which order set aside the nonsuit in this cause, and placed the same on the docket for trial:

1. Because no notice of the plaintiff's motion to set aside the nonsuit was served on the defendant.
2. Because this court had no power to make said order setting aside said nonsuit.

ELISHA T. LORING,
By C. I. WALKER,
Attorney.

To S. D. MILLER,
Plaintiff's Attorney.

You are herewith served with a copy of motion in said cause. Said

motion will be heard before the circuit judge, at chambers, at No. 114 Adelaide st., Detroit, Tuesday, Jan. 2, 1877, at 10 a. m.

ELISHA T. LORING,
By C. I. WALKER, *Att'y.*

STATE OF MICHIGAN,
County of Wayne, ss:

Henry M. Campbell, being duly sworn, deposes and says, that on Thursday, the 20th day of December, A. D. 1876, he served a true
50 copy of the within motion and notice on S. D. Miller, esq., plaintiff's attorney, by leaving the same at his office, with the person in charge thereof.

HENRY M. CAMPBELL.

Sworn & subscribed before me this 20th day of December, A. D. 1876.
CHARLES F. BURTON,
Notary Public, Wayne Co., Mich.

Afterwards, to wit, on the 16th day of January, A. D. 1877, an order was entered in said cause in open court overruling said motion; which order was in the words following, to wit:

51 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment, at the district court-room, in the city of Detroit, on Tuesday, the sixteenth day of January, in the year one thousand eight hundred and seventy-seven.

Present, honorable Holmer H. Emmons, circuit judge.

WILLIAM B. FRUE
vs. } 5115.
ELISHA T. LORING.

In this cause a motion having been entered by the defendant to set aside the order made therein on the thirty-first day of October, A. D. 1876, by which order the nonsuit theretofore granted in said cause was set aside and the said cause set down for trial at the November term of 1876 of said court, and the said motion having been argued by Mr. C. I. Walker and Mr. A. Russell in support thereof, and by Mr. W. P. Wells in opposition thereto, and the same having been submitted to the court, and fully considered, it is now by the court here ordered that said motion be, and the same is hereby, overruled with costs.

52 And afterwards, to wit, on the 31st day of May, A. D. 1877, the said defendant came into said court, by his said attorney, and entered and filed his motion for rehearing of motion to vacate order; &c.; which motion and notice & proof of service thereof is in the words and figures following, to wit:

Circuit court of the United States for the eastern district of Michigan.

WILLIAM B. FRUE
vs. }
ELISHA T. LORING.

And now comes the said defendant and moves the court for a rehearing of the motion heretofore made in this cause by him to vacate the

order setting aside the judgment of nonsuit herein. This motion is based upon the following grounds:

First. Because this court had no power to set aside judgment after the term.

Second. Because said motion to vacate was heard before the circuit judge when confined to his residence by sickness resulting in death, and when said judge was unable to personally examine the law
53 or complete the opinion which he had commenced to prepare through an amanuensis.

C. I. WALKER &
ALFRED RUSSELL,
Atty's for Def't.

To SIDNEY D. MILLER, Esq.,
Att'y for Pl'ff:

Please take notice that the above is a copy of a motion this day filed in said cause, and that the same will be called up for hearing on Monday, the 4th day of June, A. D. 1877, at the opening of court in the forenoon, or so soon thereafter as counsel can be heard.

Dated Detroit May 31, 1877.

C. I. WALKER,
ALFRED RUSSELL,
Atty's for Def't.

EASTERN DISTRICT OF MICHIGAN,
County of Wayne, ss:

John M. Hall, being duly sworn, deposes and says that on Thursday, the 31st day of May, A. D. 1877, he served a true copy of the foregoing motion & notice on Sidney D. Miller by delivering the same to him in person.

JOHN M. HALL.

Subscribed & sworn to before me this 31st day of May, A. D. 1877.
HENRY M. CAMPBELL,
Notary Public Wayne Co., Mich.

54 Afterwards, to wit, on the 5th day of June, A. D. 1877, an order was entered in open court in said cause overruling said last mentioned motion, which order is in the words following, to wit:

At a session of the circuit court of the United States for the eastern district of Michigan, begun and held on Tuesday, the fifth day of June, in the year one thousand eight hundred and seven.

Present, honorable Noah H. Swayne, associate justice of the Supreme Court of the United States, & honorable Henry B. Brown, district judge.

WILLIAM B. FRUE
vs. } 5115.
ELISHA T. LORING.

The motion to vacate the order setting aside the non suit in this cause having been heretofore argued by counsel for the respective parties and submitted, and the same having been duly considered, is now by the court here overruled and denied.

55 2D TRIAL.

Venire.

Therefore, to try the issue above joined, let a jury come thereof, by whom, &c., who neither, &c., because as well the said plaintiff as the said defendant have put themselves on that jury.

Verdict.

And the jurors of that jury, of whom mention is made, to wit, Stephen C. Baker, John C. Waterbury, Jefferson J. Wilder, Thomas Symous, Harman Allen, Henry M. Lacroix, Edward S. Hunt, Walter Wood, George Renwick, Jacob Kincaid, Samuel Bigelow, and Eliakim R. Blakesley, who were, on the 27th day of June, A. D. 1877, duly elected, tried, and sworn well and truly to try the issue joined between the parties aforesaid, and after hearing the evidence, the arguments of counsel, and receiving the charge of the court, on the 30th day of said June retired to their room to consult of their verdict, in charge of an officer sworn to attend them, and after being a short time absent, return into court and say they find that said defendant did undertake and promise in manner and form as the said plaintiff hath, in his declaration, alleged against said defendant, and the said jury assess said plaintiff damages on occasion thereof at the sum of sixty-seven thousand four hundred and eighty-two dollars and thirty four cents.

Judgment.

It is therefore considered by the court now here, that the said
56 plaintiff do recover of the said defendant the said sum of sixty-seven thousand four hundred and eighty-two dollars and thirty-four cents ($67,482.34), damages assessed by the jury as aforesaid, together with the sum of ninety-six dollars and twenty cents ($96.20), the plaintiff's costs of his said suit, &c.

Judgment entered June 30th, 1877.

57 *Bill of exceptions.*

Circuit court of the U. S. for the eastern district of Michigan.

WILLIAM B. FRUE
vs.
ELISHA T. LORING.

On the 27th day of June, in the year of our Lord one thousand eight hundred and seventy-seven, this cause came on for trial before Hon. B. Ballard, sitting as circuit judge.

Mr. WALKER. The defendant, before proceeding to trial, desires to object to the case proceeding to trial upon the grounds that the court has no jurisdiction in the case, and that the case is not properly here for trial, and desires to have this objection entered.

Counsel for plaintiff moves to amend the item stated as follows in his bill of particulars, "for amount collected of A. H. Sibley, and receipt acknowledged by E. T. Loring, $4,092.72," so as to read for amount collected of A. H. Sibley, and receipt acknowledged by E. T. Loring, $6,901.48.

Amendment allowed without objection.

Thereupon, to maintain the issue on behalf of the plaintiff, he introduced the following testimony:

WILLIAM B. FRUE, plaintiff, called and sworn in his own behalf.

Examined by Mr. WELLS.

Q. What was your residence in 1866?

A. Houghton, Mich., in Houghton Co.

Q. Did you know Elisha T. Loring?

A. Yes.

Q. How long had you known him?

A. Five or six years.

Q. Where did he live?

A. At Boston.

Q. What was your business in 1866?

A. I was manager of mines; manager of mining works.

58 Q. Did you make any discoveries during that year of mining lands?

A. I examined lands, and came to the conclusion that they were valuable for mining purposes, from their location.

Q. Had you heard anything from Loring during that year in reference to his becoming interested with you in mining lands?

A. Yes.

Q. What and how?

A. Mr. Palmer returned from Boston and stated that Mr. Loring was desirous of taking an interest with Palmer and myself in any mining lands that we might think were valuable for mining purposes.

Q. When was that?

A. That was towards the close of the summer of 1866; it might have been the first of October.

Q. What was then done between you and Palmer in reference to these lands?

A. I advised Palmer to go to the agent of the St. Mary's Mineral Land Company, and contract for a certain piece of land on section 26.

Q. Were these lands contracted for?

A. Yes.

Q. Lands on what section?

A. Section 26.

Q. Were other lands which you had discovered contracted for?

A. They were; but the contract was not carried out. All contracts made on Lake Superior with the resident agent had to be submitted to the directors in Boston, hence a contract that I had entered into——

Q. No matter about that. State what lands were finally purchased under any arrangement between you, Palmer and Loring.

A. I cannot answer positively. I was aware that section 6 and an 80 in 1 was purchased under the arrangement, but a portion of it was afterwards abandoned.

Q. And also lands in section 26?

A. Also lands in section 26.

59 Q. What arrangement was made between you and Palmer in reference to persons becoming interested in those lands?

A. We talked the matter over and decided to allow parties certain interests.

Q. What interests?

A. Do you want the exact amounts?

Q. I want the exact amounts so far as you were concerned.

(Witness here refers to memorandum.)

Q. Were companies to be organized?

A. The companies were to be organized.

Q. How many companies on these lands you have mentioned?

A. It was contemplated that two companies were to be organized.

Q. What companies—what names?

A. The names at that time were not decided on.

Q. Were two companies organized afterwards, which came into possession of these lands which you have spoken of?

A. There were two companies organized.

Q. Who was to organize those companies?

A. Well, it was not decided upon at the time who should organize the companies; but there was a general understanding that Mr. Palmer, on his return to Boston with Mr. Loring, and perhaps Mr. Bigelow, would perhaps perfect the organization of the company.

Q. What companies were in fact organized on those lands you have mentioned?

A. The Ossipee Mining Company was organized on section 26, and the Kearsarge on the south half of section 6.

Q. Now state what interests in the stock of these two companies the different persons were to have.

Mr. WALKER. Do you refer to the arrangement between the witness and Mr. Palmer at that time?

Mr. WELLS. Yes, sir; I refer to that.

COURT. What was the capital stock in these companies?

60 Mr. WELLS. That will appear from further examination. The maximum was five hundred thousand dollars.

WITNESS. Mr. Palmer put down for the Boston party——

Mr. WALKER. Allow me to understand whether this relates to the Ossipee Company?

A. I am now speaking of the Ossipee Mining Company, which was afterwards organized on section 26. Palmer put down ten thousand dollars.

Q. Dollars or shares?

A. Dollars.

COURT. For whom?

A. For Boston parties—names unknown. He put down for Mr. Loring $5,000. I put down for myself and friends $15,000. We put down for A. H. Sibley $2,000. Mr. Palmer put down for his son $1,000; and Mr. Mandlebaum $1,000.

The COURT. Who put that down?

A. We were both to take—that is, agreed to take—that is, give Mandlebaum an interest of one thousand dollars. The amount stated makes forty thousand dollars, which was the contract price for the land in section 26, afterwards organized into the Ossipee Mining Co.

COURT. That does not make forty thousand dollars.

A. Mr. Palmer put down for himself six thousand dollars, making the forty thousand dollars.

Q. Forty thousand dollars, I understand you to say, was the purchase price of the lands?

A. Purchase price of the lands.

Q. Was any more money to be invested, as capital or otherwise, in the Ossipee Mining Co. besides the lands?

A. It was decided to place forty thousand dollars in the treasury of the company, when it should be organized, for working capital.

Q. In what proportions and who were to contribute to this working capital?

A. The parties who took the interests.

61 Q. In what proportions?

A. According to their interests. If they put down a thousand dollars for a thousand dollar interest, they were to be called on for a thousand dollars towards the working capital; forty thousand dollars had to be made up in that way.

Q. Then was anything more paid in as capital or lands or otherwise into the Ossipee Mining Company at any time?

A. There was an additional amount of land purchased after the company was organized?

Q. At how much?

A. I understood the land cost twenty-five thousand dollars.

Q. Well, how much was put into the company?

A. I know of no other figures than those.

Q. Besides the original forty thousand dollars for the purchase price of the lands, and forty thousand dollars for working capital, how much more was put in to make the whole investment in the Ossipee?

A. There was an assessment, as I looked upon it, for $1.50 per share to cover this new purchase of land.

Q. Then, how much in all was the amount of money which these parties invested, or were to invest, in the Ossipee Mining Co?

A. It was one hundred and ten thousand dollars in all. I am not aware that the five thousand dollars was added to the working capital.

Q. Upon that basis, how much was the stock in the Ossipee to cost the original promoters?

A. $5.50 per share.

Q. Now, sir, as to the Kearsarge; how much did the lands cost?

A. The lands on which the Kearsarge was organized cost $50,000.

Q. How much was put in for working capital?

A. Forty thousand dollars.

Q. State the proportions that it was arranged should be contributed by the parties to the Kearsarge ultimately; that was put down to you and Palmer in the Kearsarge.

62 A. I cannot very well state about the Kearsarge. As I have already stated that the contract which I had made with the St. Mary's Mineral Land Company's agent was not carried out.

Q. It is not necessary to go into that. State how much was to be the cost of the stock in the Kearsarge Company to the original promoters.

A. $4.50 per share. The cost of the land being $50,000, and the working capital $40,000—making ninety thousand dollars, or $4.50 per share on 20,000 shares.

Q. Can you state the amount of shares that you were to have in the Kearsarge under the arrangement between you and Palmer?

A. 4,200 shares.

Q. I have not asked you to state the amount of shares you were to have in Ossipee; I have asked you about the money; but what amount of shares were you to have in the Ossipee by the original arrangement between you and Palmer?

A. I think the amount of shares was seventy-five hundred.

Q. After those arrangements were made between you and Palmer as to the contributions or proportions of stock, was any arrangement made between you and Palmer with reference to your transmitting the money to Boston?

A. Yes.
Q. What?
A. Palmer wanted I should remit the moneys to Mr. Loring.
Q. Why?
A. To cover my contemplated interest in the two companies.
Mr. WALKER. I think we must object to any arrangement between the witness and Palmer.
Mr. WELLS. We propose to show that this arrangement was communicated by Mr. Palmer to Mr. Loring, and assented to by him, thereby directly connecting Loring with the arrangement.
Mr. RUSSELL. Do you propose to show that he ratified it?
Mr. WELLS. He assented to it.
63 Q. Why was the money to be sent to Mr. Loring to cover the contemplated interest which you had put down in the two companies that were to be organized; what instructions did you give to Palmer in reference to this?
A. I instructed Palmer to pass all money—or I will commence: Mr. Palmer wanted I should forward all moneys to Mr. Loring there; I refused to do this; not that I had any fear of Mr. Loring's responsibility——
Mr. WALKER. We object to what the negotiation was between the witness and Palmer, except as they were taken to Loring.
Mr. WELLS. We don't care anything about that in particular.
WITNESS. The arrangement with Palmer was that I would forward all moneys to Palmer, and he was to pass them over into the hands of Loring, and request Loring at the time to credit W. B. Frue's account with them—or rather my account.
Q. For what purpose were they to be credited to your account?
A. To be used by Loring to pay for the stocks in the companies that were to be organized.
Q. Whose stock?
A. My stock.
Q. Did Palmer proceed to Boston?
A. He left the lake for that purpose. I should judge from the letters that I received from him shortly afterwards that he had gone to Boston.
Q. Was money remitted to you by Mr. Palmer during that winter?
A. During that winter?
Q. Yes, sir.
A. Yes.
Q. About what time did Palmer go to Boston?
A. He went to Boston about the last of October or the first of November, 1866.
Q. If any changes as to the amount of stock which you were to have in these two companies were afterwards made, state the final amount of stock which you were to have in these two companies was for the money you sent forward.
Mr. WALKER. I object until the arrangement is shown. They may show what the arrangement is shown and by whom. He is asking for results without showing the process.
64 Mr. WELLS. I suppose I may ask him what amount of stock he was to have finally in these companies, and then you may ask him as to the sources of his knowledge.
Mr. WALKER. I object on the ground that it is incompetent as against this defendant.
(Objection overruled.)
Q. State what amount of stock in each of these companies you were

to have under any change in the arrangements; what was the final amount of stock?

A. The final amount of stock in the Ossipee was 5,835 shares.

Q. At what price?

A. $5.50 per share.

Q. What amount in Kearsarge?

A. 4,200.

COURT. That was not changed?

A. That was not changed. It was not considered worth anything.

Mr. WELLS. After Palmer proceeded to Boston when did you first see Mr. Loring?

A. I met Mr. Loring in June, 1867, at my house at Houghton, Mich.

Q. You say you know of the remission of moneys during the winter?

A. Yes.

Q. The amount of moneys paid over to Loring I suppose you can testify to?

A. Not in items; the gross amount.

COURT. He means paid over to Loring.

A. I cannot testify to that positively.

Q. Then I will go on to the time in June, 1867; you say you saw Loring at Houghton?

A. Yes, sir.

Q. I want you to state what took place, if anything, in reference to your being entitled to certain amounts of stock, or any promise to send the stock; state what took place.

A. We had a meeting at my office.

65 COURT. Who are "we"; you and Mr. Loring?

A. Mr. Palmer, Loring, Noble and myself.

Mr. WELLS. At your office where?

A. At my private office at Houghton.

COURT. Who is Noble?

A. He was a book-keeper for the companies.

Mr. WELLS. State who Noble was; you have stated it to the judge, state it to the jury.

A. Noble was acting as book-keeper of several mines for which I was superintendent at the time.

Q. Now can you state what took place there between you?

A. The meeting was for the purpose of settling up the transaction; that is, settling up with regard to the stocks and the money sent forward. Mr. Loring had presented——

Q. Who had called for the meeting?

A. I had called that meeting. Loring presented accounts. They were not according to my understanding. The accounts were headed Charles Palmer and E. T. Loring, or E. T. Loring in account with Charles H. Palmer; and I don't know but one was headed Charles H. Palmer in account with E. T. Loring. I stated that they were not the accounts I wanted; that I had sent forward my money, and that I wanted Mr. Loring to account to me individually for the moneys sent forward; and Mr. Loring stated at the time that he had not received all the moneys which I had sent forward. I turned around to Palmer; says I, how is this? He intimated that Palmer had used some money in New York of the money which I had sent down. I asked Palmer how this was, and Mr. Palmer spoke to Loring, and he says, Did I not account to you, Mr. Loring, in our transactions for that money? and Mr. Loring said he did.

Q. Was anything said at that time about the amount of stocks due you or to which you were entitled?

A. Yes.
Q. What?
A. Palmer wanted I should remit the moneys to Mr. Loring.
Q. Why?
A. To cover my contemplated interest in the two companies.
Mr. WALKER. I think we must object to any arrangement between the witness and Palmer.
Mr. WELLS. We propose to show that this arrangement was communicated by Mr. Palmer to Mr. Loring, and assented to by him, thereby directly connecting Loring with the arrangement.
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Mr. WELLS. We don't care anything about that in particular.
WITNESS. The arrangement with Palmer was that I would forward all moneys to Palmer, and he was to pass them over into the hands of Loring, and request Loring at the time to credit W. B. Frue's account with them—or rather my account.
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A. To be used by Loring to pay for the stocks in the companies that were to be organized.
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A. My stock.
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A. He left the lake for that purpose. I should judge from the letters that I received from him shortly afterwards that he had gone to Boston.
Q. Was money remitted to you by Mr. Palmer during that winter?
A. During that winter?
Q. Yes, sir.
A. Yes.
Q. About what time did Palmer go to Boston?
A. He went to Boston about the last of October or the first of November, 1866.
Q. If any changes as to the amount of stock which you were to have in these two companies were afterwards made, state the final amount of stock which you were to have in these two companies was for the money you sent forward.
Mr. WALKER. I object until the arrangement is shown. They may show what the arrangement is shown and by whom. He is asking for results without showing the process.

64 Mr. WELLS. I suppose I may ask him what amount of stock he was to have finally in these companies, and then you may ask him as to the sources of his knowledge.

Mr. WALKER. I object on the ground that it is incompetent as against this defendant.
(Objection overruled.)
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A. $5.50 per share.

Q. What amount in Kearsarge?

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COURT. He means paid over to Loring.

A. I cannot testify to that positively.

Q. Then I will go on to the time in June, 1867; you say you saw Loring at Houghton?

A. Yes, sir.

Q. I want you to state what took place, if anything, in reference to your being entitled to certain amounts of stock, or any promise to send the stock; state what took place.

A. We had a meeting at my office.

65 COURT. Who are "we"; you and Mr. Loring?

A. Mr. Palmer, Loring, Noble and myself.

Mr. WELLS. At your office where?

A. At my private office at Houghton.

COURT. Who is Noble?

A. He was a book-keeper for the companies.

Mr. WELLS. State who Noble was; you have stated it to the judge, state it to the jury.

A. Noble was acting as book-keeper of several mines for which I was superintendent at the time.

Q. Now can you state what took place there between you?

A. The meeting was for the purpose of settling up the transaction; that is, settling up with regard to the stocks and the money sent forward. Mr. Loring had presented——

Q. Who had called for the meeting?

A. I had called that meeting. Loring presented accounts. They were not according to my understanding. The accounts were headed Charles Palmer and E. T. Loring, or E. T. Loring in account with Charles H. Palmer; and I don't know but one was headed Charles H. Palmer in account with E. T. Loring. I stated that they were not the accounts I wanted; that I had sent forward my money, and that I wanted Mr. Loring to account to me individually for the moneys sent forward; and Mr. Loring stated at the time that he had not received all the moneys which I had sent forward. I turned around to Palmer; says I, how is this? He intimated that Palmer had used some money in New York of the money which I had sent down. I asked Palmer how this was, and Mr. Palmer spoke to Loring, and he says, Did I not account to you, Mr. Loring, in our transactions for that money? and Mr. Loring said he did.

Q. Was anything said at that time about the amount of stocks due you or to which you were entitled?

A. The amount of stocks was not definitely ascertained at the time, but—I am not positive about that.

66 Q. Well, what was the final result of the conversation?

A. The final result of the conversation was that Mr. Loring admitted—that is, in order to carry the thing out correctly, Mr. Noble went up to the office and brought down his books, from which he checked the amounts of money, as shown on the different accounts then presented by Loring. The amounts were found to agree within a few thousand dollars, and that amount was accounted for in connection with this money which Palmer had spent or used in the city of New York.

Q. What did you say in reference to those accounts that were not with you?

A. I said those accounts had nothing to do with me, except as they merely set forth the amounts of money that had been remitted, but that I had nothing to do with Charles H. Palmer.

Q. Was anything said by Loring with reference to sending you your stocks?

A. Mr. Loring agreed on his return to Boston to make out a statement of the cost of my stocks. I requested him to make out a statement showing the number of shares, at $5.50 per share for the stocks in the Ossipee, and the amount of stock in the Kearsarge, at $4.50; charging me with that and crediting me with all the moneys sent forward that was checked there at the time; and he was to send me the certificates of stock and the statement of stock as soon as he could get to Boston and straighten up the account.

Q. Did he make any objection to the amount of stock you claimed you were entitled to?

(Objected to as assuming something not in the case. Objection sustained.)

Q. Was there any statement with reference to the amount of stock you were entitled to; I mean in reference to figures?

A. There was a perfect understanding, but I cannot state the substance of it; that is, I cannot state the price.

Q. Did Loring make any objection to the cost price of the stock in both of these companies as you made it?

A. He made no objection to it.

Q. Did he make any objection to the amounts?

A. I will correct that; he spoke about an assessment, and said

67 that the assessment had not been paid, and I wanted to know of him what difference it made. The assessment on the call for $5.50 a share on the Ossipee stock and $4.50 on the Kearsarge. I told him I did not want the thing split up, that is, so much for interest and land, and so much for assessment. I wanted the thing in gross, that is, the cost of the stock to the original promoters.

Q. Did he make any objection to your statement that the cost of the Ossipee was $5.50 and the Kearsarge $4.50?

A. No.

Q. What were you saying in reference to his promise to send stock?

A. He agreed to send, on his return to Boston, all of my stocks in the Ossipee and in the Kearsarge.

Q. Some stocks had been sent you by Loring?

A. Yes.

Q. Were any of the stock sent you by Loring sent you after this interview in June, 1867?

A. I recollect of no stocks being sent to me.

Q. Are you positive or not?

A. I am positive I received no stocks.

Q. Did you ever pay Loring any money individually; if so, what sum?

A. I ordered twenty-five hundred paid, passed over or paid to Loring, in July, 1868.

Q. Did you pay it to him?

A. I was in the office at the time. I instructed Noble to draw a check or draft for that amount, and Mr. Noble passed it over to Loring while I was in the office.

Q. And of all these remittances or moneys claimed in this bill of particulars in this suit, that is the only amount which you personally paid to him, and that was paid in your presence?

A. Yes, sir.

Q. On what account was this twenty-five hundred dollars paid?

A. It was paid on the general account of Loring, on the same account——

68 Q. On whose general account?

A. That is my account with Loring.

Q. Why did you pay twenty-five hundred dollars in June, 1868?

A. Well, he still claimed there were moneys due him on these stocks, while I contended that I had overpaid my interest; that is, overpaid for the stocks. It was then perfectly well understood as to the amount of stock I was to have originally.

Q. Did these remittances and this twenty-five hundred dollars in point of fact pay——

(Objected to as leading. Objection sustained.)

Q. Was there any arrangement between you and Palmer, or between you, Palmer, and Loring, in reference to selling certain stocks in these two companies to other persons? If so, state.

A. There was some talk in regard to it. I proposed to sell five thousand shares of each company pro rata.

Mr. WALKER. Where was this talk, and with whom?

Mr. WELLS. I asked him if it was between him and Palmer, and asked him to state the original arrangement as to the sale of this stock. The conversation in regard to the selling of this stock was before Palmer left for Boston. We proposed to connect it with Mr. Loring, and he acted upon it and sent the stock.

Q. What was the arrangement?

A. The arrangement was to sell five thousand shares of each company's stock.

Mr. WALKER. That I understand was your proposition in the arrangement?

A. It was the proposition assented to by Mr. Palmer; five thousand shares in the Ossipee and five thousand in the Kearsarge.

Q. After those companies were organized, did you sell any stock to outsiders under this arrangement?

A. No.

Q. Did you deliver any stock which was sold to outsiders after these companies were organized?

A. I delivered stock to outsiders after the companies were organized; but the stock was sold before the companies were organized.

69 Q. What do you mean by its being sold?

A. Parties had contracted with me for it at Houghton.

Mr. WALKER. Was that contract in writing?

A. Well, yes, sir; that is, what I mean—perhaps I ought to explain what I call a contract. There was a writing on the head of a bill paper which set forth that any parties—

Mr. WALKER. You need not state the contents.

Mr. WELLS. It is not a contract. We claim we have not got it.

(Objected to as incompetent.)

Mr. WELLS. I will ask him to state if he delivered stock in these companies which he says he had contracted to sell and got the money. I don't care anything about the preliminary negotiations.

(Objected to as incompetent and immaterial. Objection sustained.)

Q. How much stock did you sell in the Ossipee Mining Company to outsiders?

A. 2,000 shares.

Q. And how much in the Kearsarge?

A. 5,000.

Q. At what price in each?

A. The stock was sold in the Kearsarge for $10 per share.

Q. That makes how much?

A. That would make fifty thousand dollars.

Q. How much in the Ossipee?

A. It was sold for ten dollars a share, but before that I delivered this stock to parties, I was notified of an extra thirty thousand that had to be raised for the purchase of lands for the Ossipee Mining Co.

Q. How much did you sell it for finally?

A. $11.50.

Q. How much was the total amount sold?

A. It is seventy-three thousand.

Q. Who sent you that stock you sold and delivered?

A. Mr. Loring must have sent it. He is president of the com-
70 pany, and I had to account to Mr. Loring for this stock; and I ordered the stock, and it was sent. I was not present in Boston, and I did not see him mail the stock to me.

Q. Did you receive the seventy-three thousand dollars that you have spoken of?

A. Did I receive it?

Q. Did you receive the money? Did they pay you for the stock that you sold?

A. Not all of it. I accounted for the seventy-three thousand dollars.

Q. Whether you did or not, did you send forward the seventy-three thousand dollars?

A. I sent forward the seventy-three thousand dollars. I ought to give an explanation. They are parties who had purchased before the company was organized, three hundred shares.

Mr. LOTHROP. I do not think the title is of any consequence.

Mr. WELLS. That is of no consequence if you accounted to Mr. Loring for these moneys.

A. I accounted to Loring.

Q. Whose stock was this that was sold?

A. It was stock belonging to the original promoters.

Q. Then why did you send forward all moneys to Mr. Loring?

A. I sent them forward because I wanted to keep him in ample funds.

Q. What proportion of these moneys did you send forward belonging to you, as proceeds of the sale of stock?

A. There is my stock in the Kearsarge; there is only 1,050 shares sold, and I was entitled to a drawback on that. There was in the Ossipee 580 odd shares. I have forgotten the amount.

Q. Of the stock that was sold, what proportion belonged to you?

A. I have stated, in the Kearsarge 1,050 shares; it is impossible to

remember all these figures without referring to notes. I cannot make a perfect ledger of my head.

Q. Well, sir, you can refer to notes.

A. You want the amount?

Mr. WALKER. What are you reading from?

A. Minutes.

71 Q. Minutes made when?

A. This was put onto paper last evening. I supposed I would be asked the question, and I could not retain the figures in my mind; that is, I had to commit them on paper.

Q. Who made the memorandum?

A. It is made by Mr. Noble, and I figured out a part of it myself, to be sure.

The COURT. The stock forwarded by you to Loring belonged to the promoters in Houghton?

A. Yes, I have the figures here now.

Mr. RUSSELL. We would like to look at the paper before he testifies.

(The paper is handed to defendant's counsel.)

Mr. WELLS. How many shares of Ossipee, of the sale of stock, were you entitled to have the proceeds of?

A. Five hundred and eighty-three and a half shares.

Q. Why?

A. Because there were 2,000 shares sold, and it was one-tenth of the whole stock sold.

Q. What is one-tenth of your interest?

A. One-tenth of the amount of stock sold was 583 and a half shares.

The COURT. I do not think we will take up time in giving the conclusions of the witness.

Q. How much stock was sold in the Kearsarge?

A. One-quarter of the whole stock sold.

Q. What was one-quarter of your interest?

A. One-quarter was 1,050 shares.

Q. Was any stock besides what was sold disposed of otherwise by the original promoters?

A. Yes.

Q. How much?

A. There were 400 shares donated in the Ossipee.

Q. What do you mean?

72 A. Given away—made presents of.

Q. To whom?

A. Persons at Lake Superior.

Q. What proportion of donated stock were you chargeable with?

A. I charged myself with 117 shares.

Q. Was any stock donated in the Ossipee?

A. I am now speaking of the Ossipee.

Q. In the Kearsarge?

A. Yes.

Q. How much?

A. 200 shares.

Q. What proportion of yours?

A. 42 shares.

Q. Was this donated stock all sent to you and delivered by you to persons entitled to it?

A. There were two hundred shares of donated stock——

Q. In what?

A. In the Ossipee. That I surrendered to the parties to whom it was

donated out of my own stock; that is, I had used my own stock for that purpose to clear off the liability of parties.

Q. So that you paid all the donated stock in that company?

A. No, there were 200 shares delivered to me afterwards by Mr. Palmer; 400 was the amount.

Q. How much stock to which you were entitled in the Ossipee Company have you actually received from Loring?

A. In the stock sold, donated, and delivered there was 1,001 and a half shares.

Q. No, I mean how much stock ought to be credited to Loring on the stock that he delivered to you?

A. I credited Loring with a thousand and one and a half shares.

Q. In which company?

73 A. In the Ossipee.

Q. How much in all did you credit Loring with in the Kearsarge?

A. 3,103 shares.

Q. Of the moneys which you claim to have paid Loring in this transaction, were any applied to any other companies than the Kearsarge and Ossipee?

A. Yes, sir.

Q. State what.

A. There was—refers to memorandum—there was money paid on the Iroquois, on the mines comprising the north half of section 6 and the 80 in section 1.

Q. How much money?

A. Ten thousand dollars.

Q. In what proportions were these parties to contribute?

A. Ten thousand; that would be 50 cents per share—20,000 shares.

Q. Was the Iroquois transaction carried on?

A. No.

Q. What became of the 10,000 you paid?

A. It was lost; that is, forfeited, as it were.

Q. Ten thousand dollars paid on the land, and then you forfeited it?

A. Yes, sir.

Q. Why was it forfeited?

A. Because the contract with the Mineral Land Company——

Mr. WALKER. It is not necessary to go into that.

Mr. WELLS. You concluded not to pay the balance.

A. Yes.

Q. How much do you concede to Loring should be your part of that?

A. $2,100.

Q. Why?

A. Because I was to have 4,200 shares of stock.

Q. Did you, after June, 1867, have any further interview with Mr. Loring?

A. Yes.

74 Q. What further interviews besides that of June, 1867, did you have with Loring, and where?

A. I remember a meeting in July, 1868.

Q. Is the interview you now speak of, in July, 1868, the same as when the $2,500 was paid?

A. Yes, sir.

Q. Anything said about your stocks at that time?

A. There was considerable said, but I am unable to recall it to my mind; it left but little impression.

Q. What further interview did you have with him?

A. I next saw Loring in October, 1868, at my house.

Q. Anything said at that time about your stocks?

A. There was considerable. He approached me for more money.

Q. More money?

A. More money. I told him, as I had repeatedly before, in our conversations, that I had overpaid for my interests, and he brought up the question again. He said, you don't understand this thing; you have not paid the assessment. I told him I thought I understood it, and that he had not delivered me any stock.

Q. What did he say as to that?

A. Well, he wanted to—he said he was in close quarters, as it were, for money. He had to raise money from some point or other, and that he must have it.

Q. In reply to your statement that you had overpaid your interest, what did he say?

A. He said, you don't understand it; you have not paid your assessment. I still contended that $5.50 on the Ossipee covered all assessments, and I did not want the two separated. I made a request that the purchase price of the land and the working capital should be combined when the stock was changed in 1867, when we had our first meeting.

Q. Anything said about the Kearsarge?

A. I don't remember that there was at that interview. I was not in health at the time. I was sick at the time and the interview was short.

75 Q. That was when; in 1869?

A. In the fall of 1868.

Q. Why was it short?

A. I was sick.

Q. Is there anything more with reference to the interview in 1869, the conversation you had with him?

Mr. WALKER. He has not testified to anything in the year 1869.

Q. You were speaking now of October, 1868, that you were sick; now, did you have any further interview?

A. Yes, sir.

Q. When?

A. I had another interview with him in May, or it might have been June, 1869.

Q. State what took place.

A. I made a demand on Mr. Loring at that time for my stock.

Q. In what companies?

A. In the Ossipee and Kearsarge, and also in another concern which don't come into this.

Q. What did you say? Go on and state what took place.

A. He gave me to understand that the stock was placed as collateral, had been placed as collateral, in the hands——

Mr. WALKER. No matter what he gave you to understand; state what he said.

A. He said that Palmer had placed the stock in his hands as collateral.

Q. Collateral to what?

A. I don't know.

Q. What did you say?

A. I told him that Palmer had no right or control over my stock, and he could not place my stock in his hands as collateral.

Q. Go right on and state all that took place at the interview.

A. I cannot remember all the conversation; but during the conversation I told Loring that he had better look around and get some
76 one to go on his bond or bail, as I would have him arrested. Said I, you intend, Mr. Loring, to leave on Wednesday. This conversation was on Monday.

(Objected to as incompetent.)

Q. I want to know if Loring made any promises in reference to these accounts of that stock?

(Objected to as immaterial.

Mr. WELLS. The conversation leads directly to an undertaking by Loring to take these stocks. Go on.

A. I gave Loring to understand that I would have him arrested. The conversation was on Monday, and he informed me that he intended to leave on Wednesday, and I advised him to look around and get some one to go bail, as it was my intention to have him arrested, and I did not want to take him unawares. I also apologized to him for having to treat my guest in that kind of a way; but he felt very sore about it, and he said he did not want to hear another word about this. Well, I told Mr. Loring that it was all right; that I would proceed and see what I could get otherwise; and I would have no further talk with him about it. On Tuesday, when we were going up to the mines together in the carriage, Mr. Loring approached me about the conversation we had on Monday, and he wanted to know if I intended to carry out my threat that I then made; and I stated to him that I did not wish to hear anything more about it, as he had requested me not to say a word on the subject, and I would retaliate. After some conversation, he wanted I should go to my lawyer with him and get the lawyer's advice about it. He wanted an extension of thirty days to go to Boston and look over the account and render a correct statement. We went to the lawyer; and being informed that my——

Mr. WALKER. Were you with him when you say you went to the lawyer?

A. Yes, sir.

Mr. RUSSELL. Who was it?

A. Hubbell and Chadbourne. They informed me that my position in the premises would be just as good at the end of thirty days as though I arrested Mr. Loring then, and I consented to let him go without arresting him.

Mr. WELLS. Why was thirty days given?

77 A. He asked for thirty days to look over the accounts and give me a correct statement.

Q. Statement of what?

A. Statement of the whole transaction; of the Ossipee and Kearsage stocks.

Q. Did he do it in thirty days?

A. He did not.

Q. Send you any stocks?

A. Sent me no stocks and no accounts.

Q. Ever seen him since?

A. Yes; I saw him in the early winter, I think, of 1870.

Q. Any demand for these stocks, or any convesation with reference to them then?

A. There was something at that time, but I don't remember distinctly. I was engaged in other business, and I wanted to get Loring interested in a new concern——

Q. Never mind about that. If there is any interview subsequent to 1869 in which anything was said about these stocks state it.

A. I have stated all that I remember.

Cross-examination:

Mr. WALKER. Who paid the land company the forty thousand dollars of the original purchase of the Ossipee?

A. Who paid?

Q. Yes.

A. I don't know.

Q. Did not Loring pay the money?

A. Undoubtedly.

Q. How, sir?

A. Very likely he did; but I cannot state positively, not being in Boston. If you want me to answer by hearsay——

Q. Did you not so understand, as a member of the company?

(Objected to.)

78 Q. Don't you know, as a member of the company, that Loring paid for that land?

A. I don't.

Q. You did not pay for it directly.

A. I did not.

Q. Who paid for the second purchase, the $25,000? Have you any knowledge upon that subject?

A. I only know there was an assessment.

Q. No, sir; who paid for the land?

A. I don't know.

Q. Do you know whether the working capital, $45,000, was actually paid into the company?

Mr. WELLS. $40,000.

Mr. WALKER. $40,000; $5,000 afterwards added.

A. I only know that the stock was figured at $5.50 a share. I was not in Boston; I could not swear.

Q. That working capital was actually expended in supplies and work in the mines, was it not?

A. A certain portion of it undoubtedly was; I don't know that all.

Q. Don't you so understand, that all of it was expended?

A. I could give different answers to that question if I will assume; but the question is whether I am to answer you as I know.

Q. Yes, sir. What do you know about it? Don't you know there was a large amount of money expended on the mines?

A. There was a large amount of money; but I did not keep the accounts, and I cannot say whether all the working capital was expended or not, or whether it was all expended. I am unable to answer that question.

Q. When was the work abandoned on that mine?

A. It must have been along in the winter of 1868, or perhaps in 1869. They might have continued up to that time. I was not in charge of the mining.

79 Q. Was not this money that was sent forward that you have mentioned sent forward to pay for your proportion of the original investments in the lands and working capital?

A. I sent my money forward to pay for the original stock that I had subscribed for, which I knew very well would pay for both the assessment and the——

Q. The question I asked is this: was not the money you sent forward

sent forward to pay your proportion of the original cost of the lands and of the working capital?

The COURT. He has said yes.

Q. It was so done, was it?

A. Yes, sir. I would not have sent money to pay for the land unless I had intended to get my stock out.

Q. Of course; but you were to be interested in that company as one of the original promoters, were you not?

A. I was to be interested to a certain amount of stock in that company.

Q. Were you not to be interested as an original proprietor?

A. Yes, sir.

Q. How was it with the Kearsarge Company; who paid for the land that was put into that company?

A. I don't know.

Q. Did not Loring advance that money?

A. I don't know.

Q. Was it paid for?

A. I have reasons to believe that it was paid for.

Q. If paid for, who paid it?

A. Well, Mr. Palmer might have paid for it; Mr. Bigelow might have paid for it.

Q. Do you know who paid for it?

A. No, sir. I say some of those gentlemen unquestionably paid for it, but I don't know who paid for it.

Q. You stated that, according to arrangement, you were to have 5,835 shares of the Ossipee Co. stock?

A. Yes, sir.

80 Q. When was that proportion fixed upon?

A. It was fixed upon in the winter—in the early winter of 1867.

Q. How fixed upon?

A. By my surrendering a certain amount of stock asked for by Loring.

Q. Did you see either Palmer or Loring during that winter?

A. I did not see Loring.

Q. Was the arrangement by correspondence?

A. It was.

Q. Where is that correspondence?

A. Well, I cannot say where it all is; there is some undoubtedly to be had. A number of the letters have been lost—quite a large number of them.

Q. Precisely in what way was this amount fixed? who informed you, and what were the negotiations by which this amount was fixed upon?

A. There was a surrender, as it were.

Q. No, sir; I am asking how it was done; not the results; who wrote to you about it?

A. Loring.

Q. Where are Loring's letters upon that subject?

A. Well, they are around.

Q. How?

A. They are somewhere around here.

Q. Can you produce them, sir?

A. Yes; I can produce some of the letters.

Q. Will you produce them this afternoon—the letters fixing the amount of stock you were to have?

A. I will, if I can get them.

Q. Are they in your control?

Mr. WELLS. Specify the letters.

Mr. WALKER. The letters fixing the proportions you were to have in your company?

81 A. I have not said that I had any such letters.

Q. You did not see them personally in this winter?

A. I don't understand your question.

Q. You have stated that originally that you were to have a certain amount of stock in this Ossipee Company, but that during the winter a different arrangement was made, and the amount fixed upon; now, I want to know precisely how that was fixed upon, and where is the evidence of its being fixed, because you did not have personal interviews with them.

A. I have tried to commence and explain how it was, and you stopped me.

The COURT. Explain.

A. Mr. Loring, in November I think about the 15th, 1866, wrote me quite a lengthy letter——

Q. Now, that is the letter that I want; have you that letter?

A. It is to be had, I think; I think I can produce it.

Q. I don't want you to give me the contents of it; produce that letter this afternoon.

COURT. Produce the letter this afternoon.

Mr. WALKER. I wish you would produce any further correspondence from Loring showing the amount of stock to which you were entitled.

A. I can produce quite a number of letters.

Mr. WELLS. Bear in mind, he has not said it was fixed by letter.

Q. If it was not fixed by letter, how was it fixed? You did not see them that winter.

A. The amount was fixed at fifty-eight hundred——

Q. No, sir; I am not asking that; how was it fixed; by letter?

A. It was fixed by conceding to the parties a certain amount of my interest, and afterwards figured out by the parties in Boston, I suppose.

Q. Will you produce anything that figures that out, or any letters showing that, after dinner? Was this stock all to issue to you individually?

A. Yes, sir; if I called for it, it was to be issued to me indi-
82 vidually.

Q. Were not others interested with you in this stock?

A. There were parties back of me.

Q. No, sir; I am not asking you that. Were not others associated with you as the owners of this 5,835 shares of Ossipee stock?

A. The stock belonged to me; I could give that stock to whom I pleased.

Q. Did you have any persons originally associated with you upon that subject, as owners of that stock?

A. No persons originally associated; that is, I put down a certain interest; that is, marked off the figures for my own protection.

Q. No matter what you put down; was not Mr. Noble to have a proportion of the 5,835 shares?

A. I was to furnish Noble that.

Q. No, sir; was not he to have it to sell? Was he not interested with you originally?

A. He was not interested in that.

Q. Was not Mr Hodgson interested with you in these 5,835 shares—two of them?

A. He had an interest—that is, it might be considered that he had an interest—in the stock; but the stock was entirely under my control, to give it or to keep it.

Q. Had it not been determined from the start what proportion of these 5,835 shares belonged to Noble, and how much to the Hodgsons?

A. No, sir; I don't think it had; I could give the stock to them, or I could keep that stock.

Q. I am not asking what you could do; if you owned it, you could do anything with it; I am not asking that question. Then you deny that they were in any way associated with you as the owners of this stock?

A. They were associated to a certain extent; I had promised the parties that I would give them the stock. Their dealings were directly with me in the transaction.

Q. Yes, sir; but no matter with whom their dealings were; were they not interested in this stock with you and entitled to a portion of it?

A. I intended to give them——

83 Q. I am not asking that, sir. Were they not interested with you and entitled to a proportion of this stock?

Mr. LOTHROP. I suppose Mr. Walker wishes to know if they had the same right to claim the stock from Mr. Loring that you had?

A. They had not.

Mr. WALKER. I hope that will be stricken out.

COURT. Let the gentleman proceed in his own way.

Mr. WALKER. I ask that that answer be stricken out.

COURT. Very well, strike it out.

Q. I will ask you the question again to see that there is no mistake about it. You say they had no interest in this stock—these 5,835 shares?

A. The stock belonged to me.

Q. Then they had no interest in it, had they?

A. They had no interest. I could order the whole stock——

Q. They had no interest, had they?

A. They could not control the stock.

Q. I am not asking you about that; had they any interest in it?

COURT. You are proposing to ask for a conclusion.

Q. Of the money that you say was sent forward, did not Mr. Noble send money forward directly to pay for his stock?

A. He sent money forward by my instructions.

Q. Answer my question, if you please. Did he not send money directly forward to pay for his stock as such?

A. The answer would be, he did not.

Q. Did not the Mr. Hodgsons pay over to you money to be sent forward to pay for a portion of this stock?

A. They paid over money which I sent forward.

Q. Please answer my question, whether they did not pay over to you money to be sent forward to pay for this stock?

A. They paid me money.

84 Q. I am not asking you that.

The COURT. That is a part of the answer.

Q. Did they pay it over to be sent?

A. The money was under my control. When I received it from them I could do as I had a mind to do with it. I could deposit it in the bank or send it forward.

Q. Was it not paid over to you to be sent forward, and for the sole purpose of being sent forward?

A. The money was paid over to me.

The COURT. Was it agreed between you and them at the time of payment that it should be sent forward; was that the purpose for which it was paid?

A. No, sir; it was not paid to me for that purpose.

Mr. WALKER. For what was the money sent to you and paid to you, if it was not to be sent forward?

A. Ask that question again.

Q. If the money was not paid to you to be sent forward, what was it paid to you for?

A. It was paid to me for certain stocks that I would deliver to the Hodgsons.

Q. That you were to deliver to the Hodgsons?

A. Yes, sir; that I would deliver.

The COURT. Does your answer refer to Noble as well as Hodgson?

A. Yes.

Mr. WALKER. Did Noble pay you money to be sent forward?

A. He asked me where to send that money.

Q. That is not the question. Do you say that he did not pay money to you to be sent forward?

A. I stated that Noble did not send money forward to my knowledge; sent money forward by my instructions.

Q. Then it was not the original understanding that they were to have any of the original stock? You were to sell them stock if you chose—so that was all there was about it?

85 A. We had an understanding—that is, I might state, at first there was no understanding, because they were not present at all when I put down the amount of stock on this piece of paper, allotting it to them; but I did it for my own protection.

Q. Before the amount of stock was finally agreed upon in the way you mentioned, and you were to have 5,835 shares, was it not then agreed how much stock Noble should have and how much Hodgson was to have?

A. Noble understood the amount he was to receive from me.

Q. Was he not to receive it from the company?

A. No, that was never understood.

Q. Was it not true, sir, that you and the Hodgsons and Noble were all associated together, and that you and your associates were the parties spoken of, and for whom the money was sent forward?

A. It was understood outside, but I have stated that I put down their names for my own protection. If you will allow me to say why for my own protection, I will state it.

Q. I don't care about that. You were a witness in this case when it was tried in 1874?

A. Yes.

Q. Did not you, in giving an account of an interview that took place in June, 1867, in answer to this question, "Do you remember anything that took place in regard to checking items?" say, "Noble went up to the office and brought down his copy book and some other documents, from which he commenced to check the amounts. I became perfectly satisfied with the admissions that were made, that is, by Loring, of this money that Palmer had used, that the accounts were correct; and I have no doubt that Loring understood the thing perfectly well at this time, because it was a friendly meeting. I had no idea but what the whole business would be settled up fair and square; that there would be no

trouble about it; and at that time I requested Loring to make a statement charging me with all my interests and crediting me with all moneys sent, as then checked over, on his return to Boston; and he also promised to return the stock of the Kearsage and Ossipee mines, that is, for William Frue and associates." Did you not so testify?

A. And Mr. Loring did understand—

Q. I am asking you now if you did not so testify?

86 A. I say yes.

Q. In relation to this allotment, did you not say, in answer to this question, "In what amount was it changed as to yourself" (referring to the change of allotment? "In the allotment for myself and friends it was 7,500; that was the original allotment to Hodgsons, Noble, and myself. The change of allotment in Boston, which was done with my consent, gave me 5,835 shares, or within a fraction of that. It did not quite come to that." Did you not so testify?

A. I did.

Q. Did you not, in answer to this question, "State more particularly what you stated with regard to his not being called upon to advance the money for your interest"? say, "I told him in my letter that I would not call upon him to advance any money." (See p. 58, former testimony.)

The COURT. Who is "him"?

Mr. WALKER. Mr. Loring. That he would call upon him to advance no money. "That I had sufficient money to meet all the interest that I went in for; that is, the interest of myself and associates, viz, William R. Noble, David Hodgson, and John C. Hodgson." Did you not so testify?

A. I think I did; very close to those words. There may be a slight difference. I have seen some printed forms that do not give the evidence as it was given at the time; but in substance I think that is correct.

Q. Did you not further testify—I read a little preliminary, so that you may see what the connection is—"How was Mr. Loring's increase of 500 shares, which you speak of, provided for? Out of whose shares did it come"? say, "It came pro rata out of the interest which I had allotted to myself and friends, and I think out of Charles H. Palmer's"? "What do you mean by pro rata; each one contributing equally"? say, "Each one contributing equally"? And to the question, "How was the thousand shares to Mr. Bringham provided"? answer, "I have stated that that came out pro rata"? And to the question, "Out of whom"? say, "Out of the lake party, which means William B. Frue and associates and Charles H. Palmer"? Did you so testify?

A. I am not sure that that is the exact wording.

87 Q. State whether you did so testify.

A. I think it comes very close to what was stated.

Q. Did you testify in this way: "Now, sir, in giving the amount of money you paid Loring, did you include the money paid on behalf of Noble's interest and Hodgson's interest?" say, "Yes, sir"? And, in answer to question "Did they not furnish money to be sent forward"? further say "They furnished me with money and I had it sent forward"? And, in answer to the question, "They were advised before you furnished money of the arrangement that you had made with Palmer, were they not, under which they were allotted an interest"? further answer "I informed them, as a matter of course, what I had done for their interest"? And to the further question, "Under that their money was sent forward"? further answer, "Under that they advanced me money

to pay. I well knew at the time they had not money to pay for the interest"? Did you so testify? (See former testimony, p. 95.)

A. In substance, I think I did.

Q. I have been enquiring about the Ossipee. These men were also to be interested in the Kearsarge, were they not?

A. I was to give them an interest in it. I was to give or provide them an interest.

Q. Were they not to be interested and have a part—interested with you in the Kearsarge stock, the 4,200 originally?

A. If you will let me explain, I will answer no. Shall I explain?

COURT. Yes.

A. In selling the 5,000 shares of Kearsarge mine, I sold one-quarter of the whole. That took off from my 4,200 shares subscribed——

Q. I don't see what that has to do with it.

A. I am coming to the point. I have to give an explanation to show that that stock belonged to myself; that I controlled that stock.

Q. I don't care about that. I did not know but you had some special explanation to make. You said that you took some subscriptions for stock?

A. Yes, sir.

Q. For this stock you sold?

88 A. Yes.

Q. Was not that stock sold upon a joint account of all the original promoters of the company?

A. It could not have been so sold, although I might have testified to it without taking thought of the matter. The stock was sold before the promoters became aware of the arrangement at all; sold by me to these parties.

Q. When did the promoters—when the promoters did know it, was it not a part of the arrangement when the companies were organized that this stock was to be for the joint benefit of all the promoters—this stock which you were endeavoring to sell?

A. Yes.

Q. It was for the joint benefit of the original promoters?

A. I so understood it; that is, I allowed it to be so.

Q. What do you mean by that?

A. Because I sold two thousand shares of the Ossipee stock without instructions from the Boston party to do so. I even dictated to the Boston party that they must not sell.

Q. In other words, they adopted your say?

A. Yes, sir.

Q. And that was for the benefit of the joint promoters?

A. Yes.

Q. The company had not been organized at that time?

A. No, sir.

Q. When was the sale made?

A. In November. It was made in the early part of November, and the company was not organized up to January.

Q. Was there a written arrangement between you and the man to whom you yourself sold that stock?

A. Well, there was not a real written arrangement; there was merely a heading on a paper.

Q. Where is that heading?

89 A. I am not positive where it is now; but I can give it in substance.

Q. The question is, where is the paper? It was left in your possession by the gentleman who signed it?

A. Yes, sir; or, rather, in the possession of Noble. I left it there at the office.

Q. Have you seen it since then?

A. I think I have.

Q. When was the last time you saw it?

A. I cannot answer.

Q. Did you enter into any written agreement with these men as to what you would do about furnishing them stock and money—a written agreement with these men as to what you would do with their stock?

A. They held no written agreement that I am aware of.

Q. They paid you money at the time?

A. They paid me money at the time.

Q. And paid you some money after the companies were organized?

A. Yes, sir; they paid me some money after the company was organized.

AFTERNOON SESSION—FIRST DAY.

Cross-examination of Mr. FRUE resumed.

(Witness produces a letter of November 15th, 1866.)

Q. Did you have another letter from Loring in relation to the allotment?

A. I had other letters from Loring in regard to the stock, but I have not got the letters. The letters have been misplaced or destroyed and I cannot find them.

Q. Do I understand you to say you had any other letters fixing this allotment, from Loring?

A. There were other letters with regard to the allotment of stock and the changing of the allotment, and I state that I have not got the letters now. I swear merely to what was in the letter as far as my recollection serves.

90 Q. This I understand you to be the subscription of the stock of which you have spoken?

A. Yes, sir.

Q. And these are simply different pieces?

A. That is all. I found that with the others, and I believe that alludes to the subscription.

(Mr. Walker here reads the heading of the subscription.)

Q. This was the only contract that was made with these men who were to take the stock?

A. The only contract.

Q. A certain amount was paid you upon these various subscriptions, I understand you?

A. Yes; one-half paid at the time of subscribing; the other half was paid when the stock was delivered, as far as the parties were able to take the stock.

Q. As to those subscribers that have not received the stock that you say they were thus entitled to—have they ever made any demand upon you—the stock was not issued to those men, was it, all of it—these 2,000 shares?

A. The stock was issued to the men as far as they paid me the additional $5 a share, when I handed over the certificates; but owing to a panic the men were unable to pay the other half—men subscribed for

200 shares and paid me five dollars per share. I passed them over a certificate for one hundred shares, and held the other myself and accounted to the Boston parties for the whole, and I hold the stock to-day.

Q. When did you make such account to the Boston parties?

A. I accounted by sending money forward.

Q. When did you send this money forward for these subscriptions?

A. From time to time, commencing in November, and going along into March, I think, or about March sometime.

Q. Did you send this money forward upon subscriptions distinct from the money that you sent forward to pay for your share of the interest?

91 A. I do not think it was so sent forward; there might have been some allusion made to it in letters that it was from the sale of stock, or the like of that; but I did not look upon the thing as amounting to anything.

Q. Were the 2,000 shares that you say were sold, issued to you from the company?

A. The stock was sent to me.

Q. The 2,000?

A. The 2.000 shares were sent to me.

Q. Then you got the value of the 2,000 shares, did you?

A. Yes, sir.

Q. And was the same true of the Kearsarge? Did you get the 5,000 in certificates of the Kearsarge?

A. Yes, sir; in the name of W. B. Frue, trustee.

Q. That stock you received, did you?

A. Yes, sir.

Q. Then you say you made no distinction between the moneys sent forward on account of these sales and any other money that was sent forward?

A. I would not have made any distinction.

Q. I am not asking you what you would not have done; I ask what you did do.

A. I think the words may have entered in some of the letters enclosing money, "on account of stock sold."

Q. Were any accounts kept separate as to this money from the money that you sent forward for your own interest?

A. There was not. Will you allow me to make an explanation?

Q. It is not necessary. These explanations simply delay, without throwing any light. Why was all this money received for the sales of this stock sent forward to Mr. Loring?

A. I wanted to keep Mr. Loring in funds.

Q. Why did you want to keep him in funds—why did you not retain your proportion of these sales?

A. I sent the money forward to him as I drew drafts on other parties who owed me money, and also sent that forward. I made no distinction in the money.

92 Q. That does not answer my question. Why did you send this whole $73,000 forward, instead of retaining the interest that you say belonged to you, in your own hands?

A. I sent the money forward to Mr. Loring to keep him in funds on my account.

Q. Why keep him in funds on your own account if you had overpaid him?

A. If I had overpaid him?

Q. Yes.

A. I contemplated at that time further purchases outside.

Q. What was your object in keeping him in funds on your account?

A. So that he might invest the money, or a certain portion of it, in other lands which were considered valuable at that time.

Q. Then the money which you sent forward was not all sent forward in relation to this stock, but was sent forward for other purposes, in relation to other lands?

A. I sent more money forward than to pay for the stocks in question.

Q. I understand you to say that the money which you did send forward to Mr. Loring, and forming a part of this account, was sent forward upon other accounts and for other purchases?

A. If the thing had been carried out, the money would have been used, and I would have been in debt to Mr. Loring——

Q. I am asking now what it was sent forward for, no matter what it was used for.

A. For a contemplated purchase in section 24.

Q. Then you sent forward portions for other purposes than for the payment of your interest in these corporations, did you?

A. Yes, sir. I do not know but I ought to qualify my answer in regard to sending money forward to Loring for other purposes; there was a letter sent forward to Mr. Palmer, requesting him to invest certain moneys, or a certain amount of money, in an outside concern, which I had reason to believe that the parties, meaning Mr. Loring, did not intend to invest in, and I requested a certain amount of money to be invested. Mr. Palmer——

Q. Then you sent forward——

A. It was not invested.

93 Q. I understand you, you do not know how that was; it was the conduct of other parties. Now, how much money did you send forward distinctly for another purpose than upon these corporations?

A. I cannot give the exact amount.

Q. About how much?

A. I think about twelve thousand dollars.

Q. When was that sent forward?

A. It must have been late in December, '66.

Q. And you say it was only twelve thousand dollars?

A. It was only twelve thousand dollars. There was a letter—if I can explain—there was a letter which enclosed certain moneys sent forward by Mr. Noble, and I afterwards qualified the amount about twelve thousand dollars.

Q. Did you not send forward upwards of twenty five thousand dollars over your own signature, to be applied to another and a different purpose?

A. I did not send the money myself.

Q. Send drafts, I mean?

A. I did not send the drafts myself; not a single draft to Palmer; that is, myself directly. Mr. Noble handled all the drafts that were sent forward.

Q. Mr. Noble was your clerk. I do not want any such prevarication as that. Did you not direct him, then, and did you not sign a letter yourself, sending forward $25,000 for another and a distinct purpose?

A. He had a letter. I know in the usual form of sending remittances it would not be signed by myself; and I dictated a certain amount of instructions at the bottom of that letter; but I qualified it afterwards.

Q. Then you say that you did direct that there was $25,000 and odd

to be used for another purpose. Now you directed that that remittance should be applied to another and a distinct purpose?

A. I do not remember that I directed the whole remittance that the letter enclosed.

Q. You have the original letter in your possession, have you not?

A. It must be here somewhere.

Q. Is that the letter to which you refer?

94 A. Yes, sir.

(Letter dated December 31st, 1866, offered in evidence and marked Exhibit One, hereto annexed.)

Q. Those were the instructions under which $25,000 and odd of the moneys now charged in your account were forwarded to Mr. Palmer, were they not?

A. Yes, sir.

Q. In point of fact, were not purchases made in that section and in that company by Mr. Palmer, or through his agency, in which you were interested?

A. What section?

Q. The section named in that letter—24.

A. I am not aware that any lands were purchased by the party in section 24.

Q. Were they not in 10?

A. I have understood that there were certain purchases made.

Q. Do you not know that? Have you not been interested in purchases?

A. I have called for a statement to show what interest I had, and it never was furnished me by Mr. Loring.

Q. I have asked you once before for what purposes the money was sent forward to Mr. Palmer, to be delivered to Mr. Loring, and I want to call your attention to your testimony on the former trial upon that subject:

(Reads from former testimony:)

"Q. I will put the question in another form. Was it not understood that these associates were to advance the money in proportion to the interest they took to pay for the land?

"A. The associates?

"Q. Yes, sir; that is, Charles H. Palmer, Loring, and the Boston parties?

"A. It was supposed, as a matter of course, I cannot say positively that the thing was mentioned at the time, but I took it for granted that every one would pay for his own interest, as a matter of course. I had always been in the habit of protecting the Hodgsons' interests.

"Q. The question is how; you answer my question; that is, the original associates were, in the first instance, to advance the money in proportion, according to the interest they assumed to buy.

95 "A. I naturally viewed it in that way.

"Q. And it was in that view you sent money forward to Mr. Palmer to pay to Mr. Loring?

"A. I sent forward money to pay for my interest in those lands.

"Q. To pay the proportion that you and your associates had assumed to pay?

"A. Yes, sir.

"Q. That was the final purpose for which you sent money?

"A. Yes, sir."

Q. Did you so testify?

A. I undoubtedly testified in substance to what is there. It might be slightly changed; but as near as I can remember it is correct.

Q. And again, upon the same subject (reading): "At the time it was understood that the Mineral Land Company had accepted the proposition for the sale of land?

"A. As far as section 26 was concerned.

"Q. Did you send that money forward for the purpose of keeping Loring in funds to pay on account of that land?

"A. To pay on account of land as far as my interest went.

"Q. If you sent more than your interest, what was he to do with it?

"A. He would account to me for it."

Q. Did you so testify?

A. Yes, sir.

Q. Was not this, then, the arrangement between you and Mr. Palmer, at Lake Superior, that you say Loring afterwards assented to—that Loring was to advance the money to pay for the lands to make the original investment; that you and your associates and others were to send forward money as fast as you could to take care of your proportion of that investment, and until money enough was sent forward for that purpose the stock was to be issued to Loring, as trustee, and held for you?

A. I did not so understand that. I cannot answer that question; that is, in that form.

Q. You authorized a bill in chancery to be filed in the Commonwealth of Massachusetts against Mr. Loring, did you not?

96 A. I employed my counsel to do it for me.

Q. Were you aware of the contents of that bill?

A. I became aware of it last week.

Q. Not until last week?

A. Not until last week.

Q. Who furnished the material—the facts?

A. My counsel, I understood, furnished the facts with regard to it

Q. What counsel?

A. Mr. Wells and Mr. Lothrop.

Q. Don't you know that in that bill it is distinctly charged that the stock was to be issued to Mr. Loring, as trustee, and by him held until it was thus paid up?

A. I only became aware of that fact last week.

Q. Do you say that it is not the fact that you understood that Loring was to make these advances, and then hold the stock until you had made all your payments?

A. I have never called upon Mr. Loring to make any advances. Mr. Loring has been more in my debt than I have been in his. I did not expect Mr. Loring to make advances for me, and I never requested him to make advances for me.

Q. Did not Mr. Loring make payments upon these very lands before you had sent him a single dollar?

A. I do not know.

Q. Don't you know that Mr. Palmer drew upon him from Lake Superior when he entered into the contract—don't you know it?

A. I don't know what Mr. Palmer did. I don't know who Mr. Palmer would draw on, and I would not know whether Palmer had a balance in his favor in the hands of Mr. Loring.

Q. Don't you know that Palmer drew upon him to pay for those lands the first payment?

A. I do positively not know that he drew.

Q. You say you do not remember that there was a distinct arrangement that Loring was to hold this stock in trust until you paid up all your proportion?

97 A. There never was such an arrangement.

Q. And you don't know that your counsel had so alleged it in your bill in chancery?

A. I did not know it. I question whether my counsel here were aware of it, as it was refixed in Boston.

Q. I called your attention before dinner to some statements which you made on a former trial in relation to your associates, Noble and the Hodgsons; I now call your attention to one other statement of that sort, involving several questions and answers. Please pay attention to the testimony as I read it.

(Reads:)

"Q. Now as to those 2,211 shares issued to you and sent to you by Loring, and mentioned in that letter, how many shares of stock, as an individual, were you entitled to under your claim at that time?

"A. I ordered the stock. He sent me 2,211 shares. Of course there was not that amount standing to me in the allotment, but I controlled and considered the other stocks put down to the Hodgsons and Noble as put down to me. I ordered on the strength of that and my order was accepted.

"Q. Then under the allotment to you at that time you were not entitled to the stock to be issued to you for those 2,211 shares, were you?

"A. In that view of it I was not.

"Q. I mean you, individually, acting for Hodgsons and everybody else—not you and your associates, but you individually?

"A. No; I would not, probably, be entitled to more than 1,400 or 1,500 shares of stock.

"Q. Then the balance of 2211 was delivered your order, and they were all in your name?

"A. They were all in my name.

"Q. How large were the certificates that made up the 2,211?

"A. There were any number of certificates; some small ones; but I do not know that they were any higher than $100.

"Q. You have been asked by Mr. Pond if the Hodgsons and other persons called your associates were not paying you along from time to time as you forwarded the money. Did the Hodgsons in fact pay you in advance at the time they got their stock?

98 "A. They paid me money.

"Q. They paid you money to apply?

"A. That is, to assist me in carrying out their allotment of stock that I had guaranteed. Loring had written that he would have to carry their interest, and I told him no, that I would see their entries paid.

"Q. Was not stock that Loring sent you issued to the Hodgsons and Noble?

"A. I am not aware of any stock issued to any of them except to my order.

"Q. To whom was the stock that passed through your hands issued?

"A. To me.

"Q. All of it?

"A. That is, except fifteen shares, which I ordered for a man by the name of Biscobank, and I believe there were some others.

"Q. Was that out of your stock?

"A. It was out of the allotment of stock that was really applied for for Noble, because I wanted the stock to give to E. Biscobank. Noble

requested me to get the stock for him, and I ordered it, and it came along."

Q. Did you so testify?

A. I think so.

Q. Is it not true that, in the understanding in relation to the final allotment of stock of the Ossipee, you individully were to have 2,250 shares, that Noble was to have 375 shares, that J. C. Hodgson was to have 1,313, and David Hodgson 1,313. Was not that the allotment?

A. No.

Q. What was the allotment to each of you?

A. I have not divided the thing up to see what I should pass over to Mr. Noble or the Hodgsons; that is, when I got the stock, that was an after consideration.

Q. How much was actually allotted to Noble in the Ossipee? Was there any allotted to Noble in the Ossipee?

A. Only by myself.

Q. Any communication with Boston in relation to these entries?

99 A. I do not remember of any communication further than Palmer was aware of what I had put down and probably conveyed it to Mr. Loring, and Mr. Loring wrote me about it.

Q. Where are his letters upon that subject?

A. You have the letter of the fifteenth. You have been handed that letter.

Q. Is there any other letter bearing upon that question?

A. There is no other letter that I have under my control.

Q. What had become of your other letters that bore upon that question?

A. I have lost quite a number of letters.

Q. Lost them since the last trial?

A. I am not aware of having lost any letters since the last trial, but I had lost a copy-book in which my letters were kept before the last trial.

Q. Then you say there was no special allotment to Noble at all?

A. There was no special allotment made by me in Boston for Noble.

Q. Was there any special allotment made by you here to Mr. Noble in the Ossipee; and, if so, how much was it?

A. I intended a certain amount of stock for Mr. Noble——

Q. I am not asking what you intended. I ask what allotment was actually made to Mr. Noble of shares in the Ossipee.

(Objected to, as the question assumes that an allotment was made.)

Q. You say there was no allotment made except by you. I am asking you what that was, not with reference to the allotment by the company.

A. I intended to give——

Q. I am not asking what you intended. What allotment was made to Noble by any arrangement between you and him?

A. The allotment to Noble from me was 1,000 dollars in the Ossipee mine, which would call for 500 shares, that is on the ground floor. Then would come in the assessments after.

Q. How much in the Kearsarge?

A 200 shares.

100 Q. Those you allotted to Noble?

A. Those I allotted to Noble.

Q. How much money did Noble ever pay into your hands on that account?

A. Well, there was not any really of the money that Noble paid that

came into my hands, but he forwarded that money according to my directions.

Q. How much?

A. $3,000 in all.

Q. And in your name?

A. I suppose it would go in my name; but the draft would state—it would state for certain things, perhaps.

Q. How many shares were allotted to Hodgsons, each?

A. The allotment to the Hodgsons was two thousand shares of Ossipee; possibly I allotted them two thousand shares apiece.

Q. How much in the Kearsarge?

A. 1,000 shares in the Kearsarge.

Q. How much money did they pay into your hands?

A. They paid by my direction something close on to seven thousand dollars. It might be a little over—it might be over; I have not the figures.

Q. Did they ever, previous to the commencement of this suit, make any demand upon you for that money or that stock?

A. They had some talk about my stock.

Q. Please answer my question.

A. I was afraid they were about to commence——

Q. Did they ever make any demand previous to the commencement of this suit upon you, either for that money or that stock?

A. They told me that I ought to get their stock for them.

Q. And that is all, is it not?

A. That is all.

Q. Did Noble make any demand upon you for the money that he, you say, paid in for you?

101 A. I think Noble did.

Q. When?

A. I won't be sure, but I think it was along in 1868.

Q. In whose presence?

A. I don't remember that there was any one present. I am not very sure about how the demand was made. I should judge that it was made——

Q. You need not state how you judge it was made. If you remember it, state it.

A. The demand was undoubtedly made in the early part of 1869.

Q. I thought it was in 1867.

A. 1868 or the winter of 1869; probably in December, 1868, or in the forepart of 1869.

Q. Will you state precisely what he did demand?

A. I simply remember of his wanting to know where he should get his stock; something of that kind.

Q. He inquired where he was to get his stock?

A. Yes, sir; something to that effect.

Q. You said this morning something about Mr. Loring, in 1869, when you threatened to arrest him, wanted thirty days' time to render an account and furnish the stock demanded. Will you state precisely what he was to do in thirty days?

A. He asked for the thirty days to give him time to look over his accounts and settle up the transaction.

Q. What else?

A. That is about the sum and substance of it.

Q. What did you say this morning about his sending stock?

A. I don't remember distinctly; but in settling up he would naturally——

Q. I am asking what he said; that is all. What is your recollection of just what he said on that subject—what he wanted time for?

A. He wanted time to look over the accounts and to render a perfect statement, and it would be natural enough——

Q. You need not say what would be natural enough. Did he make any promise on that occasion to do anything else but to make a statement?

102 A. I do think he did; but I would not want to be positive on it.

Q. Did you not so testify that he did this morning?

A. I do not think that I testified positively.

Q. Did you not testify on the former trial in relation to this interview [reading]—"Mr. Loring asked for thirty days, and after consultation——

"Q. Thirty days to do what?

"A. Thirty days to look over the papers and render a statement of account.

"Q. Well, sir, did he say what he would do within thirty days?

"A. He asked for thirty days to look over the account and render a statement. That was the only thing he promised."

Q. Did you not so testify?

A. I do not know but that I testified so. That does not carry the whole meaning of the interview or spirit of it.

Q. I am asking you if you so testified?

A. I cannot remember distinctly the way that I might have testified two years ago, but I think that is the sum and substance of it.

Redirect examination:

Q. You said in your cross examination that this allotment was changed on account of a complaint by Loring in a letter?

A. Yes, sir.

Q. Is that letter you refer to the letter of November 15th?

A. Yes, sir.

Q. You have been asked if the arrangement contemplated that you should pay this money for interest in lands. What did you say in answer to that question?

A. That it was to pay for interest in the concern, when organized.

Q. In the concerns?

A. In the companies.

Q. Stock or lands?

A. I never had in my mind anything but so much per share for stock in those companies when they were organized, the same as the

103 heading of my subscription list to other parties, but only in different forms. They had to pay the high price, while, being one of the original parties, as it were, in making the exploration, I was entitled to something different from the outside public, that subscribed for themselves.

Q. Your interests were for stock?

A. My interests were for stock.

Q. Did Hodgsons and Noble have any direct dealings with Loring in this transaction?

A. I am not aware that the Hodgsons or Noble had any direct dealings with Loring in this transaction. Loring, I believe, understood it as I did myself.

Q. Understood it how?

(Objected to. Objection sustained.)

Q. You were stopped by Judge Walker when you wanted to explain exactly the transaction between you and Hodgson and Noble. Now state what it was.

A. Noble and the Hodgsons had no direct dealings at all, to my knowledge, with Loring; and the fact that Loring furnished me the stock shows that he understood——

Q. What was your arrangement?

A. I think I understand now what you want. Loring delivered to me 2211 shares of Kearsarge. I sold of my interest 1,050 shares, which would reduce the stock down to——

Q. That is not what I want. At the time of this original arrangement, which was made between you and Palmer, that you have called an allotment, what was the arrangement between you and Hodgsons and Noble, if any?

A. There was no arrangement. Hodgsons were off miles in the woods at the time.

Q. Why did you speak of their having stock from you?

A. Because I promised to give them stock at a later interview—that is, after I met them—when they came back from the woods.

Q. At the time that you and Palmer made this arrangement and allotment, had Hodgsons and Noble any knowledge of it whatever?

A. Nothing.

Q. Was it any more than a purpose in your own mind to give them or sell them so much stock?

(Objected to as leading.)

104 Q. What, if anything, was your relation to the Hodgsons and Noble in reference to stock at that time?

A. Nothing except a friendly act to provide for them.

The COURT. Did they come under any obligation to take stock, any promise or understanding?

A. No; they came under no obligation to take stock.

Q. Was there any understanding at that time between you and Hodgsons and Noble that they would take stock?

A. No, there was no understanding at the time.

Q. Did they know anything about what you speak of as your intention to let them have stock, if they wanted it, at any time?

A. Some time before that, when out in the woods, they spoke to me and said they would like to have me procure for them an interest in the companies, if they were organized and the land purchased.

Q. Was there anything more than that?

A. Nothing more than that.

Q. Did you make any agreement with them?

A. No agreement. If I could enter into an explanation of our relations, how I had provided for them——

Q. Whether it was an agreement or an intention on your part to let them have the stock if they wanted it?

A. It was an intention of my own mind to let them have it.

Q. Is that all?

A. That is all.

Q. You have been asked why you sent forward your proportion of the $73,000, which was the proceeds of sold stock. You did in fact send forward the whole $73,000, did you not?

A. Yes, sir; not in separate amount. It was mixed up.

Q. You never have sent it all forward?

A. Yes, sir.

105 Q. Is that included in the amount of your statement of account in this suit?

A. It is.

Q. Is it a part of the remittances that passed through Palmer's hands?

A. Yes, sir.

Q. You say that the stock sold was issued to Mr. Loring; the stock sold to outsiders for which this $73,000 was received, was issued to Mr. Loring?

A. No.

Q. Part of it?

A. None of it.

Q. To whom was it issued?

A. To W. B. Frue, trustee.

Q. And you delivered it to the persons from whom you had received the money, or the money in part?

A. Yes, sir; or a certain portion of it.

Q. These parties that subscribed, you say, did not pay you the whole?

A. No.

Q. But did you account to Loring for the full amount of the sold stock?

A. I accounted—that is, in a formal way, I have accounted by not raising any objections, allowing myself to be charged $73,000, giving Loring credit for that amount.

Q. With reference to the letter of December 31st, which contained the $25,000 and upwards of remittances, it appears that you gave authority that a part of that money might be invested in purchases in 24, in Torch Lake or Penn?

A. Torch Lake and Penn mean the same thing.

Q. Has Loring accounted to you in any way for any interest in Torch Lake or Penn or section 24, if he has purchased any such interest with this money?

A. There were no purchases made on 24. There were purchases made of Torch Lake and the south half of the sections. Torch Lake is organized on the north half of sections 35 and 36. The south half was also purchased, and I have called upon Loring——

(Objected to as immaterial.)

106 Q. Has anybody ever accounted to you for any interest in section 24 or Torch Lake or Penn, for any part of that twenty-five thousand dollars, if any part was so invested?

(Objected to as immaterial and not re-examination.)

Q. If any portion of this $25,000 referred to and enclosed in the letter of December 31st, 1866, was invested in Torch Lake or Penn or section 24, have you received any account of your interest or any interest in that property?

(Objected to as immaterial and hypothetical. Objection overruled. Exception for plaintiff.)

A. I have received no statement from any one.

Q. Have you received any interest or any stock?

A. I have received no interest.

Recross-examination:

Q. You have spoken of the Hodgsons, that they were not present at the time you and Palmer made that arrangement; is it not true that the

Hodgsons were explorers and explored this very land, and had the understanding that they were to be interested in the stocks?

A. They had approached me when I was in the woods. I took them out into the woods to explore these lands, and they spoke to me to get them or procure them an interest in the stock if the company was organized.

Q. Did you agree to do so?

A. I do not think that there was any agreement more than I probably stated, yes, I would see to it—in the usual form.

Q. Then there was an understanding between you and the Hodgsons while they were actually engaged in these explorations that they were to be interested in any corporation that grew out of it?

A. That is, that I would secure them an interest.

Q. When was your first arrangement with Noble, that he was to have an interest in the corporations growing out of these explorations?

A. That must have been some time in October.

Q. Was it not before Mr. Palmer left for Boston, and as a part of the arrangement?

107 A. It might have been before Mr. Palmer went to Boston. I provided for Mr. Noble because—

Q. No matter for the reason. I am asking for the fact. That was while Palmer was there and before he went to Boston?

A. Yes, sir.

Q. That Noble was to be interested and have a part of this stock?

A. Yes, sir.

CHARLES H. PALMER sworn for plaintiff.

Q. Where do you live?

A. I live at Pontiac, Michigan.

Q. How long have you lived in this State?

A. Since 1852.

Q. Do you know the parties to this suit?

A. Yes, sir.

Q. Did you know them in 1866?

A. Yes, sir.

Q. Did you ever have any moneys from Mr. Frue to pay Mr. Loring, the defendant?

A. I did.

Q. When?

A. I had them commencing in November, 1866, to March, 1867.

Q. State in detail the amounts so received from Mr. Loring.

A. November 8th, 1866, $2,000; November 10th, $10,970; November 14th, $19,960.40; November 16th, $4,988.39; November 22d, $2,675; December 31st, $25,401.48; February 4th, 1867, $14,480.94; February 13th, $11,544; February 23d, $5,940.93; March 22d, $13,438.66. That came to Mr. Loring while I was absent. March 30th, $2,900. That also came to Mr. Loring while I was absent from Boston.

Q. Making an aggregate of what?

A. $114,299.80.

Q. You say you paid these amounts mentioned to Mr. Loring?

A. Yes, sir.

108 Q. From whom did you receive them?

A. I received them from Captain Frue.

Q. At what time did you place these several moneys in the hands of Mr. Loring? At the dates mentioned?

A. At the dates, I think, they were received. That is, when I received the money I paid it myself.

Q. You have stated that some of these items were received by Mr. Loring while you were away from Boston?

A. The two last I was not in Boston.

Q. How, then, did Loring get them?

A. Mr. Loring was authorized to open my letters, and he did so in other instances besides these. It was customary and proper, because that was the understanding.

Q. I now show the witness Exhibit I—the letter of December 31st, 1866. Was that the letter containing the remittance of $25,401.48?

A. It was.

Q. Was there any draft on Sibley in the $25,000 remittance?

A. There was $6.901.48.

Q. Was the whole remittance in that letter handed to Mr. Loring?

A. It was all handed to Mr. Loring. Mr. Loring's endorsement was made on the letter.

Q. What endorsement; what words?

A. "Deliver to C. H. Palmer,"—that is the draft on Sibley.

Q. The words endorsed on this letter, "deliver to C. H. Palmer," are in whose handwriting?

A. Mr. Loring's.

Q. Did you deliver this letter to him?

A. I did, sir.

Q. In what form were those remittances?

A. They were drafts upon different mining companies, for the most part; sometimes on banks, but for the most part on mining companies.

109 Q. Composed of drafts of different amounts?

A. Of different amounts.

Q. In what form did you hand over the funds to Loring?

A. The drafts were handed to Mr. Loring.

Q. Exactly as as you received them?

A. Exactly as I received them.

Q. You did not convert any of them?

A. Excepting he gave them back to me to be used for the purposes for which they were sent.

Q. To whose order were those drafts payable?

A. They were payable to my order.

Q. Does that remark apply to all remittances?

A. I think it does. There might have been exceptions, but I do not remember.

Q. When delivered to Loring, did you in point of fact endorse them?

A. Certainly I endorsed them.

Q. All of them?

A. All of them; those of March 22d very likely might have been endorsed by Loring, as he used my name occasionally.

Q. Under what arrangement between Frue and Loring, or Frue, yourself, and Loring, were those moneys paid to Loring, if any?

A. There was an understanding with Frue that he would send forward his moneys from the Lake to me, to hand over to Loring, and Mr. Loring understood that those funds would come—a general understanding.

Q. When did the understanding between Frue and Loring, that Frue should send funds to you, as you state, begin?

A. It began with this transaction.

Q. At what time?

A. Very likely that I told Frue that Loring would expect the funds when I was up there before in Boston, immediately previous.

Q. What occurred between you and Mr. Loring, when you were in Boston, before you went up to the Lake; what did Loring say to you, if anything?

110 A. The talk was with reference to the great value of the Calumet Mine, and the lands adjoining, and those lands were owned by the Mineral Land Company, and the design was to purchase them.

Q. Whose design?

A. Myself and Mr. Loring and others; some of the Mineral Land Company also.

Q. On what section were those lands that were designed to be purchased in this transaction?

A. Section 26, immediately south and adjoining the Calumet, on section 26, with some land attached to it—one section immediately on the northeast.

Q. Then in section 26, section 6, and section 1?

A. Yes, sir; section 1 joins 6.

Q. Did Loring say anything to you with reference to having an interest in those lands, or in any enterprise upon them?

A. He did.

Q. What?

A. He wanted an interest if we made the purchase.

Q. Did you communicate Loring's conversation with you in Boston to Mr. Frue?

A. I did.

Q. State in general what arrangement was made between you and Frue when you got up the lake.

A. The arrangement was simply to examine the lands, and to decide what was best to purchase, and such was done.

Q. Were the lands in point of fact at any time subsequently purchased?

A. They were purchased.

Q. For what companies?

A. They were purchased for the Ossipee and the Kearsarge companies, to be formed.

Q. Was there any arrangement between you and Loring and Frue up the lake with reference to the interests which the various parties were to have in these lands, or companies organized upon them?

111 A. There was simply figures put down.

Q. Figures for what?

A. Figures representing something; only it was not expected to be exact; an interest which the parties would have.

Q. Interest in what?

A. Interest in the companies to be organized. In speaking of this matter, we always spoke of stock. Designing——

Mr. WALKER. Please state the fact.

A. That is the fact.

Q. Was the interest in the stock of the companies?

A. That is the way we talked about it; in speaking of such a thing we would always speak of stock.

Q. The allotment of interest in the stock of these companies was made between you and Frue up the lake?

A. A rough sketch of it.

Q. Did Frue give you any instructions as to what was to be done with the money he was to transmit you?

A. He simply said it was to pay for his stock, and also the money that was collected would be collected from stock sold.

Q. What instructions did he give you with reference to what you would do with the moneys that he transmitted?

Q. Simply to place them in the hands of Mr. Loring to his credit.

A. To whose credit?

A. Capt. Frue's credit; so much received from him.

Q. First, to pay for his interest in the stock, you have said?

A. Certainly.

Q. And for stock sold?

A. Certainly.

Q. What do you mean by that?

A. It was designed to sell stock on delivery.

112 Q. Whose stock was to be sold on delivery?

A. The stock of the companies to be formed.

Q. Who was to contribute the stock that was to be sold?

A. Every person having an interest was to contribute. It was simply the individual whose stock was sold.

Q. You were to contribute *pro rata* a certain amount of their stock to be sold?

A. Whatever was sold.

Q. With whom was it arranged as to the selling?

A. Capt. Frue.

Q. To whom was the money to be sent?

A. To me.

Q. As a part of this account?

A. Yes, sir.

Q. After the arrangements which you have spoken of, made between you and Loring and Frue at Houghton, did you go to Boston?

A. I did.

Q. Did you see Loring?

A. I did.

Q. What did you communicate to him with reference to these matters?

A. What I have said and what is coming.

Q. Communicated what you have said occurred between you and Frue?

A. Yes, sir.

Q. Did you state to him the instructions which Frue had given to you with reference to the payment of these moneys to him?

A. I did.

Q. Did you give any directions to Mr. Loring with reference to the account which was to be kept of these moneys?

A. I did.

Q. What?

A. I gave to Mr. Loring every letter containing money, with

113 the enumeration of the draft, for him to credit it to Capt. Frue, precisely as it came from Capt. Frue; every letter I gave him.

Q. Do you mean you said anything about crediting it to Capt. Frue?

A. I did.

Q. Do you know whether he did it or not?

A. I know that he did it, because he showed me the account. They were the same as I had with Capt. Frue's name put down to it; he showed it to me. I had money from other sources—New York, Detroit. Paid Mr. Loring, which were credited in the same way, so that the account showed where all the moneys came from.

Q. You do not mean that moneys received from other sources were credited to Frue?

A. No.

Q. To whom?

A. Individuals who sent them, so that any money which I paid him, I saw that the entry corresponded with the fact.

Q. As to the person from whom you received it?

A. The person from whom I received it.

Q. Now, sir, without asking you as to that allotment up the lake, can you state what the final allotment of stock to Capt. Frue was, if any was made between you and Loring, in Boston, in these two companies?

A. I remember the final amount that would belong to Capt. Frue.

The COURT. How did you ascertain?

A. At the time I knew the amount of stock—having memoranda with me—which the different parties had; parties in New York, Detroit, and Boston. I knew the amount which the parties had; I knew the general principles of the distribution, and I could now ascertain by going to papers and memoranda, showing just how the stock was allotted in each company. I have Capt. Frue's statement, and I have a memoranda. I have not the whole.

Q. I will get at it in another way. Was there any change made in Boston between you and Loring of the allotment which you and Frue had made up the lake?

A. There was a change made.

114 Q. What was the result of that change in fixing the amount which Capt. Frue was to have in these two companies?

A. It lessened Capt. Frue's, and the result was that he was to have 5835 shares of Ossipee stock.

Q. How much of Kearsarge?

A. 4200, and 4200 of Iroquois.

Q. When was it determined that the third company, the Iroquois, should be organized on a portion of these lands?

A. It was determined after I went to Boston, but abandoned afterwards.

Q. Was anything paid to carry out the project on the Iroquois?

A. There was $10,000 paid. That was an arrangement with the Mineral Land Company accepting the $10,000 and releasing the $40,000. It was a friendly relation.

Q. The whole price of the designed purchase on the Iroquois was $40,000?

A. Yes, sir.

Q. And ten thousand dollars was paid. What became of that $10,000?

A. I think the whole price was $50,000, and $10,000 was sunk.

Q. Were the Kearsarge and Ossipee actually organized?

A. They were.

Q. At what time?

A. The organization was in September or October, 1866.

Q. By what persons?

A. By Boston people.

Q. They had these organizations?

A. Yes, sir; one was in September and the other was in October.

Q. Were the purchases of land on 26, 6, and 1, which was contemplated between you and Frue, actually made for these two companies?

A. They were made, commenced at the lake, but culminated in Boston.

Q. Who, if any person, was the financial agent or general manager of these corporations?

A. Mr. Loring.

115 Q. What official relation did he sustain to these companies?

A. He was a director and officer—president, I think.

Q. Was he treasurer?

A. He was.

Q. Who was the financial manager of these corporations?

A. Mr. Loring.

Q. I will pass from what took place in Boston to the commencement of the time when you saw Mr. Loring, after you left Boston. How long did you remain in Boston in connection with these matters?

A. I remained in Boston nearly the whole of the winter of '66-'7. I was at home perhaps a short time, but I was there nearly all the time—either in New York or Boston.

Q. When did you go back to Lake Superior?

A. I went back to Lake Superior in May, I think; May or the early part of June.

Q. Were you present at an interview between Loring and Frue, in in June, 1867, at Houghton?

A. I was.

Q. State what occurred at that interview?

A. At that interview there was an examination of accounts, of the money sent and the money received by Mr. Loring through me. I had a memorandum, and Mr. Loring had his account there, and Noble had the copies of the letters sent.

Q. Have you the memorandum that you had at that interview?

A. I have the memorandum with me.

Q. Where is it?

(Paper is produced, marked Exhibit 2, hereto annexed.)

Q. What do you say with reference to the amount being gone over on these memoranda between you—between the parties?

A. These amounts were all checked.

Q. In Loring's presence?

A. In Loring's presence.

Q. Were the checks as they still are on the memoranda?

116 A. They were.

Q. That is the very paper, is it?

A. Yes, sir.

Q. Any objection on Loring's part to any amounts as having been paid him?

A. None whatever. He mentioned something about some moneys used in New York.

Q. By whom?

A. It was spoken of by me, but he said it was correct.

Q. What was correct?

A. The use of the mon'y in New York.

Q. How much was it that you had used in New York that he spoke of in that way to you?

A. I think it was $4,000.

Q. What did you say with reference to that?

A. I said that I gave him the whole amount. What he referred to was $4,550. That is all the Grand Portage drafts that were due, payable in New York, which he gave to me to use in the purchase of property there—which I did not use, however. I passed it to Mr. Sibley, and he made those purchases.

Q. Did you hear any demand made for these stocks by Capt. Frue at that time? State what Capt. Frue said in respect to the stocks.

A. The understanding was that Loring said the accounts were correct, and that he would go down; when he went down he would send the stocks.

Q. Down to Boston?

A. Yes, sir.

Q. Any conversation with respect to the amount of stocks to which Frue was entitled?

A. I do not think there was.

Q. Not as to the exact figures?

A. No; I do not think there was, as there was no dispute about them.

Q. Was there any conversation had with respect to the amount of stock which Frue had sold, if any, as a part of these moneys remitted?

117 A. There was nothing particular said about it; it was a fact.

Q. State what was said on that occasion.

A. There was nothing particular; because there was no dispute about that.

Q. Do you know as a matter of fact that whatever proceeds of sold stock were received by Frue were included in these remittances? Do you know anything about that?

A. I know the money came to me in these drafts, the items that we settled.

Q. Was any stock delivered to you by Mr. Loring to be sent to Capt. Frue to be sold?

A. There was.

Q. How much?

A. There was some 5,000 shares Kearsarge and 2,000 shares Ossipee; and there was stock besides in the East.

Q. Did Mr. Loring, at that time, in June, 1867, produce any accounts in Houghton?

A. He did; we had the accounts of all these moneys.

Q. What was said by Frue with reference to the accounts which Loring produced?

A. Capt. Frue spoke of the account.

Q. Wanted an account?

A. Yes; the account was not such an account as ought to have been presented to Capt. Frue, but it was this omnibus account.

Q. What do you mean by omnibus account?

A. I mean an account that had a name to it, and it happened to be my name, as all these moneys went in on this joint paper, and my name was used as a sort of designation. My name was used to designate an account, which was an account of a great many people.

Q. What did Capt. Frue say as to the account which Loring produced, made up in this way?

A. He said they were not very plain and they were not very satisfactory, so far as the accounts were concerned, because it was really a very mixed affair.

Q. Did the accounts differ from each other in form?

A. Not that I particularly saw there, because I simply looked to the part I had to do with.

Q. What part was that?

118 A. Simply to see that I had been credited with the moneys.

Q. What did Capt. Frue say?

A. He wanted an account with a statement of moneys he had forwarded and the stock which belonged to him. He wanted a simple account, such an account as had been presented to different parties from time to time in this transaction.

Q. Was anything said by Loring in answer to that demand or request of Capt. Frue?

A. Loring said he would do that.

Q. Would do what?

A. Would make out a separate account.

Q. Did he say anything in respect to what he would do concerning the stocks?

A. He said he would send the stocks.

Q. Send the stocks?

A. So far as I understood, it was an entire settlement. It was a perfect understanding between them.

Q. Was there any dispute at all between Frue and Loring at that time as to the amount of stock which Frue claimed to be entitled to?

(Objected to as incompetent.)

Q. Was there any talk in respect to the amount of stock which Frue would rece ive?

A. There was, that was spoken of; the amount of stock he had received, and what was the balance of his stock.

Q. Was there any difference or dispute between Frue and Loring as to the amount of stock which Frue was entitled to over and above what he had received?

(Objected to; objection overruled. Exception for defendant.)

A. Not at all.

Q. When did you see Mr. Loring next?

A. I next saw Mr. Loring in the fall of 1868, in October.

Q. Did anything occur then with reference to these transactions?

A. No, nothing that I remember; it was under circumstances when other transactions were considered.

119 Q. At what place?

A. Houghton.

Q. I want to direct your attention to a fact—did you ever learn that Loring claimed a right to keep an account of these moneys with you as personal to yourself?

A. I thought I learned that in the fall of 1868, going from Houghton with him to Boston on another matter, and after I got to Boston I detected, as I thought, a disposition——

Q. In what manner did you learn anything in respect to his keeping the account as personal with yourself?

A. The language was, I think, there was money due on that account, and he went into it. He must have gone into it, he said, with the understanding that he must have a lien.

Q. A lien for what?

A. For moneys that he had advanced.

Q. What did you say in respect to that?

A. I said to him that Capt. Frue had paid for all his interest, and he was entitled to his stock, and it was unjustified and could not be justified, to retain his stock which had been paid for. I spoke very strongly, so strongly that Loring said I had misunderstood; he did not mean any such thing.

Q. Any further interview between you and Loring with reference to these transactions?

A. I saw Mr. Loring in the spring of 1869, here in the city, when these

transactions were reviewed. Mr. Loring then said that he would never let Capt. Frue have these stocks unless he was obliged to.

Q. When was that?

A. In May, 1869.

Q. Where was it?

A. It was at the Russell House.

Q. Was that after Loring returned from up the lake?

A. It was. I received a letter from him to meet me here, and I met him.

Q. Do you know whether that was before or after the threat of arrest on the part of Capt. Frue?

120 A. I learned from Mr. Loring the circumstances which occurred up there. The letter was very urgent that I should meet him here, and I learned those circumstances.

Q. What circumstances—about his threatened arrest?

A. Yes; that he was arrested.

Q. That he was arrested?

A. I think he said so.

Q. This declaration that he would not send the stocks was immediately after you learned that?

A. Yes, sir.

Q. Who made these purchases of land for these companies?

A. Really it was actually made by the parties in Boston, though Capt. Frue and myself commenced the application.

Q. Were the preliminary negotiations for the purchase of lands before your return to Boston?

A. Before I left Boston there was an expectation of it; and when I went up the lake the applications were made for the land, but the actual business of the purchase was done in Boston.

Q. According to the arrangement between you and Loring in Boston, at what price was Frue's Ossipee stock to cost?

A. To cost $5.50.

Mr. WALKER. There is no question about the cost of the two stocks at all—that the Ossipee was $5.50 and the Kearsarge $4.50.

Cross-examination by Mr. WALKER:

Q. At this time, in the fall of 1866, were you not the attorney of Mr. Frue, the general attorney, with a general power?

A. No, sir; I was not.

Q. Had you not been his attorney and had that general power?

A. Only for particular occasions. I might have had power of attorney for transferring stock or something of that kind, but nothing general at any time. It would be simply for a simple case.

121 Q. Did you not have a power of attorney from him in 1865, a general power?

A. I do not recollect of ever having a general power, or any other power, excepting for a particular case.

Q. Are you acquainted with Mr. Frue's signature? Is that his?

A. I think it is.

Q. Look at that and it may refresh your mind.

A. This undoubtedly applies to business which was understood at the time.

Q. I am asking whether it was not a full power of attorney?

A. It might have been. But all powers that Mr. Frue ever gave me had some definite object.

Q. Look at that letter and see whether it is your own, and see whether you refer to a power of attorney there?

A. That is my letter.

Q. Does that refer to that power of attorney?

A. Very likely.

Q. Was that power of attorney ever revoked?

A. I do not know that it was formally, but I never exercised a general power of attorney excepting it was understood what I did it for.

Q. You said that Mr. Frue sent you some money. Have you the letters in which he sent you those moneys?

A. I have not those letters now.

Q. Did you not in some instances leave copies, or leave these letters to be copied, and take back the original from Mr. Loring?

A. I meant Mr. Loring—I thought I was very particular—should have a copy of all the moneys sent.

Q. Look at that letter and see if that won't remind you about that first letter of November 9th.

A. I presume that is the copy of the letter.

Q. Then the $2,000 was sent you by Mr. Noble, and to pay for his stock, was it not?

122 A. The $2,000 came to me as the other, and I passed the money to Mr. Loring.

Q. I am not asking you that question, but whether it did not come from Mr. Noble and to pay for his stock?

A. It came the same as the others.

Q. You think that is a copy of the letter, don't you?

A. I do.

(Letter offered in evidence and marked Exhibit 3, hereunto annexed.)

Q. You left a copy of the letter or the original with Loring when you passed him the money, did you not?

A. Yes, sir.

Q. Do you know what became of the letter of November 10th—have you that letter?

A. No, sir.

Q. Will you look and see if that is the original?

A. It is.

(Letter marked Exhibit 4, hereunto annexed.)

Q. Look at that—that is a copy of the letter of November 14th.

A. It is so stated.

Q. Have you any doubt about its being a correct copy?

A. No, I have no doubt.

(Letter marked Exhibit 5, hereunto annexed.)

Q. Look at that letter of November 16th. Is that a copy of the letter received by you?

A. I have no doubt of it. I have no means of identifying it except the sums.

(Letter marked Exhibit 6, hereunto annexed.)

Q. Look at that letter of November 22d. That is the original, is it not?

A. Yes, sir.

(Letter marked Exhibit 7, hereunto annexed.)

Q. Look at the letter of February 4th, and see if it is an original?

A. I should think so.

(Letter marked Exhibit 8, hereunto annexed.)

123 Q. There is an original of February 13th?

A. Yes, sir.

(Letter marked Exhibit 9, hereunto annexed.)

Q. Another original of February 23d?

A. Yes, sir.

(Letter marked Exhibit 10, hereunto annexed.)

Q. There is a pencil mark on it; is that a part of the original letter?

A. No, sir.

Q. Letter of March 22d; is that an original?

A. Yes, sir; that is correct, no doubt. I do not know that I ever saw it.

Q. That is Mr. Noble's handwriting?

A. Yes, sir.

(Letter marked Exhibit 11, hereunto annexed.)

Q. March 30th—the last one?

A. My impression is that these two last never came into my hands. Mr. Loring received this, and here are Mr. Loring's minutes.

(Letter marked Exhibit 12, hereunto annexed.)

Q. You say that all these remittances were passed over to Mr. Loring?

A. They were.

Q. All of them?

A. All of them.

Q. Did you not yourself, in behalf of these interests, make a purchase of lands in New York in December, and use these very funds?

A. No, sir, I did not.

Q. Did you not draw from Mr. Loring for that purpose?

A. Mr. Loring, after the land was purchased by Mr. Sibley, in New York, sent me with the funds from Boston to New York, after Mr. Sibley had notified Mr. Loring that he had made the purchase.

Q. Did not Mr. Sibley draw upon Mr. Loring for that purchase, and pass the draft to you and endorse it—that purchase of $25,000?

124 A. Mr. Loring sent me with about $21,000 to New York.

Q. What date was it that he sent you to New York with $21,000?

A. I think it was about December 10th.

Q. Was that a draft drawn upon Mr. Loring by Mr. Sibley? Look on the back for your endorsement.

A. My endorsement is not there.

Q. Is not that your endorsement?

A. No, sir. That was simply a paper passed between Mr. Sibley and Mr. Loring as the evidence of the transaction. It was not the actual transaction, because I took myself $21,000 to New York, and there myself and Mr. Sibley drew on Mr. Loring for the balance.

Q. Either yourself or Mr. Sibley drew for the balance, you say?

A. Certainly.

Q. What was the whole amount of the purchase?

A. $25,000.

Q. That was made about the 10th of December, was it?

A. Yes, sir.

Q. For what company was that purchase made?

A. For the Ossipee Mining Company.

Q. Then you say he drew upon Loring for the balance, the $4,000, or you did?

A. Either myself or Mr. Sibley. I having been sent over with some $21,000, one of us drew that balance.

Q. But Mr. Loring paid the whole $25,000?

A. Mr. Loring paid it.

Q. Had he not also paid at that time the whole amount due the Land Company for the first purchase, $40,000?

A. No, sir, he had not paid that. Mr. Loring never paid it. He might have paid considerable, but the other parties paid also.

Q. The other parties had paid into the company; did not Mr. Loring make the payment to the company of whatever funds he had received from the parties in interest?

A. Whatever he received he probably paid.

125 Q. He paid from the company's funds; did he not pay for that $40,000 purchase—the original purchase?

A. He paid from such funds as he had received from different parties.

Q. He was the one that paid it, as the managing man of the company?

A. I presume he did.

Q. And they were corporate funds?

A. No; they could not have been corporate funds.

Q. Was not the purchase made for the company?

A. Made for the company.

Q. And was it not paid by the several proprietors paying their money in to Mr. Loring as the financial agent of the company?

A. No; that would be individual to Mr. Loring and individual to the parties.

Q. Did they not pay it to him as the financial agent of the company, to be paid for these lands?

A. What company do you mean?

Q. I mean the Ossipee.

A. No, sir; they did not. There could not be any such thing.

Q. Did you not say that the corporation was formed in September or October?

A. I did.

Q. Now, sir, was not the land conveyed to that corporation by the land company?

A. It was conveyed directly to the corporation.

Q. Did not Mr. Loring, as the financial agent of the corporation, pay for that purchase entirely?

A. It would be an individual thing.

The COURT. He paid the money, did he not?

A. Yes, sir.

Q. And he was the financial agent?

A. Yes, sir.

Mr. WALKER. I understand you to say this land was conveyed to this corporation?

A. But the land would not be conveyed unless it was paid for.

126 Now it was individuals that paid for the land; it was the corporation that paid for the land through Mr. Loring, in New York, because the corporation was formed and it was bought for the corporation.

Q. It was bought for the corporation?

A. Yes, sir; that was a different transaction.

Q. Had not the land company—the first purchase already been paid for and conveyed to the corporation at that time?

A. It was paid for before it was conveyed. That is the ordinary way of such a company.

Q. You made the contract with the land company, made an application, and made a payment?

A. I think I made the application and made a formal payment of $1,000.

Q. Did you not make that payment by draft upon Mr. Loring?

A. Very likely I did.

Q. That was in Lake Superior?

A. Yes, sir.

Q. Did you not soon after pay the $7,000 by another draft upon Mr. Loring from Lake Superior?

A. I do not remember that.

Q. What is your recollection about drawing for $7,000 in addition?

A. In the first place I would not have any recollection about it, but the probability of the 1,000 is so great that I have no doubt about it; but I have no recollection of 7,000, and if there was 7,000 I think it was a mere form, perhaps a matter of form with the land office down there.

Q. Was not the $8,000 to be paid down?

A. That is possible.

Q. Out of that 40,000, twenty per cent. of it, and you drew on Loring for the payment?

A. That is possible.

Q. Was not this money remitted to you, was it not a part of your arrangement that this money was remitted to you by Frue for the purpose of paying for these very lands?

127 A. These lands were paid for before this money was remitted, that is my recollection.

Q. Before any of it was remitted?

A. I think it was. That would be my recollection.

Q. Can you tell when the lands were paid for—by whom was the purchase paid?

A. By the different parties.

Q. By Mr. Loring?

A. By Mr. Loring and by the other parties.

Q. Did not Mr. Loring make all the payments?

A. I think he received the money and took it.

Q. You received that remittance of December 31st. Was all the money paid in to Mr. Loring, did you say?

A. All paid in to Mr. Loring. He received all the drafts.

Q. Was that draft to Mr. Sibley paid him at that time?

A. That was paid him.

Q. At the time?

A. Not at the time.

Q. By whom?

A. By Mr. Sibley.

Q. How do you say that you passed it to him? How came you to say that?

A. The draft on Mr. Sibley came in the letter, and Mr. Loring passed it to me.

Q. Were not all the contents of that letter passed to you?

A. Very likely for the purpose of endorsement; but not all passed to me, not any of it passed to me.

Q. What had Mr. Loring to do with the money that Mr. Frue sent you to purchase Torch Lake interest?

A. He had all to do with it, all went to him.

Q. I am asking what he had to do with that? How came you to pay to Loring the money that Frue sent you for a special purpose, viz: To purchase Torch Lake?

A. It was because I did not use it for the purpose of purchasing it. We did not decide to make that purchase, and we did not use it for that purpose.

128 Q. Do you say you made no Torch Lake purchase?

A. No, sir, he had not paid that. Mr. Loring never paid it. He might have paid considerable, but the other parties paid also.

Q. The other parties had paid into the company; did not Mr. Loring make the payment to the company of whatever funds he had received from the parties in interest?

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A. He had all to do with it, all went to him.

Q. I am asking what he had to do with that? How came you to pay to Loring the money that Frue sent you for a special purpose, viz: To purchase Torch Lake?

A. It was because I did not use it for the purpose of purchasing it. We did not decide to make that purchase, and we did not use it for that purpose.

128 Q. Do you say you made no Torch Lake purchase?

A. I say I made no Torch Lake purchase.

Q. And you had nothing to do with any Torch Lake purchase?

A. I had something to do as being one that counselled the purchase of Torch Lake stock; but I did not make the purchase.

Q. You did not make the purchase?

A. No, sir.

Q. Did you not make the purchase upon Torch Lake, and make the drafts upon Mr. Loring from those very moneys that you yourself paid into his hands to pay for that purchase—think of that?

A. Whatever purchase was made in the Torch Lake was made by Mr. Sibley, and all the transactions went through Mr. Loring's hands.

Q. The question is whether you did not draw on Mr. Loring to pay for that very purchase on Torch Lake.

A. It is possible that there might have been some drafts, but I do not remember any whatever.

Q. You have no recollection of any money being paid by you or through you for that Torch Lake purchase?

A. I recollect that there was $4,450 of drafts on the Grand Portage, which Mr. Loring gave me to make purchase on Torch Lake; that is, to give Mr. Sibley to do that, and I gave it to Mr. Sibley, and he did make the purchase. That is the only transaction that I remember.

Q. When were those Torch Lake purchases made?

A. They were made in January, February and March of 1867.

Q. Look at those several drafts, all drawn by you upon Mr. Loring, and see whether they are not the drafts which you drew to make that Torch Lake purchase?

A. These were the drafts that I gave to Mr. Sibley to make those purchases; Mr. Loring having authorized me to do this, and having received the funds to make the purchases.

Q. With reference to his receiving the funds—you refer to the $25,000 which had been put into his hands?

129 A. No.

Q. What other funds had you received to make those purchases?

A. I did not make any purchases out of any specific money.

Q. What funds had he received into his hands for this Torch Lake purchase, if it was not that $25,000 that was sent for that specific purpose?

A. The purchases that were made for Torch Lake were for different purposes—made by Mr. Sibley—and the moneys were paid to Mr. Loring.

Q. What moneys were paid to Mr. Loring?

A. Mr. Clark and Mr. Bigelow.

Q. Have you any personal knowledge of any such thing?

A. I simply know he had the stock; I had nothing to do with the details of that transaction.

Q. How came you to draw upon Mr. Loring for $21,000 to pay for that Torch Lake purchase?

A. Possibly because Mr. Loring, you know, authorized me to do that.

Q. How?

A. He told me to do that, and I never understood that I was drawing upon any $25,000.

Q. What did you think you were drawing on?

A. I was drawing on Mr. Loring for what he authorized me to do. Mr. Loring decided not to make a purchase of $25,000 for Capt. Frue. We never acted upon it.

Q. Loring had nothing to do with that, had he?

A. We decided not to act upon it.

Q. Did Loring have anything to do with it; was not that letter sent you by Capt. Frue, and did it authorize you to employ Mr. Loring to have anything to do with it?

A. I wrote to Capt. Frue——

Q. You need not state what you wrote without producing the letter.

A. I paid the moneys to Loring.

A. But you at the same time furnished him, did you not, with a copy of this letter showing the purchase for which the money was sent you?

130 A. I did.

Q. Showed him the letter?

A. Yes, sir.

Q. Now, sir, that money was then in his hands; he knew that it was sent for that Torch Lake purchase; in January and February you made these Torch Lake purchases and drew on him for $21,000, did you not?

A. I drew on him for whatever those drafts were. Loring and myself decided not to use that authority of Capt. Frue, that we would not make the purchases, and we never did.

Q. You did not make any Torch Lake purchases?

A. We did not make any purchases. We never acted upon it. We decided it was improper and we never acted upon it.

Q. How came you to make the purchases on Torch Lake?

A. Loring authorized me to make those purchases and to receive the money from other parties.

Q. If it was improper, why were they purchased?

A. It was improper for one person to make a purchase of a large amount outside of others who were connected with the business.

Q. Why did Loring have anything to do with the Capt. Frue matter; the authority was not to him, was it? it was to you.

A. We both decided not to have anything to do with it.

Q. How came he to have any decision about it; it was not addressed to him, was it?

A. But we consulted about it, and we decided not to act upon that authority.

Q. Why did you consult, when Loring had nothing to do with it?

A. Because it looked to me improper to step outside of an association and buy a particularly good thing for one party, and a particularly bad thing for another—it was not exactly what should be done and we decided not to do it, and it was the understanding with all the parties; we did not think that was exactly right.

Q. When that purchase was made what was the arrangement about the various shares?

A. In the purchases there were parties down there that paid for their stock, and the understanding was that the division would be according to the general division.

131 Q. Was not the understanding that Mr. Frue was to have 3,000 shares of the stock?

A. I think there was a general understanding, that is, that was expected to be.

Q. And the purchase was completed?

A. Yes, sir.

(The following drafts are attached together and marked Exhibit 13, hereunto annexed:)

February 14th, draft of Palmer upon Loring, $3,200.

Feb. 27th, draft of Palmer upon Loring, $5,000.

Feb. 28th, draft of Palmer upon Loring, $6,250.
April 11th, draft of Palmer upon Loring, $4,500.
April 19th, draft of Palmer upon Loring, $300.
(These drafts were offered in evidence by the defendant.)
(Objected to by the plaintiff as immaterial. Objection overruled and plaintiff excepts.)

THURSDAY, *June 28th*, 1877—10 a. m.

CHARLES H. PALMER, witness for the plaintiff, is recalled, and his cross-examination is resumed:

Mr. WALKER. I understand you to say that this $21,000 in drafts, made by you upon Mr. Loring, were drawn for the purposes of the Torch Lake property?

A. Torch Lake stock—yes.

Q. You say that all the funds you have described and minuted upon that memorandum, that you state was shown to Mr. Loring, were passed by you over to Mr. Loring, do you?

A. Yes, sir; yes.

Q. All of them?

A. All of them, yes.

Q. Was that the case with the draft upon Mr. Sibley?

A. What draft do you refer to?

Q. A part of the $25,000; $6,000 and odd.

132 A. Mr. Loring took the amount of it and handed it to me.

Q. Handed what to you?

A. The draft upon Sibley, for collection.

Q. So that that draft was not handed by you over to Loring?

A. I handed it to Mr. Loring, yes, sir; and I took it from Loring after having given it to him, with the rest of them. The minute on the letter of Mr. Loring shows that.

Q. So that draft came into your hands and did not remain with Mr. Loring at all?

A. It came into my hands for collection, but Mr. Loring himself collected it.

Q. Have you any personal knowledge of that?

A. I have Mr. Loring's personal statement to me that he did collect it.

Q. When did you get that statement?

A. It was some time in 1867, probably in the fall of 1867.

Q. How did the draft get into his hands; you say Mr. Loring handed it to you?

A. The draft did not get into his hands again, but he collected the amount of Mr. Sibley.

Q. All you know about that is the statement of Mr. Loring?

A. The statement of Mr. Loring, yes, sir.

Q. Did you not use, directly, some of the funds that were transmitted by Mr. Noble or Mr. Frue to you in purchase of property—use them yourself?

A. Not otherwise than as Mr. Loring gave them to me.

Q. I am not asking how; did you not use them directly yourself?

A. I used some of the very drafts—some of the very drafts were given to Mr. Sibley; some of the very drafts; I did not use them myself.

Q. But you gave them to Mr. Sibley in payment of the property, did you not.

A. I gave them to Mr. Sibley for the payment of the Douglass purchase, for the Ossipee Mining Company.

Q. So that the money and those drafts never came into Mr. Loring's hands at all, did they?

A. Mr. Loring gave them to me to give to Mr. Sibley, and sent me to New York to give them to Mr. Sibley.

133 Q. What amount was that?

A. That was some $21,000.

Q. Then they were paid by you; Mr. Loring never realized the money upon these drafts, but handed the drafts to you to make some purchases, did he not?

A. Mr. Loring received the property.

Q. I am not asking about that. Will you answer my question directly? It will save time. Did you not use those drafts directly in the purchase of property?

A. I did not use them. As I said before, I gave them to Mr. Sibley.

Q. Was not that using them; that was for the purposing of paying for the property purchased, was it not?

A. Yes.

Q. You were a witness on the former trial of this case, were you not?

A. I was; yes, sir.

Q. Did you testify in this way: "When you say that you handed the moneys received by you from Frue to Loring, does that remark *re*ply to all the moneys you received during that period?—A. My remark *re*plied to all moneys which I received during the period, and perhaps I ought to qualify that a very little.—Q. Qualify it to the extent the fact was.—A. The qualification is that sometimes I was in New York, and these letters containing the money were directed to me in Boston, and Mr. Loring would open these letters, and if they contained drafts payable to my order he would send them to me if I was in New York. In two instances those moneys were used, for they were sent to me directly, in the purchase of property that was ordered to be purchased, at the same time the account with the draft and every draft was given to Loring, so that the account rendered was the exact amount Capt. Frue sent me." Did you so testify?

A. I did, yes.

Q. Reading further: "So you accounted for what you did not directly hand over, that you used, to Mr. Loring?—A. I accounted to Mr. Loring for the exact amount." Is that your testimony?

A. That is my testimony; at the same time I overlooked at that time the intermediate fact in this whole case—the intermediate fact that I did not use them, but I gave them to Mr. Sibley. That at the time escaped my attention.

134 Q. What did you give them to Mr. Sibley for?

A. I gave them to Mr. Sibley for the purchase of this property.

Mr. WELLS. State what property.

A. The Douglass property, in section 26, for the Ossipee Mine.

Q. (Mr. WALKER.) Let me call your attention to another part of your testimony: "Are you able to say that Mr. Loring opened that letter—referring to the $25,000 remittance of December 31st—opened that letter at all; that you did not receive that in the original letter in which Frue sent it?—A. I would not say; but I would say this: I know that he did open some of them. I know that, because I recollect it; I would not say that he did open all of them, for they might come in the original envelope.—Q. So that you cannot say but what the $21,000 passed directly from you to Loring?—A. I stated that I thought not, but I would not be positive with that particularly. I know that some were.—Q. You know that they did come to you unendorsed?—A. Most

certainly; they could not come otherwise.—Q. The negotiations for that land were all made by you in New York, and with Loring in Boston?—A. The negotiation for that land was decided upon by those interested in the original company.—Q. I mean you were the acting negotiator on the part of the associates?—A. I was made the acting man on the part of the parties who had been concerned.—Q. You also applied $4,500 of that money directly to the purchase of the Torch Lake interest, did you not?—A. I did, sir.—Q. That is, for the Torch Lake stock?—A. Yes, sir; there is a memorandum to that effect. Those drafts had to be drafts on parties in New York.—Q. Was it or was it not a residue of the $25,000?—A. No, sir, not at all; it was after the other transaction some time.—Q. That $4,500 never went into the hands of Loring?—A. Unless he sent it to him in the way I have mentioned.—Q. It never went into his hands in such a way that he could use it?—A. The purchase was one —— Q. That is not my question; did that $4,500, as it came from Frue, go into the hands of Loring so he could use it?—A. Of course it did not." Did you so testify?

A. I did; but it was not the fact, as I find. It was not the fact; I was mistaken.

Q. You have had very long consultation with your counsel——

(Objected to.)

135 A. I have a memorandum of Mr. Loring here in my hands. I have the memorandum of every amount I gave to Sibley. As I have stated before, I did not use a dollar. I have Mr. Loring's memorandum here in my hand, and furthermore, all of these letters came to Mr. Loring, and as to the $25,000 I find I was not in New York. I find Mr. Loring's endorsement upon the letter, and I find——

Q. Where is that letter?

A. That letter of the 31st you will find here. I find that I was in Boston, and that Mr. Loring gave me the money to go to New York to give to Mr. Sibley.

Q. How did you find out that?

A. I found it by the letter.

Q. Then you were mistaken in your former testimony on all these points?

A. I say Mr. Sibley did all this business, and it entirely escaped my mind at the time.

Q. What was the occasion—in reference to the interview of 1867—what occurred there? You have stated, "In that interview—these accounts were in one account in my name, &c."—"alluding to the fact that some of the letters had been opened, transmitting drafts to me in New York, and I used the drafts directly. To that remark I made the remark that I had accounted for all of them, and he conceded I had, and he saw, no doubt, I was correct." Did you so testify?

A. I did, sir.

Q. You admit the fact, then, that you so used a number of the drafts directly in New York, and you merely accounted to Loring for them?

A. The fact was that Mr. Loring had received all of these letters and received all of these accounts, and had under my eye entered them to the credit of Capt. Frue in the general account. That was the fact.

Q. I understand you to say that Mr. Loring was the treasurer and financial manager of this corporation?

A. He was, sir.

Q. And I understand you to say that these moneys were paid over to him as such treasurer?

A. I did not say that.

136 Q. Why, then, should they be paid to him if they were not paid to him as treasurer?

A. They were paid to him because he acted for the parties in this transaction, in an individual transaction.

Q. An individual transaction?

A. It was an individual transaction.

Q. How act as an individual? What were his duties with the moneys except he received them as treasurer himself?

A. These moneys were not paid to him as treasurer.

Q. What duty had he to do but to take them with one hand as an individual, and with the other hand account for them as treasurer?

A. His duty was to take them from the person on whose account they were paid, and to credit the parties, as he did.

Q. Were not these moneys sent to pay for the stock in these corporations? Is not that your testimony?

A. Certainly, the money was sent to pay for the stock, but not in reference to Mr. Loring, as any officer of the company.

Q. Were they not paid over to Mr. Loring for the very purpose of paying for the stock?

A. They were sent to him to pay for the stock, but not in his capacity as treasurer.

Q. Were they not paid over to him for the very purpose of paying for that stock? Did not the very letters coming to you state that, that they were paid for the stock? Were they not paid under the arrangement between you and Loring?

A. As an individual, certainly.

Q. Do you say there was any express arrangement that he was to act as an individual in that matter?

A. There was, sir.

Q. What was said about his acting as an individual, and when was that said?

A. It was said in the beginning of the transaction.

The COURT. Are you stating your own inference?

A. It is in the nature of the transaction.

137 Mr. WALKER. I understand you to say that on coming down from Lake Superior you reported to Mr. Loring what understanding had been had between you and Mr. Frue upon Lake Superior about his remitting money. Now, sir, in that conversation do you pretend to say that anything was said, distinctly, that in receiving that money he received it as an individual, and not as treasurer; was anything said? I am asking what was said, not your inference.

A. I don't remember that anything was said about Mr. Loring as treasurer; not a single word. I simply paid it to him as an individual.

Q. He was treasurer, was he not?

A. Well, he was—I am not certain that he was; he was at some time, but I am not certain he was before the collection of it.

A. Did you not say that he was treasurer and financial manager from the beginning?

A. He was from the time the treasurer was appointed, but I don't recollect when he was appointed.

Q. And that money was paid over for this very stock?

A. It was paid to him for this stock, because he held it himself, not as treasurer.

Q. How is that?

A. When the company was formed he held this stock himself, not as treasurer, not as an officer, when the company was formed.

The COURT. How did he hold it?

A. It was issued by the company to him.

Q. The whole stock?

A. Perhaps not the whole of the $20,000, but very likely a large part of it; certainly a large part of it.

Mr. WALKER. And he held it then as trustee until Frue should pay up for the stock that he was to pay for; was that it?

A. No, sir; there was nothing said about it.

Q. How came he to hold the stock?

A. That would be in the nature of an organization. That is so in every organization; simply holds the stock to distribute it.

138 Q. Was not Frue one of the original parties?

A. He was one of the original parties; no stock was put in his name.

Q. When you were in Boston do you remember of ever seeing that paper before—the list of the stockholders in the Ossipee, the original list? [Hands the paper to the witness.]

A. No; I do not. I would not have been very likely to have seen it.

Q. Were you not familiar with the transactions of the company during that winter there?

A. I was not familiar with this part of it.

Q. You were there and aided in making the arrangements for the allotments?

A. I don't think this contains the original stockholders in the company at all.

Q. I am referring to the new allotments made in Boston. Look over that list, and see if it is not precisely according to the list of new allotments then made in Boston?

A. That I could not tell. I know these parties were to have stock, that is, many of them. In that form I never had anything to do with it.

Q. Was not Mr. Loring to have 2,250 shares in the Ossipee?

A. That was about the amount.

Q. Were you not to have 2,220 shares?

A. I was.

Q. Was not Mr. Sibley to have 1,470 shares?

A. I think so.

Q. Was not Mr. Brigham to have 750 shares?

A. I simply presume it; I don't remember it.

Q. Was not Mr. Noble to have 375 shares?

A. Mr. Noble was to have about that number.

Q. Was not Mr. Mandlebaum to have 375 shares?

A. I think likely.

Q. Was not your son to have 375 shares?

A. Yes, sir.

Q. Was not Mr. Hall to have 250 shares?

139 A. I think so.

Q. D'Aligney to have 75 shares?

A. I presume so, but I don't recollect.

Q. Was not Wood to have 75 shares?

A. Mr. Wood did not have 75.

Q. Was not that the design originally?

A. It was judged he would earn 275.

Q. Was not J. Williams to have 150 shares?

A. I don't remember.

Q. Was not Mr. Frue to have 2,250 shares?

A. That was about his stock.

Q. And J. C. Hodgson 1,313 shares ?

A. I think so.

Q. And David Hodgson 1,313, the same number ?

A. That I could not say, because that was a matter of Mr. Frue's. I did not keep any account of that.

Q. And then there was 2,000 of stock that was to be reserved to be sold ?

A. Yes, sir; that is a mere memorandum; that is not an official paper.

Q. But is it not a memorandum made at the time, and did you not see it as one of the memorandums in relation to the distribution of that stock ?

A. I have no recollection of seeing this paper. As for myself, I merely had memorandums of my own.

Q. Now, will you look at that in relation to the Kearsarge ?

A. Mr. Walker, I have no recollection of those papers, because they did not necessarily go to me.

Q. Don't you remember looking over a paper at the time you arranged this new allotment in Boston, and definitely ascertaining how the stock was to be distributed ?

A. I did, but that was simply a memorandum.

Q. In Kearsarge were you not to have 1,800 shares ?

A. Well, if I did, I didn't.

140 Q. Were you to have ?

A. I might originally.

Q. Was not Mr. Loring to have 1,800 ?

A. I presume so.

Q. Sibley 750 ?

A. Yes; you know I would not remember.

Q. If you don't remember, say so ?

A. I don't remember.

Q. Was not Mr. Palmer, your son, to have 75 ?

A. I think so.

Q. And Mr. Noble 55 ?

A. I don't remember what he was to have.

Q. Do you know how much the Hodgsons were to have in that company ?

A. No I do not.

Q. 750, was it not ?

A. Very likely ; I don't remember.

Q. Do you know whether Frue was to have 1,500 ?

A. I don't remember that.

Q. Don't remember it ?

A. I don't remember, because they did not come to me in that shape.

Q. Brigham to have 750 ?

A. I remember that as well as anything.

Q. I told you yesterday I would call your attention to the fact of whether you did not draw upon Mr. Loring for $8,000 from Lake Superior (hands a paper to the witness). The first one a draft for $1,000 ; and there is a draft for $7,000 ?

A. These were mere formal drafts, you know. They were not used.

Q. Not used ?

A. I think not; no, sir.

Q. Was not this $8,000 paid to the company ?

A. They took charge of that. That is a mere formal matter. They took charge of that.

141 Q. Formal for what ? Was not this the 20 per cent. that you

state in your letters—the exact agreement—that $8,000 was to be paid down?

A. Very likely. I don't think it was. I don't think so.

Q. You contracted to pay him for this land?

A. Yes, sir.

Q. You were authorized to contract?

A. Yes, sir.

Q. How do you know they were not paid?

A. My recollection is that the Boston people took the entire management; that relieved us from that.

Q. Was your draft ever protested?

A. No, sir; it was not. But I don't remember of ever seeing it again.

Q. What do you mean, then, by saying it was not paid?

A. I presume everything was paid according to arrangement; but my idea was it was a matter of form.

Q. Were not the terms of the contract in fact that you were to pay $8,000?

A. I presume so. Mr. Walker, the whole thing is explained by saying that the parties selling, that is, the Mineral Land Company, the officers, were interested; it was a mere accommodation.

Q. You say there was an allotment made first in Lake Superior between you and Mr. Frue; to whom was that allotment *were* made, so far as Mr. Frue and his associates were concerned? Who did it relate to?

A. Mr. Frue took stock for himself and such friends as he wanted to share in this; and my dealing was with Mr. Frue in relation to it.

Q. Your dealings were with Mr. Frue; but was not the stock allotted between you and Frue, so far as you could allot it, in Lake Superior—allotted to Mr. Frue, to Mr. Loring, to yourself, and to the two Hodgsons, and Mr. Noble?

A. There was a certain amount of stock?

Q. Can you answer my question, if you please? Was not the stock, so far as Mr. Frue and you allotted it in Lake Superior, allotted to Mr. Frue, to yourself, to Loring, to the two Hodgsons, and to Mr. Noble?

142 A. Mr. Frue's stock and those with him——

Q. Cannot you answer my question?

A. I think not, for I had nothing to do with Mr. Noble.

The COURT. He asked you whether you and Mr. Frue did not make the allotment?

A. That I don't remember. It came to me as a lot of stock.

Q. And you knew nothing about Noble or the Hodgsons?

A. I don't remember about the amounts—at that time.

Q. You don't remember the amount, but was not stock in that arrangement allotted to Hodgsons and Noble?

A. What I think was the fact is this: that I had to explain why Capt. Frue took more than the rest, and undoubtedly I knew at the time how much he designed for those parties. That is all my connection with it. I had to explain where the stock went.

Q. On the former trial, in answer to this question, did you not testify as follows: "State in a general way to whom the interests were allotted"—say, "The interests were allotted to Capt. Frue, myself, Mr. Loring, and the two Hodgsons, and Mr. Noble. I think my son had a small interest, and then there was Mr. Sibley and Mr. Mandlebaum, and then there was a certain amount to be apportioned and divided as they might think fit,"—did you so testify?

A. I did so testify.

Q. Was that true?

A. It was not exactly true, because I had taken impressions that I received afterwards. This thing being explained, all my dealings were with Capt. Frue.

Q. Then it was not true as you before testified? You were called upon to testify to the truth, were you not?

A. Yes, sir; I was. I meant to do that; I meant to do that.

Q. Did you not afterwards, in relation to the allotments in Boston, testify: "Q. If the allotment was changed as you have stated, can you give the final allotment of the shares as it took place, so far as it respected Frue?—A. I think I can give the final amount. Q. Give it.—A. Ossipee was 5,835 shares. Q. What do you include in Capt. Frue's?—A. I include Noble and the two Hodgsons."—Did you so testify?

143 A. I did; yes, sir.

Q. Then you understood all along that some of the stock was allotted to them?

A. I would not say that, because you know a formal allotment and subscription is one thing and the knowledge of what a party will do with the stock when he gets it is another.

Q. Did you not testify that you understood that certain stock was to be allotted to Hodgsons by the Boston allotment?

A. I would not say in that form; that would give a wrong impression.

Q. That answers the question; you say you did not say so.

The COURT. The question is, whether you did not so testify this morning?

Mr. WALKER. Have you not testified this morning that you understood that certain stock in that Boston arrangement, allotment, was allotted to Noble and about 375 shares of the Ossipee?

A. The actual fact would be that I understood it had.

Q. The question is, did you not so testify?

A. I did not mean to say that the Boston parties allotted stock to the Hodgsons; that would be untrue; they did not do it. It would not be right to say that.

Q. What do you mean to say, then?

A. I mean to say that I had knowledge that Capt. Frue was going to let them have some stock.

Q. Had you no knowledge; was there nothing said in the Boston allotment about the Hodgsons and Noble?

A. Certainly. I explained to the parties the reasons why Mr. Frue was to have more than any other one. I gave them the reasons; these parties were exploring on these lands.

Q. Then Hodgsons and Noble were to have a portion of that stock. Were not Frue and his associates spoken of?

A. Very likely. What I mean——

Q. Hodgson and Noble were spoken of?

A. What I mean to say is that it was an original allotment by the Boston parties. They had simply allotted so much to Mr. Frue and his friends.

144 Q. Do you mean to say that in the Boston allotment a distinct amount was allotted to Frue, separate from the Hodgsons and Noble?

A. Certainly. I have seen such a statement; whether it was made up at that time or not I do not know?

Q. Do you mean to say that was the arrangement in Boston; do you so testify?

A. I would not say anything different from what I have said.

Q. You cannot answer that question?

A. Boston parties knew Capt. Frue and they knew he had more stock for those parties.

Q. Then they knew Noble and the Hodgsons were associated with Capt. Frue as owners of this stock, this 5,835 shares, did they?

(Objected to as leading.)

A. I don't think I can make my ideas any plainer than I have upon the subject. The general fact was a larger share was allotted to Capt. Frue for his particular use.

Q. You say that this money was paid over to Mr Loring from you. Was it not all expended, the whole amount of capital, including the working capital, of both of these corporations, entirely expended in the explorations and in the purchase of these lands?

A. You know there was expended in the purchase of the lands to the extent of their stock—certain portions of this money were expended for the purchase of property and certain portions were expended in working the property—that is, without knowing it, that is what I suppose.

Q. Let me call your attention to it. In the first place $40,000 was expended for the Ossipee in the original purchase from the land company.

A. Yes.

Q. That was actually paid?

A. It was.

Q. $25,000 was actually paid for the lands purchased of Douglass and others?

A. Yes, sir.

Q. Then there was $45,000 to make your working capital up to a $110,000?

A. It was $40,000.

145 Q. How would that make it $110,000?

A. There was $5,000 paid as a matter of expenses, $2,500 paid to Mr. Loring for his trouble.

Mr. WELLS. The $25,000 was paid Douglas and Sheldon for the lands by Loring and it was conveyed to him; he then conveyed it to the company for $35,000?

The WITNESS. No, $30,000.

Q. Do you say that Mr. Loring conveyed that property for $30,000 to the company and was allowed $30,000 for the property?

A. I believe that was the fact.

Q. What do you know about it, sir?

A. It was put into the company for $30,000 because that would be $1.50 a share.

Q. But were not more that $40,000 actually expended, or an excess expended in explorations?

A. I think not. That is the fact, you know. It was put in at $30,000.

Q. Did you not understand that there was an excess of working capital expended in the exploration; did you not know it?

A. That excess was paid in as working capital.

Q. How was it with the Kearsage; was it not the same way?

A. The same way.

Q. The money all expended in exploring until the work were abandoned?

A. In working the mines.

Q. Did you not testify on the former trial of this case, in answer to this question, "Was not all the money that was paid to Loring as work-

ing capital expended, and some $15,000 additional, in making explorations and seeing whether it would pay to go on and develop the mines supposed to be in the lands of the Ossipee? A. My impression is, without having kept the account, that the assessments were expended in work upon the Ossipee." Did you so testify?

A. I believe I did say so.

"Q. Was not the same thing true of the Kearsage with the working capital paid into the treasury of the Kearsarge; was it in like manner expended in explorations? A. I think likely." Did you not so testify?

146 A. I ought to say working; explorations would be merely preliminary; it might be without any mining explorations.

Q. And after the money had been expended the works were abandoned, were they not?

A. They were stopped.

Q. You have testified to an interview between Loring and Frue, Mr. Noble and yourself, in Lake Superior, in June, 1867, in which Mr. Loring presented certain accounts, having been kept in your name. Did not Mr. Loring claim then, and was it not admitted to be true, that Mr. Loring held the stock in trust for these parties until the amount was paid, and that you and Frue insisted that, so far as Frue's part was concerned, it had been paid for?

A. There was no conversation of the kind. I don't recollect anything of that kind. I don't think anything of the kind was said.

Q. Did not Mr. Loring on that occasion insist that he had a lien on the stock until it was all paid for?

A. No, sir; he did not; that is, I have no recollection of a word on the subject.

Q. Did he not insist further—claim that your stock and the stock of Frue and his associates was all in one mass, and that he should hold the whole until the whole was paid for, and did you not object to it?

A. He did not; nothing said of the kind.

Q. Did he not claim there was a balance due him on the stock that had been allotted you—Frue and his associates—and that he should hold the stock until that was paid for?

A. He did not; no, sir. He may have stated that there was some balance due him on the stock; but there was nothing said about his holding the stock; nothing whatever.

Q. Did he not claim you were not entitled to the stock until it was paid for fully?

A. No, sir; he did not.

Q. Nothing of that sort?

A. Nothing of that sort.

Mr. WELLS. At that time?

Mr. WALKER. Yes, sir; I am referring to that time. Was not Frue's complaint, in your presence, with Mr. Loring, that he had mingled his account with yours?

147 A. Yes, sir; he spoke of it.

Q. Did not Mr. Loring claim that putting the two accounts together, yours and Frue's, that there was a balance due him, and that he was entitled to hold the stock until that balance was paid?

A. No, sir; he did not.

Q. Nothing of that sort?

A. Nothing of that sort. I mean that I heard nothing, and I was present, I believe, in the room, all the time, and I heard nothing of the kind.

Q. You say that, at that interview, you looked over the accounts, and that Mr. Loring acknowledged the receipt. Did he do anything more, sir, than simply acknowledge he had received certain amounts from you—they were credited to you on his account, were they not—you and others? Did he do anything more than to acknowledge that these funds had been paid into his hands, certain amounts of them?

A. He admitted that all the moneys Capt. Frue had sent to him had been passed to his hands.

Q. Did he not claim, and did you not admit, on that occasion, that certain moneys had not been paid to him, but that you had paid out and had rendered an account to him?

Mr. WELLS. You have gone over that once.

Mr. WALKER. I have not asked about that interview.

WITNESS. He admitted the receipt of these moneys, because there were none used whatever but what he had understood and had authorized.

Q. Then he admitted, did he, in that connection, that he had received them all?

A. Received them all, yes, sir.

Q. He did not claim then that any portion had been expended by you?

A. No, sir; he alluded to the lands purchased, but then that belonged to the whole concern.

Redirect examination:

Mr. WELLS. In giving the dates and the payments to Mr. Loring, from your memorandum, were they the dates of those letters which were sent to you enclosing the remittances, or the dates you paid them over to Mr. Loring?

148 A. I think my memorandum is of the dates of the letters.

Q. Was Mr. Loring the treasurer or president, or other officer, of these corporations at the time you communicated to him the arrangement with Mr. Frue as to the payment of these moneys?

A. No, sir; no.

Q. When were these corporations practically organized upon these lands?

A. I could not say; but it was probably sometime in the winter of 1867?

Q. What do you mean by the winter?

The COURT. I would like to know what he means by practical organization, too.

Mr. WELLS. That I will bring out. Was the winter of 1867 commencing with January, that you speak of?

Q. Yes.

Q. As I understand you, articles of association in the name of the Kearsarge and Ossipee had been taken out by certain gentlemen in Boston, in the fall of 1866?

A. Yes.

Q. Those articles of association, as I understand you, were afterwards made use of for the practical organization of these companies?

A. Yes, sir; yes.

Q. Were the gentlemen who had on hand these articles of association thus taken out the same gentlemen who afterwards engaged in the Kearsarge and Ossipee Companies?

A. They were; yes.

Q. Now I ask you when did the purchase of the lands for these companies, and the practical organization of the companies, by the election

of officers, take place; how long after you got to Boston and communicated this arrangement with Mr. Loring?

A. I have no memorandum of it.

Q. Well, about how long?

A. I would say probably in—I should think sometime about the first of January.

Q. Were the lands conveyed by the Mineral Land Company to the Kearsarge before March, 1867?

A. I don't know that I have any memorandum of that fact.

149 The COURT. Have you not the deeds here?

Mr. WELLS. I have, and will put them in. I want to show the difference between the practical organization and the taking out of these articles.

Q. Now, as to this purchase of the Douglas and Sheldon lands; as I understand you this purchase was made by Mr. Loring?

A. The actual purchase was made by Mr. Sibley.

Q. Who did Mr. Sibley receive the funds from?

A. He received the funds from me.

Q. From you?

A. That is, he sent to Mr. Loring, and Mr. Loring sent me on with them.

Q. What was the purchase price?

A. $25,000.

A. Do you know what the Ossipee Company paid to Mr. Loring for this land; this additional land?

A. They paid to him $30,000.

Q. To whom was the conveyance from Douglas and Sheldon made?

A. Made to Mr. Loring.

The COURT. Will it not save time to put the documents in?

Mr. WELLS. Yes, your honor, I will do so.

Q. Did you communicate to Mr. Loring, when you went to Boston, your instructions received from Frue as to the payment of these moneys to Mr. Loring?

A. Yes, sir; I did.

Q. Why were these drafts made payable to your order?

Mr. WALKER. Of what consequence is that?

Mr. WELLS. Because I think there is some misapprehension in the mind of the court as to whether Mr. Palmer has testified that Mr. Frue instructed him to pay these moneys to Mr. Loring. I understand you to concur with his honor, that no such testimony has been given. I want to show positively by this witness what he testified to about them.

Q. Why were those moneys transmitted through you?

(Objected to. Objection overruled.)

150 A. It was simply that I would see that they certainly went to Mr. Loring's hands.

Q. To whose credit?

A. To his credit.

Q. At the time you paid these moneys to Mr. Loring you have said he was not an officer of the corporation when you commenced?

A. He was not.

Q. And when you communicated the arrangement to Mr. Loring?

A. He was not an officer, of course.

Q. You have also testified that he began to place these moneys to the credit of Mr. Frue?

Q. You say that, at that interview, you looked over the accounts, and that Mr. Loring acknowledged the receipt. Did he do anything more, sir, than simply acknowledge he had received certain amounts from you—they were credited to you on his account, were they not—you and others? Did he do anything more than to acknowledge that these funds had been paid into his hands, certain amounts of them?

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The COURT. Will it not save time to put the documents in?

Mr. WELLS. Yes, your honor, I will do so.

Q. Did you communicate to Mr. Loring, when you went to Boston, your instructions received from Frue as to the payment of these moneys to Mr. Loring?

A. Yes, sir; I did.

Q. Why were these drafts made payable to your order?

Mr. WALKER. Of what consequence is that?

Mr. WELLS. Because I think there is some misapprehension in the mind of the court as to whether Mr. Palmer has testified that Mr. Frue instructed him to pay these moneys to Mr. Loring. I understand you to concur with his honor, that no such testimony has been given. I want to show positively by this witness what he testified to about them.

Q. Why were those moneys transmitted through you?

(Objected to. Objection overruled.)

150 A. It was simply that I would see that they certainly went to Mr. Loring's hands.

Q. To whose credit?

A. To his credit.

Q. At the time you paid these moneys to Mr. Loring you have said he was not an officer of the corporation when you commenced?

A. He was not.

Q. And when you communicated the arrangement to Mr. Loring?

A. He was not an officer, of course.

Q. You have also testified that he began to place these moneys to the credit of Mr. Frue?

A. Yes, sir; he did.

Q. What is the source of your knowledge on the subject?

A. When I handed them to him I saw the entries.

Q. On what?

A. On a very large sheet of paper. It was not a book; it was a large sheet of paper. As I took money from other parties to him, they were entered there—the parties names; and how the moneys were to be credited was entered.

Q. Had Mr. Loring at that time any books of the corporation?

A. No, sir.

Q. To your knowledge, did he ever credit any of these moneys on any books of the corporation?

A. No, sir.

Q. In what capacity did you deal with Mr. Loring in these payments and communications?

A. As an individual. I cannot conceive that he had anything to do—

Mr. WALKER. Never mind about stating what you conceive.

Q. You have stated in this interview at Houghton, Mich., that Mr. Loring did not claim he had any right to hold these stocks for a lien?

A. Nothing of the kind.

Q. When did he first make a claim of that kind, if ever?

151 A. The first intimation—that I testified to before—that was in the fall of 1868.

Q. You have been asked as to your testimony in the former trial in respect to who made the Douglas and Sheldon and Torch Lake purchase in New York, and you said you were mistaken in having left out Mr. Sibley's interference in the matter. Through whom in New York was the Douglas and Sheldon purchase made?

A. It was made through Mr. Sibley.

Q. To whom were the funds that you took from Mr. Loring to New York paid?

A. To Mr. Sibley.

Q. Through whom were the purchases, if any were made, of Torch Lake or Penn made in New York?

A. They were made through Mr. Sibley.

Q. I understood you to say on your cross-examination that no part of this $25,000 remittance, made December 31st, by Mr. Frue, was used in the Torch Lake purchase?

A. I think it was not. The only particular fund that I know of was the $4,450; that is the only one.

Q. The $4,450 that you used was used in the Douglas-Sheldon purchase, was it not?

A. No; it was used in Torch Lake. That was a draft upon the Grand Portage Company, given to Bigelow in New York, and he put it into the hands of Mr. Sibley.

Q. Why did you not do as Mr. Frue authorized you to do in the letter of December 31st, in respect to an investment in Torch Lake of $25,000?

A. In the first place, we did purchase the most expensive part, that is, section twenty-four.

Q. That was abandoned?

A. That was abandoned. In the second place, we did not purchase scarcely any stock at that time, and we did not think it proper to purchase of any individual separately.

Q. If you know, state from whom Mr. Loring received the funds that he authorized Mr. Sibley to make the Torch Lake purchase with?

A. I don't know; he received the funds for that purpose from several individuals.

Q. Where did they live?

A. They lived in Boston.

152 Q. Then the purchase was not made for Frue, but for Boston parties?

A. For Boston parties and for Frue and the other parties.

Q. Frue was to be admitted?

A. Yes, sir.

Q. Do you know whether Mr. Loring has ever given to Mr. Frue any interest in the Torch Lake or Penn?

A. I think he has charged him with one, but never given it to him.

Q. Now, sir, look at this account (hands a paper to the witness). Do you know where that account came from?

A. It came from Mr. Loring.

Q. Why do you say that?

A. His handwriting is on it.

Q. What part of it is his handwriting? Read that part in his handwriting.

A. "These items do not appear in the account-current between C. H. Palmer and E. T. Loring." I cannot read the rest.

Q. Whose handwriting is the body of the account in?

A. The clerk of Mr. Loring.

Q. Do you know that?

A. I know his handwriting.

Q. Was it rendered in this transaction—this account—by Mr. Loring?

A. It was, sir; yes, sir.

Q. To whom was it rendered?

A. It is in my name, I think.

(The paper is marked Exhibit A 1, and offered in evidence, and hereunto annexed.)

Mr. WALKER. What is the object?

COUNSEL. It has various objects. It proves various facts in this case.

(Objected to as immaterial and irrelevant. Objection overruled.)

Q. What do you mean by Torch Lake and Penn?

A. I mean a mining company organized upon sections 35 and 36.

Q. Torch Lake and Penn and section 24, spoken of in Mr. Frue's letter of December 31st, were abandoned?

153 A. Were abandoned.

Q. No purchase made?

A. None whatever.

Q. You have been made to say by Judge Walker that some of the former testimony you gave was not true. Did you mean that you were mistaken, or that you intended not to tell the truth?

A. I meant to say that I have forgotten a certain class of facts. I was mistaken in that testimony. I was mistaken.

Q. Did you take any other part in the negotiations for Torch Lake and Penn in New York than to pay the money to Mr. Sibley?

A. No, sir; I did not.

Q. You kept in the background, did you not?

A. I did not appear at all.

Q. Mr. Sibley made the payments?

A. He made the payments.

Q. Do you know whether Mr. Loring communicated directly with Mr. Sibley upon the subject?

A. He did; yes.

Recross-examination:

Mr. WALKER. In relation to this last point let me call your attention to what you testified to on the former trial: "I believe you remarked that you were in New York in the winter of 1866 and 1867 a good deal?—A. Yes, sir; that is, I was there frequently, and spent a week or two, sometimes, at a time. Q. In the winter of 1866 and 1867, did you not in New York make purchases of lands, and purchases of Torch Lake stock, also, in which land and in which stock Mr. Frue had a share?—A. I did, in which all the parties which have been spoken of here had an interest. Q. Are you able to state, with some approach to definiteness, how much money you spent in those purchases?—A. The land which was bought for the Ossipee cost $25,000, and the Torch Lake stock, with the land and property connected with it—I am not able to tell the amount purchased—must have amounted to $20,000 or more. Q. That included the
154 stock, too?—A. No; the land connected with it was the adjoining land. The land was purchased through Mr. Sibley. Sibley had a part, Hall a part, Hoyt a part, Boston parties having a part, and myself and Capt. Frue a part. It was purchased in certain proportions which would have been established through this transaction. Q. What was the cost of the Torch Lake property?—A. I do not pretend to state the cost of all these purchases, because all these parties were numerous at the time, I knew. Q. You state as nearly as you can recollect.—A. I think I understate it, perhaps considerably, when I say $20,000. Q. What funds did you employ to pay that?—A. The funds that I employed to pay that was, say $4,500, that came directly from Capt. Frue, as I think. Loring sent the letters containing the remittances, and the balance was funds I obtained from Loring of these general funds; that is, I did not keep any account of that. I say there were connections made in Boston, and they took a portion of this purchase, and the amount for balances drawn of Loring at the same time to make these purchases." Did you so testify?

A. I did.

Q. Is that wrong or right?

A. I think there would be an entire misapprehension from that testimony.

Q. Is it true or false?

A. It is incorrect, because it is insufficiently accurate; it is too general. I will explain shortly if you prefer.

Q. You can explain now, and then I have some other matters.

A. The money that was drawn from Mr. Loring for the Torch Lake stock was money that parties in Boston had paid to Mr. Loring and money sent from the Lake. That was all settled with these parties.

The COURT. I don't understand what you mean by the Boston parties furnishing the pay. How can you say it was paid by the Boston parties if it was mixed with the general funds?

A. J. W. Clarke furnished Mr. Loring money for 500 shares in Torch Lake. Of the draft that I passed to Mr. Sibley, J. W. Clarke furnished money for 500 shares, Mr. Bigelow 100 shares, J. H. Cotton 1,000 and odd shares, Mr. Brigham 1,000 and odd shares, Mr. Loring 3,000 shares, Mr. Lewis 3,000 shares, Mr. Frue 2,600 shares, Mr. Frue 3,000 shares.

155 Q. Making 5,600 for Mr. Frue?

A. The amount of $20,000 of money which was furnished for this particular purchase. There were other parties that received from Mr. Loring, and I have not their names.

Q. The amount invested for Mr. Frue was drawn for moneys you paid into Mr. Loring's hands for Frue?

A. Mr. Loring attended to that. I don't know now what portions he used.

Q. Frue's shares were drawn from Mr. Loring?

A. Mr. Loring arranged Frue's shares. I had nothing to do with it.

Q. You drew on Mr. Loring for Mr. Frue's shares as well as for others?

A. I drew the money without any designation. That was between Loring and Sibley.

Q. But Mr. Frue was interested to that extent?

A. Yes, sir.

Q. But I thought you had nothing to do with the purchase; how is that?

A. I had as much to do in the counsel as any one. When I said I had nothing to do, I meant the actual labor, the actual purchase.

Q. Had nothing to do with the negotiation between the parties?

A. Nothing between the parties.

Mr. WELLS. Do you mean the parties in New York?

A. I mean the parties in New York. It is barely possible that I may have seen some particular one, but generally I kept out.

Mr. WALKER. Is that your letter of February 14, 1867 (shows a letter to the witness)?

A. Yes, sir.

Q. You drew there and gave notice to Mr. Loring of a draft of $3,200?

A. Yes, sir; that was done for Mr. Sibley. You understand that Mr. Sibley did the work. I saw Mr. Sibley, but I kept out of sight.

Q. You had nothing to do with the negotiation?

A. I mean with the parties who sold Sibley.

Mr. WELLS. Why did you keep out of sight?

156 A. If I had gone into the market they would have supposed that I knew of something that was transpiring on the lake and these lands that would make them valuable, and I would not have got any of it. It was so with the Douglas purchase; I was not known in it at all.

Mr. WALKER. Look at that paper and see if that is your letter of February 27th?

A. Yes, sir.

Q. Is that your letter of February 28th, in which you speak of purchase made and draft drawn?

A. Yes, sir; this is mine.

Q. There is one of Feb. 26, in which you say you expect to get all of the south half of 35 and 36; is that yours?

A. Yes, sir.

Q. Then you did have something to do with the purchase?

A. I believe I stated I spoke of it, because I was one of the parties.

Q. And you drew the drafts to pay them?

A. Yes, sir, on Mr. Loring in favor of Mr. Sibley—Sibley doing this work.

Mr. WELLS. To whom did you deliver the drafts drawn?

A. To Mr. Sibley.

ALEXANDER H. SIBLEY called and sworn for plaintiff.

Mr. WELLS. Do you know the parties to this suit?

A. Yes, sir.

Q. Where did you live in 1866–'7?

A. In New York City.

Q. Do you remember a draft on you for $6,901 and some odd cents, which Mr. Loring held in the year 1866?

A. I do, sir.

Q. Who made the draft upon you?

A. Capt. Frue—William B. Frue.

Q. Did you pay that draft to Mr. Loring?

A. I did not pay it on presentation, sir, but by arrangements
157 with Mr. Loring and Mr. Palmer, who was representing Mr. Loring, this draft was held for some time to accommodate me.

Q. Was it in fact paid, and the whole thereof?

A. It was paid.

Q. To Mr. Loring?

A. To Mr. Loring.

(Objected to as leading.)

Q. To whom was it paid by you?

A. To Mr. Loring.

Q. Was it all paid at one time?

A. No, sir.

Q. Can you tell me what part was first paid—the amount that was first paid to Mr. Loring?

A. $2.500 was paid on the 23d of March, 1867; Sept. 1st, $4,029.72. There was a balance due.

Q. $4,092.72 and $2,500 would not make it.

A. It was paid out of the moneys—out of the sales of stock that Mr. Loring made for me in Boston.

Q. Of your stock?

A. On my stock in his hands. The first item was $2,500 for the sale of the "Adams" stock.

Q. And the balance was also paid?

A. Yes, sir; we settled the entire draft.

The COURT. He has not said anything about a balance.

Q. That would leave a small balance of three or four hundred dollars on the draft?

A. The money was paid. Mr. Loring kept dunning me for this draft; did it both personally and by letter; wanted it paid up, and it was paid along; but this $4,092.72 was the balance.

Q. Who did settle the draft?

A. I settled the draft.

158 Q. There had been something paid besides?

A. Yes, sir; there was some small payments of other stuff.

Q. Do you remember any transaction in New York, in 1866 or 1867, in reference to purchasing Torch Lake or Penn?

A. Yes, sir.

Q. Who acted in making such purchase in New York?

A. I was acting.

Q. Did you make the purchase?

A. I made the purchase of a lot of Torch Lake stock and of the south half of sections 35 and 36, which was called Penn, I think; I did not know it as Penn.

Q. What do you mean by saying you made the purchase?

A. I made the negotiations with the parties owning the stock in this land.

Q. Where was Palmer at that time, if you know?

A. Well, he was in New York a part of the time and Boston part of the time—moving back and forth.

Q. Were you connected with him in reference to the purchase?

A. Yes, sir.

Q. Were you communicating with him in reference to it?

A. Yes, sir.

Q. Did Loring communicate with you in respect to that purchase?

A. Yes, sir.

Q. Directly?

A. Well, he did directly and by letter.

Q. From whom did you receive moneys to make the purchase, if you received any?

A. I gave my own checks in purchasing this, or checks on New York bankers in making the purchase, and after giving them I called upon Mr. Palmer to give me funds to reimburse me after I paid it, for what I had paid out.

Q. Did he do it?

A. He did.

Q. Did you also make a purchase from Douglas and Sheldon for the Ossipee Company?

159 A. I did, sir.

Q. Did you make the payment for it?

A. I did.

Q. What amount of money?

A. $25,000.

Q. From whom did you receive those $25,000?

A. I received from Mr. Loring through Mr. Palmer.

Q. Can you state in what sums you received it, if you received it in different sums?

A. I can, sir. (Refers to memoranda.)

Q. Please state.

A. I received $17,155.40 in a draft of the First National Bank of Houghton on the Central National Bank of New York.

Q. Give me the rest.

A. I received of the same bank on the Importers and Traders' Bank of New York $3,488.39, S. Maudlebaum's draft of $1,000, and a draft of Palmer on Loring for $3,357.21.

Q. Did you receive any letter from Mr. Loring with reference to the Douglas and Sheldon purchase?

A. I did.

Q. Will you produce it?

(Paper produced and marked Exhibit A 2, hereunto annexed, and offered in evidence by plaintiff's counsel, and admitted without objection.)

Q. You received a telegram relative to same purchase?

A. Yes, sir. (Produces telegram.)

(The telegram is marked Exhibit A 3 and offered in evidence. Admitted without objection and hereunto annexed.)

Cross-examination:

Mr. WALKER. How much is that Torch Lake stock per share?

A. Well, some of it was a dollar—different prices. A dollar and a quarter was the general price.

160 Q. What was the average?

A. Some a dollar and a quarter.

Q. Some cost a dollar and a half?

A. Yes, sir.

Q. Some still more?

A. No, sir; I don't know.

M. WALKER. With the consent of the parties, I would like to have Mr. Palmer state the cost of that Torch Lake stock.

Mr. PALMER recalled for further cross-examination.

Mr. WALKER. How much of it cost a dollar and how much of it a dollar and a quarter?

A. I would say seven thousand dollars, a dollar and a half; eight thousand five hundred dollars, a dollar and a quarter.

WILLIAM B. FRUE, plaintiff, recalled in his own behalf.

Q. Has Mr. Loring furnished you any stock in Torch Lake or upon sections 35 or 36?

A. He has furnished me no stock in Torch Lake or Penn.

Q. On 35 or 36?

A. That included 35 and 36; 35 and 36 comprises the Torch Lake and Penn.

Q. Has he ever accounted to you for any of the funds which he claimed to have invested for you in these stocks?

A. He has not accounted to me for any of the funds in these stocks.

Q. What was the Torch Lake or Penn; was it an existing corporation?

A. The stock—I cannot state; I don't know that it was; I have reason to believe that it was. I could not swear positively that it was, because I do not know. I would state that I believe it was in existence.

Q. I will ask the question of the captain, was Torch Lake, Penn—section 35 and 36—and section 24, wholly different from the Ossipee and Kearsarge?

A. Wholly different.

Q. Other property?

161 A. Entirely so. 24 was a section of land belonging——

Mr. WALKER. No matter about any description.

Q. Where was the interest in these various properties last mentioned held?

A. I don't know as I understand.

Q. Who owned them before they were purchased by Mr. Sibley?

A. They were principally owned in New York and Providence, R. I.

(Evidence was then given on the part of the plaintiff by the production of the conveyances, showing that C. C. Douglass and wife and Ransom Sheldon and wife, on Dec. 11th, 1866, conveyed to Elisha T. Loring, trustee, for a consideration of $25,000, the south half of the northeast quarter and the west half of the southeast quarter of sec. 26, T. 56 N., R. 33 W.; also that on the 21st May, 1867, for the consideration of $1, Elisha T. Loring, trustee, conveyed the same lands to the Ossipee Mining Company; also that the St. Mary's Canal Mineral Land Co., on the 9th Jan'y, 1867, for a consideration of $40,000, conveyed to the Ossipee Mining Co. the north half of the northeast quarter and the west half of sec. 26, T. 56 N., R. 33 W.; also that on the 9th March, 1867, the St. Mary's Canal Mineral Land Co., for a consideration of $50,000, conveyed to the Kearsage Mining Co., the south half of sec. 6, T. 56 N., R. 32 W., and the east half of the southeast quarter of sec. 1, T. 56 N., R. 33 W.)

Plaintiff's counsel also offer in evidence a certified copy of the articles of association of the Ossipee Mining Co., originally filed in the office of the Secretary of State October 22d, 1866.

(Paper marked A 7, and admitted in evidence, and hereunto annexed.)

Plaintiff's counsel also offer in evidence a certified copy of the articles of association of the Kearsarge Mining Company, filed in the office of the Secretary of State September 24th, 1866.

(Paper marked A 8, admitted in evidence and hereunto annexed.)

162 Plaintiff's counsel offer in evidence certified copies of the reports of directors of the Ossipee Mining Company, filed under the mining laws of Michigan, in the office of the Secretary of State, for the years 1866, 1867, 1868, 1869.

(Paper marked Exhibit B 1, hereto annexed.)

Mr. WALKER. What is the object?

Mr. WELLS. The object is to show that Mr. Loring took out Mr. Frue's stock in his own name. I shall claim that these reports show it, as sworn to by Mr. Loring.

Mr. WALKER. We object: first, that they are immaterial and irrelevand; 2d, that the facts contained in them cannot be shown by a certified copy.

(Objection overruled. Exception for defendant.)

Plaintiff's counsel offer in evidence reports of the directors of the Kearsarge Company for the years 1866 and 1867.

(The paper is marked Exhibit B 2, hereunto annexed, and is objected to upon the same ground as the last papers that were offered.)

The court overrules the objection, and defendant excepts to the ruling of the court.

Plaintiff rests.

Continuation of the testimony.

Mr. PALMER recalled for further examination by the plaintiff.

Q. Do you know where the account now presented you is from?

A. This account was from Mr. Loring.

Q. Rendered in this transaction?

A. Yes, sir.

Q. In whose handwriting is it?

A. A clerk of Mr. Loring.

(Paper introduced in evidence, and marked Exhibit B 2, hereto annexed.)

(Objected to as not properly proved and as immaterial and irrelevant.)

By Mr. WELLS. By whom was that account rendered in this transaction?

A. It was rendered by Mr. Loring by letter.

163 By Mr. WALKER. When and where was it rendered by Mr. Loring?

A. I think I received it at Pontiac, but I might have received it at Houghton.

Q. From whom?

A. From Mr. Loring.

Q. Mr. Loring personally?

A. By letter.

Q. Where is the letter that accompanied it?

A. That I don't know. I have not looked for it; I don't know where it is; I simply know that these accounts have been in my hands.

Q. Can you undertake to fix just the time you got that account, and how and from whom?

A. I simply know that I received it.

Q. That is all you know about it, is it not? That you found that account in your possession?

A. I know that I received the account from Mr. Loring by letter.

with the case because the court has no jurisdiction, and I understand that the parties mean by this that the non-suit having been entered many terms ago, it is not within the power of the court to set aside that non-suit. This question has been already disposed of by Judge Swayne, and it would not be very becoming in me, I think, to differ from him on this point; in fact, I do not know that I should differ from him were I to examine the question. I have not examined the question, but I now overrule the motion of the gentlemen.

I shall now proceed, as briefly as I can, to give the views which the court entertains of the law of the case. I shall not endeavor to detail to you the facts in a minute manner. It is the province of the jury to determine the facts, and not of the judge. If the judge should volunteer an opinion touching the facts, the jury would not be bound
167 to receive it. You may pay such attention to the opinion of the court touching the facts as you may think the opinion entitled to, but it is your sole province to determine the facts.

Now it appears by the uncontradicted testimony, that in the fall of 1866, the plaintiff and the defendant, alone or in connection with others, formed a design of organizing two companies for the purpose of conducting the business of mining. The land which the parties contemplated should be acquired and vested in the corporations, are situated in this State, near the southern shore of Lake Superior. In pursuance of this design, two corporations were afterwards organized, viz., the Kearsarge and the Ossipee. In these corporations, respectively, it was agreed that each party, that is, each promoter, should have stock in proportion to the amount of money contributed by him. It was contemplated that the corporations would be organized in Boston, in which city the defendant Loring then resided, and through his instrumentality or agency. It is not material to the design of the parties whether the two new corporations were organized, or whether the entire stock in old corporations was acquired. The material matter was that they should have two corporations, of which they would have the entire control. In point of fact, the two corporations, whose entire stock these promoters afterwards acquired, namely, Kearsarge and the Ossipee, were first organized by other parties. The nominal capital in each corporation was five hundred thousand dollars, divided into twenty thousand shares of twenty-five dollars each. The actual capital was much less, that of the Ossipee being one hundred and ten thousand dollars, and that of the Kearsarge ninety thousand dollars, making the cost of each share to the promoters, or those on the ground-floor, as they have been denominated in this case, in the one $4.50, and in the other $5.50.

Before the companies were organized, the promoters determined to sell stock on joint account, and in pursuance of this arrangement they did sell by the plaintiff Frue five thousand shares in the Kearsarge and two thousand in the Ossipee, realizing therefrom seventy-three thousand dollars. This sum was remitted to the defendant through Palmer, and it constitutes the basis of a portion of plaintiff's claim. He claims that this stock really belonged to himself and Palmer and the defendant Loring, and that his share in the proceeds is nine thousand two hundred and seventy-six dollars, for which the defendant must account and is liable in this action. There is no question, I believe, that if
168 this stock really belonged to these three parties, the true share of the plaintiff in the proceeds is the above-mentioned sum—$9,276—and I instruct you that if you believe that this stock belonged to these parties, that the proceeds came to the hands of Mr. Loring, and that he has not accounted therefor to the plaintiff, the plaintiff is

entitled to recover in this action said sum of $9,276; but if you believe that said stock belonged to the corporation, and that it was sold on account of the corporation, or that the proceeds were paid to Loring, as the financial agent of the corporation, to be expended for corporate purposes, then the plaintiff cannot recover any part of it in this action. If it was so paid and received, it was received for the use of the corporations, and not for the use of the plaintiff, and as this action is brought for moneys received by the defendant for the use of the plaintiff, it follows that the plaintiff cannot recover in this action. If it was so received by the defendant for the corporation, as their financial agent, the plaintiff, as a member of the corporations, may be interested in it, but he must look to the corporations, and not to the defendant personally. You are not to confound the defendant with the corporation. It seems to me a little strange that if the plaintiff considered himself as personally interested in this money, or rather that $9,276 of it was his, he did not retain it when it was in his hands, instead of sending it to Loring. He says he sent the money to Loring because he supposed he wanted funds, and he wished to keep him in funds. To keep him in funds for what? If, to be used in developing the mines or the corporate uses, then the plaintiff cannot recover in this case, but, if it was to be kept for the plaintiff, it may be recovered. It is proper for you to determine the question of fact here suggested, and, accordingly, as you find the fact your verdict will be against or for the plaintiff in this action. Now, if it was deposited there, I say, as the financial agent of the corporation, to be used for corporate purposes, the plaintiff cannot recover in this action. On the other hand, if it was placed there on the general account of the plaintiff, and to be used by the defendant Loring with the other funds placed there by the plaintiff, then the plaintiff may be entitled to recover, depending upon other facts which will hereafter be presented to your consideration. And even if you should think that the money was not paid to Loring as the financial agent of the corporation in the first instance, but as the financial agent of the very matters to be used by him in purchasing mining lands for the corporations, or exploring or developing the mines, and the remainder
169 of it to be turned over to corporations, or to be held by himself as the financial agent to be used for like purposes, and that it was so used and applied, the plaintiff cannot recover any portion of it in this action. I mean to say he cannot recover unless it was received by the defendant for the use of the plaintiff, and not for the general promotion of the scheme. It is not material that the money was credited to Frue; this was a matter of mere bookkeeping. When the stock was delivered to him to sell, he of course was charged with it, and when he sold it and paid over the proceeds he was credited, not merely by the amount of his interest, but he was credited the whole sum of $73,000. I suppose I am understood by the jury in this matter, but lest I may not be, I repeat that if this seventy-three thousand dollars was realized from stock which belonged to the corporations, was stock reserved to the corporations, and not transferred, or intended to be transferred, to the promoters, and the money realized therefrom went to the corporations, then the plaintiff cannot recover in this action; or if the money was realized in anticipation of the formation of corporations, and it went to the hands of Mr. Loring as the financial agent of those promoters, to be used by him in exploring the lands and in paying for the lands, or in developing the lands, and it was so used, the plaintiff cannot recover in this action. If, on the other hand, it was paid over to Mr. Loring, and the portion of it which belonged to Mr. Frue was

so deposited. As it was Frue's money, if it was placed to his credit with Loring, it does not lie in the mouth of the defendant to refuse to account for it; but I repeat, that if it was sent to Palmer to be invested by him, was placed to Palmer's credit, not to Frue's, and was invested by Palmer, the plaintiff has no cause of action therefor; or even if it was placed to Frue's credit, and a portion of it was applied by Palmer, or Palmer and Loring, to the purchase of stocks in Torch Lake other than Frue has received, the plaintiff cannot recover the amount so invested, even though Frue has not received the stock purchased for him in Torch Lake. If the investment was made with his consent, or he subsequently ratified it, if the evidence satisfies you that Loring promised the plaintiff personally, or through Palmer, to invest the money from him, and to transfer stock purchased for the plaintiff to him, and he has failed to make the transfer—I mean this: there is some testimony to the effect, that when the moneys were sent forward through Palmer to Loring to be invested in the lands, stocks, or whatever you may call them, connected with the Kearsarge or the Ossipee, that there was some agreement on the part of Loring to invest that money in these stocks and to transfer the stocks to Mr. Frue, and I have told you that if you find any such agreement whilst the money was in his hands, he cannot discharge himself from that obligation by simply in-
173 vesting the money in stocks, but must perform his whole contract. He must either deliver over to Mr. Frue the stocks or must account to him for the money.

But it is contended by the defendant that this agreement did not relate to the money which was forwarded to Palmer to be invested in Torch Lake, and that there is no evidence of any such agreement, and that in fact they insisted that this money was really invested by Mr. Palmer in something else—Torch Lake or something else—certainly to the extent of 5,600 shares of stock for Mr. Frue. Now, although that was the original destination of the money, and though it was originally intended to be invested by Mr. Palmer for Mr. Frue in Torch Lake, if you shall arrive at the conclusion that it was not so invested and that its destination was changed, that it was placed with Mr. Loring, and that it was mingled with the other funds of Mr. Frue to be used by Loring precisely as he was to use the other moneys which had been deposited with him, and that Loring came under the same obligation in respect to this money that he was under in respect to the other moneys; and if that obligation was to invest it in stocks and to transfer those stocks to Mr. Frue, and he has not done it, then he is liable for this money as well as for any other part of it; but if, on the other hand, he came under no such agreement in respect to this money at all; if he made no such agreement with Mr. Frue, then I do not see that in this action, or any other, perhaps, he would be liable. I do not say there would be no remedy whatever, however.

Perhaps right here, as well as anywhere else in the course of the charge, I shall admonish you that the term stocks may be very differently used by the uneducated from the sense in which it is used by the educated lawyer or the court. This witness may not have any definite idea of the meaning of the term as he employed it. The witnesses may not distinguish between the lands and other property which belonged to the corporation, and the stocks which belonged to the corporation. When a corporation is organized, as you perhaps know, whether it be for banking purposes or mining purposes, stock certificates are issued to the persons interested, generally in proportion to the amount of money that each pays in. Lands are all which are vested in the corporation,

and tools, implements, and all other articles which are necessary to carry on a particular business contemplated in the organization of the corporation. These are vested in the corporation, and the stockholders have no property or interest in them except through the corporation as
174 members of the corporation. So long as the corporation exists they have no control over their property except as they act through the corporation and through the directors and managers of the corporation. But these various witnesses have said that these moneys were forwarded for the purpose of purchasing stocks or lands; they sometimes use the one expression and sometimes the other; and if your attention was called to the testimony of Mr. Frue in relation to the sending forward of $73,000, you would find that instead of saying it was sent forward for the purpose of purchasing stocks, that they were sent forward for the purpose of keeping Mr. Loring in funds. If you were to advert to what he says in relation to the transaction of the $25,408 48, you would see that it was not that it should be invested in stocks in Torch Lake, but to be invested in lands. In other words, I mean to say, that he has not drawn that discrimination that commonly exists between the lands that belong to the corporation and the stocks. Counsel use these expressions with more discrimination, and they say that this money was forwarded to Mr. Loring to be invested in stocks, not in lands—I mean the counsel for the plaintiff. It is for you to determine whether that be so or not. If the money was sent to Mr. Loring, I repeat, to be invested in stocks of the corporation, and he was to procure the stocks and to cause them to be transmitted to Mr. Frue, that is one thing; on the other hand, if the moneys were sent to Mr. Loring as the financial agent of the corporation or the promoters, to be invested in lands thereafter to be conveyed to the corporation, or in developing the lands, that is another thing.

Again, the defendant insists that he never made a specific agreement. And now I wish to call your attention to this part of the charge particularly, because I think here is the turning point of this case, as the jury may consider the facts. He insists that he neither made a specific agreement to purchase stocks for the plaintiff, nor caused any stocks to be transferred to him. That the arrangement was substantially this, that articles of association were prepared for two mining companies; that neither of these companies had any mining location; that explorations were to be made, mining locations were to be contracted for; that the organizations of these enterprises were to be made by the plaintiff for Mr. Loring and perhaps others; that moneys were to be collected from the plaintiff and other promoters prior to the organization of the companies, and to be placed in the hands of Loring as the financial agent of the promoters, to be used by him in the exploration of
175 mining lands, in the purchase of the same, and in the development of mines; and that if lands should be purchased, they should be transferred to the corporation thereafter to be organized; that if any of the moneys remained unexpended, they should likewise be transferred to the corporations or to their treasurers; that it was contemplated that each of the promoters should receive from the corporation stock proportionate to the amount of money which he had advanced; that all the money received by the defendant, Loring, was used for the purposes contemplated; that he never came to any specific agreement with the plaintiff to purchase or transfer to him stocks in the corporations which were to be organized; that it was the understanding that the plaintiff with the other promoters as aforesaid would be entitled to stock from the corporation; or if the plaintiff had any reason to expect that the

so deposited. As it was Frue's money, if it was placed to his credit with Loring, it does not lie in the mouth of the defendant to refuse to account for it; but I repeat, that if it was sent to Palmer to be invested by him, was placed to Palmer's credit, not to Frue's, and was invested by Palmer, the plaintiff has no cause of action therefor; or even if it was placed to Frue's credit, and a portion of it was applied by Palmer, or Palmer and Loring, to the purchase of stocks in Torch Lake other than Frue has received, the plaintiff cannot recover the amount so invested, even though Frue has not received the stock purchased for him in Torch Lake. If the investment was made with his consent, or he subsequently ratified it, if the evidence satisfies you that Loring promised the plaintiff personally, or through Palmer, to invest the money from him, and to transfer stock purchased for the plaintiff to him, and he has failed to make the transfer—I mean this: there is some testimony to the effect, that when the moneys were sent forward through Palmer to Loring to be invested in the lands, stocks, or whatever you may call them, connected with the Kearsarge or the Ossipee, that there was some agreement on the part of Loring to invest that money in these stocks and to transfer the stocks to Mr. Frue, and I have told you that if you find any such agreement whilst the money was in his hands, he cannot discharge himself from that obligation by simply in-
173 vesting the money in stocks, but must perform his whole contract. He must either deliver over to Mr. Frue the stocks or must account to him for the money.

But it is contended by the defendant that this agreement did not relate to the money which was forwarded to Palmer to be invested in Torch Lake, and that there is no evidence of any such agreement, and that in fact they insisted that this money was really invested by Mr. Palmer in something else—Torch Lake or something else—certainly to the extent of 5,600 shares of stock for Mr. Frue. Now, although that was the original destination of the money, and though it was originally intended to be invested by Mr. Palmer for Mr. Frue in Torch Lake, if you shall arrive at the conclusion that it was not so invested and that its destination was changed, that it was placed with Mr. Loring, and that it was mingled with the other funds of Mr. Frue to be used by Loring precisely as he was to use the other moneys which had been deposited with him, and that Loring came under the same obligation in respect to this money that he was under in respect to the other moneys; and if that obligation was to invest it in stocks and to transfer those stocks to Mr. Frue, and he has not done it, then he is liable for this money as well as for any other part of it; but if, on the other hand, he came under no such agreement in respect to this money at all; if he made no such agreement with Mr. Frue, then I do not see that in this action, or any other, perhaps, he would be liable. I do not say there would be no remedy whatever, however.

Perhaps right here, as well as anywhere else in the course of the charge, I shall admonish you that the term stocks may be very differently used by the uneducated from the sense in which it is used by the educated lawyer or the court. This witness may not have any definite idea of the meaning of the term as he employed it. The witnesses may not distinguish between the lands and other property which belonged to the corporation, and the stocks which belonged to the corporation. When a corporation is organized, as you perhaps know, whether it be for banking purposes or mining purposes, stock certificates are issued to the persons interested, generally in proportion to the amount of money that each pays in. Lands are all which are vested in the corporation,

and tools, implements, and all other articles which are necessary to carry on a particular business contemplated in the organization of the corporation. These are vested in the corporation, and the stockholders have no property or interest in them except through the corporation as
174 members of the corporation. So long as the corporation exists they have no control over their property except as they act through the corporation and through the directors and managers of the corporation. But these various witnesses have said that these moneys were forwarded for the purpose of purchasing stocks or lands; they sometimes use the one expression and sometimes the other; and if your attention was called to the testimony of Mr. Frue in relation to the sending forward of $73,000, you would find that instead of saying it was sent forward for the purpose of purchasing stocks, that they were sent forward for the purpose of keeping Mr. Loring in funds. If you were to advert to what he says in relation to the transaction of the $25,408 48, you would see that it was not that it should be invested in stocks in Torch Lake, but to be invested in lands. In other words, I mean to say, that he has not drawn that discrimination that commonly exists between the lands that belong to the corporation and the stocks. Counsel use these expressions with more discrimination, and they say that this money was forwarded to Mr. Loring to be invested in stocks, not in lands—I mean the counsel for the plaintiff. It is for you to determine whether that be so or not. If the money was sent to Mr. Loring, I repeat, to be invested in stocks of the corporation, and he was to procure the stocks and to cause them to be transmitted to Mr. Frue, that is one thing; on the other hand, if the moneys were sent to Mr. Loring as the financial agent of the corporation or the promoters, to be invested in lands thereafter to be conveyed to the corporation, or in developing the lands, that is another thing.

Again, the defendant insists that he never made a specific agreement. And now I wish to call your attention to this part of the charge particularly, because I think here is the turning point of this case, as the jury may consider the facts. He insists that he neither made a specific agreement to purchase stocks for the plaintiff, nor caused any stocks to be transferred to him. That the arrangement was substantially this, that articles of association were prepared for two mining companies; that neither of these companies had any mining location; that explorations were to be made, mining locations were to be contracted for; that the organizations of these enterprises were to be made by the plaintiff for Mr. Loring and perhaps others; that moneys were to be collected from the plaintiff and other promoters prior to the organization of the companies, and to be placed in the hands of Loring as the financial agent of the promoters, to be used by him in the exploration of
175 mining lands, in the purchase of the same, and in the development of mines; and that if lands should be purchased, they should be transferred to the corporation thereafter to be organized; that if any of the moneys remained unexpended, they should likewise be transferred to the corporations or to their treasurers; that it was contemplated that each of the promoters should receive from the corporation stock proportionate to the amount of money which he had advanced; that all the money received by the defendant, Loring, was used for the purposes contemplated; that he never came to any specific agreement with the plaintiff to purchase or transfer to him stocks in the corporations which were to be organized; that it was the understanding that the plaintiff with the other promoters as aforesaid would be entitled to stock from the corporation; or if the plaintiff had any reason to expect that the

to said Frue to be remitted to the defendant to be applied on the stock thus allotted to him, plaintiff cannot recover in this action.

I think that is all embraced in what I have said as far as the court intends it to be embraced.

Mr. WALKER. Your honor submitted the question to the jury in that connection in your charge, as to whether that $2,000 was Frue's money or Noble's. I have to request your honor to say that there is no evidence that that $2,000 was Frue's money.

The COURT. I do not think it will be any error for me to submit it to the jury. I am inclined to think that there is some evidence on which the jury may draw the inference—that is, on Frue's testimony. The jury may doubtless conclude that it is Noble's; but there is some testimony from Frue to show that Noble in this capacity simply acted as his clerk in forwarding the money.

6. That upon the evidence in this action plaintiff is not entitled to recover for the $2,000. That I decline to give.

7. That I have already charged.

8. If the drafts remitted by said Frue to C. H. Palmer, on the 31st of December, 1866, under instructions to purchase the property mentioned in said Frue's letter of that date, and said Palmer without authority paid such drafts, or the proceeds thereof, over to the defendant, and subsequently drew out the same or any portion thereof from the defendant's hands, and applied it on the purchase of the property thus directed to be purchased, then the plaintiff cannot recover in this action. I think that is covered by what I have said. I decline to give it in any other form than that.

9. That upon the evidence in this case, plaintiff is not entitled to recover for any portion of the money sent by plaintiff to Palmer in letter of December 31st.

179 Mr. WALKER. Your honor has covered that fully.

The COURT. The two written requests are declined. I think they are covered by what I have already said.

Mr. WALKER. I have two other requests that I desire to present: If the jury believe the testimony of Mr. Palmer, that Mr. Frue furnished the money to purchase 5,600 shares of the Torch Lake property, and that the money was drawn from Loring, the defendant, then the costs of said shares is to be deducted from the money claimed of the plaintiff in this suit as against defendant, in addition to the other deductions admitted by the plaintiff.

Mr. LOTHROP. My friend states something which Mr. Palmer did not testify to.

The COURT. I will only say in respect to that matter, that if Mr. Palmer drew out the price of 5,600 shares and invested it in this stock for Mr. Frue, and the stock was issued to Mr. Frue, there would be an end of the matter, of course. If, however, this money was invested just as though the money was to be invested if Mr. Loring came under the same obligation in respect to this stock that it is alleged he came under in respect to the other stock, then I hold that the plaintiff has a right to recover.

Mr. WALKER. We claim that there is no evidence that it was held under any such agreement.

The COURT. But suppose the court thinks there is some to be submitted to the jury, what is your remedy? It cannot be in the way of an exception.

Mr. LOTHROP. The question is whether there is any evidence tending

to show, and if there is any evidence tending to show, it must go to the jury.

Mr. WALKER. Your honor has referred, in your very lucid and able charge, which on the whole is very clear and satisfactory, to the fact that you submit to the jury the question of whether it was upon the same agreement.

The COURT. It is immaterial whether the agreement was to invest it in stocks or not. A simple deposit of money with Loring to the credit of Frue would entitle the plaintiff to an accounting.

The first and second written requests are refused. The third written request is as follows: That there is no evidence in this case that at
180 the time the defendant received the money claimed in this case he made any agreement to deliver to the plaintiff any stock in said corporation.

I decline to give that to the jury, for two reasons. I do not wish to express any opinion as to what the evidence establishes. I simply mean to say that there is evidence upon the subject which the jury may consider; and I further mean to say that even though they should conclude that there was no agreement at the time the money was placed there, if there was such an agreement subsequently made while the money was in the hands of Loring, it is the same as if the agreement had been made when it was placed there.

I am asked to say to the jury that there is no evidence but what the defendant used the money put into his hands for the plaintiff for the very purpose for which it was forwarded. I decline to give that.

I am asked to charge that the statement filed with the secretary of state in the summer of 1867 has no tendency to prove that the defendant wrongfully took in his own name stocks to which the plaintiff was entitled. I think I will give that. I do not see how the books will show. They will only establish that a certain amount of stocks was issued to the defendant; they will not show that it was wrongfully done. It is a fact which the jury may consider in connection with all the other facts. It will show how much was issued to the defendant, how much was issued to the plaintiff, an d how much was issued to the other parties.

I said to you substantially, in relation to the money which was sent from Lake Superior to Mr. Loring, that if that money belonged to the parties at Lake Superior jointly, if it was to be invested in stock for their joint use, then the plaintiff in this action cannot recover any part of it. If, however, it was Mr. Frue's money, although derived, a portion of it, from these parties, and the stock was to be taken out by him, and he was to transfer the stock, or a portion of it, to other parties, that would constitute no obstacle to a recovery. I also said that though all the money (sent from Lake Superior) did not belong to Mr. Frue, if any portion of it belonged to him separately from the rest, he is entitled to recover to the extent of that portion, provided of course that the jury can ascertain what that portion is. If you cannot ascertain what that portion is, of course you can give no verdict in his favor in that respect.

181 The defendant excepts to the refusal of the court to charge the jury as requested by him in the charges A and B; also in the original charges 1, 2, 2¼, 2½, 3, 6, 9, 10, and the additional charges 11, 12, and 13 as requested; also, to the charge of the court upon the subject of jurisdiction; to the charge of the court that under certain contingencies plaintiff could recover for the portion of the $73,000 sent

forward as proceeds of sales of stock; to so much of the charge as relates to the effect of Loring crediting the $2,000 sent forward November 8th to Frue; as to the effect of the credit by Loring to Frue of the remittance of December 31st, 1866, of the $25,000; as to the charge of the court which requires in a certain contingency that Frue should have received the Torch Lake stock to discharge the defendant upon his liability; to the charge of the court which permits the jury to find that there was an agreement made by Loring with Frue as to the disposition of $25,000.

The following were the defendant's requests to charge:

1. That no verdict can be rendered for the plaintiff in this case, for the reason that the court have no jurisdiction to try the same, the order setting aside the non-suit granted therein being without authority of law.

2. If the jury find that the plaintiff and the defendant, together with other persons, were jointly interested in the organization of certain mining corporations under the laws of this State;

And that the plaintiff, by an arrangement between all the original proprietors of said corporations, had allotted to him a certain number of shares of stock therein upon the payment into the treasury of said company of the actual cost thereof;

And that plaintiff remitted to the defendant money for the purpose of paying into the treasury of said corporation the actual cost of the shares thus allotted to him, and which the defendant actually paid for that purpose;

Then the plaintiff cannot recover in this action for the money thus remitted to the defendant and thus applied.

2¼. There is no evidence in this case that at the time defendant received from the plaintiff the money claimed in this case, he made any agreement to deliver to the plaintiff any of the stock in such corporations.

182 2½. There is no evidence but what the defendant used the money put into his hands from plaintiff for the very purpose for which it was forwarded.

3. That if, in the anticipation of the actual organization of such corporations, money was sent from time to time by the plaintiff to the defendant to pay for the stock thus to be taken by the plaintiff in said corporations; and it was understood between them that the defendant was to take said stock and hold it in trust for the plaintiff until the same was fully paid, and the plaintiff actually paid into the treasury of said corporations the money thus sent to him, the plaintiff cannot recover in this form of action for the money thus sent and paid, although he may not have received the stock.

4. If certain stock in said corporations was allotted to William R. Noble, as one of the original proprietors, by mutual arrangement between the parties, and said Noble sent money through C. H. Palmer to the defendant to be applied to the payment of shares thus allotted to him, the plaintiff cannot recover in this action for the money thus remitted by said Noble.

5. That if certain stock in said corporation was allotted to said Noble by an arrangement between the original proprietors thereto, and he paid money over to said Frue to be remitted to the defendant, to be applied upon the stock thus allotted to said Noble, the plaintiff cannot recover for the money remitted, in this action.

6. That upon the evidence in this case the plaintiff is not entitled to recover in this action for the two thousand dollars sent by Noble on the eighth of November, 1866, and paid to the defendant by Mr. Palmer.

7. If, by an arrangement between the original proprietors or stockholders of said corporation, certain shares thereof were allotted jointly to the plaintiff, to said Noble, and to David Hodgson and J. C. Hodgson, upon their paying therefor into the treasury of said corporation the cost of said stock as aforesaid, and the said Frue remitted the money to pay for said stock for himself, the said Noble, and the said Hodgsons, to the defendant, then the plaintiff cannot recover for such moneys sent for all said joint parties, in this action.

8. If said shares were allotted to said Frue, said Noble, and said Hodgsons, and the said Noble and the said Hodgsons paid money into Frue's hands to be sent forward to be applied in the payment of said stock, and Frue sent said money to the defendant for that
183 purpose, then the plaintiff cannot recover in this action for the money thus paid to said Frue and thus remitted, even though defendant has never accounted therefor.

8½. And this would be so whether allotment was several to each or jointly to all.

9. If the drafts remitted by said Frue to C. H. Palmer, on the 31st of December, 1866, under instructions to purchase the property mentioned in said Frue's letter of that date, and said Palmer, without authority, paid said drafts or the proceeds thereof over to said defendant, and subsequently drew out the same, or any portion thereof, from the defendant's hands, and applied it upon the purchase of the property thus directed to be purchased, or a part thereof, then the plaintiff cannot recover in this action for said money so forwarded and paid out.

10. That upon the evidence in this case the plaintiff is not entitled to recover for any portion of the money sent by the plaintiff to Palmer in said letter of December thirty-first.

11. If the jury believe the testimony of Mr. Palmer, that Mr. Frue furnished the money to purchase 5,600 shares of the Torch Lake property, and that that money was drawn from Mr. Loring, the defendant, then the cost of said shares is to be deducted from the money claimed by the plaintiff in this suit as against the defendant, in addition to the other deductions admitted by the plaintiff.

12. There is no evidence that $2,000 remitted by Noble to Palmer, on the eighth of November, belonged to Frue.

13. No evidence of any agreement of Loring to hold the $25,000 for Frue upon general account, or in the same way in which the other moneys were sent for the Kearsarge, Ossipee, and Iroquois.

14. If the jury find that it was agreed between the original proprietors or stockholders of said corporation that two thousand shares of the stock of said corporation, costing five dollars and fifty cents each, should be sold upon the joint account of said proprietors at an advance upon the cost thereof, each stockholder contributing his proportion of stock sold, and said Frue actually sold the same and received the money therefor and remitted the proceeds of such sale to the defendant, then the plaintiff cannot recover from the defendant such moneys, or any portion thereof, in this action, they having been paid and received on joint account of the plaintiff, the defendant, and other parties.

184 REQUEST A. All the facts in regard to the purpose of the transmission of the money by the plaintiff to the defendant, through Palmer, rest on the testimony of Palmer and the plaintiff, and there is no testimony on the part of the defendant on the subject. The

facts are therefore not in controversy, so far as this point is concerned. This undisputed testimony shows that articles of association were prepared for two mining companies; that neither of these companies had any mining location; that explorations were to be had, and mining locations were to be contracted for, and that it was designed by plaintiff, defendant, and the witness Palmer (with other promoters of the two corporations) that the money transmitted by plaintiff should be applied by defendant for corporate purposes, including payment for the explorations and the mining locations upon which the corporations were to be set up and in order that they might be set up. It was also designed by plaintiff that the defendant should procure stock in these two corporations, to be issued to plaintiff after said corporations should have been set up on these lands, the cost price of which stock should be equal to the sum of money transmitted.

The defendant did apply the transmitted money for corporate purposes, including payment for the explorations, etc., and mining locations, and the latter were deeded to the two corporations, and the defendant thereafter procured the issue of the agreed amount of stock, and a portion was delivered to and accepted by the plaintiff; but defendant departed from his instructions in this, that another portion of the stock was issued to himself, as trustee, and not to the plaintiff; and there is no evidence that defendant has converted this stock into money. It was not possible, and therefore it was not the intention of the parties that the money transmitted should be exchanged directly for the stocks (by way of purchase), because the companies were not in existence when the money was transmitted.

I therefore instruct the jury that the money was applied as agreed; that the plaintiff's acceptance of part of the stock was a ratification of the application of the money, and that the money transmitted cannot be recovered back in this form of action, the remedy of the plaintiffs being by an action for compensation in damages to the value of the stock.

REQUEST B. It is the province of the court to construe the contracts of parties verbal as well as written. No dispute exists here as to the facts and circumstances raising the contract sued on. No contract can be inferred from the uncontradicted facts which will justify a recovery in this form of action.

185 The said issue was thereupon submitted to the jury, and they then and there found a verdict for said plaintiff and assessed his damages at the sum of sixty-seven thousand four hundred and eighty-two dollars and thirty-four cents ($67,482.34).

And because none of the exceptions so offered and made, to the opinion and decision of the said circuit judge, do appear upon the record of said trial, therefore, at the request of said defendant, by his said counsel, the said circuit judge hath signed this bill of exceptions, according to the statute in such case made and provided, this 26th day of December, A. D. 1877.

BLAND BALLARD. [L. S.]

186 EXHIBIT 1.

ADAMS MINING COMPANY,
Houghton, Mich., Dec. 31st, 1866.

CHAS. H. PALMER, Esqr.,

DEAR SIR: Enclosed please find the following drafts on account of purchase land, to be applied on purchase of lands in sect's 24 & Penn.,

as I understand it; the purchase in 26 will be paid out of the treasury of Ossipee:

Franklin	draft,	No. 4451	2,000 00
Do.	"	No. 4378	1,025 00
Adams	"	No. 59	875 00
South Pewabic	"	No. 14	150 00
Do.	"	No. 15	2,500 00
Do.	"	No. 16	1,000 00
Grand Portage	"	No. 1852	600 00
1st Nat. Bank Houghton,		No. 2770, on Cent. Nat. Bank, N. Y.	3,500 00
Wm. B. Frue on		R. H. Rickard, Dec'r 31, '66	6,000 00
Do. "		A. H. Libby, " Delivered to C. H. P.	6,901 48
Wm. R. Noble "		R. H. Rickard "	600 00
Conrad Kalb "		do. " 1, '66	250 00
Making			$25,401 48

Twenty-five thousand four hundred one & $\frac{48}{100}$ dollars. In addition to this there will be $2,700 deposited with E. T. Loring by Henry Crocker for 300 sh's Adams, providing he takes it, on dispatch sent to-day, in answer to his letter. As soon as the certificates for amount sold in Kearsarge and Ossipee are received here we will settle up these two concerns and forward the remainder of the money, with enough to cover our first investment and also the 2.00 per share for the treasury.

187 In case it is absolutely necessary to raise more money forthwith to go into our purchase, you can take my Central and place it as collateral and raise money on it, but believing some of the purchases will be on time this may not be necessary; still, if it is, you have the instructions.

In regard to the Rhode Island engine, I do not know what to say, as I infer from your letter that it is not the intention to push mining to any extent this winter. If this is so I think we had better not take this engine at the price, as we will have time enough to get one early in the spring. At the saw mill they have about 30,000 feet logs on hand. I think it would be well to purchase these at a fair price, also getting the right to use the mill to cut them into lumber. The logs has been out some time with the bark on, consequently they are considerably worm eaten, and I think $6.00 (six dollars) a thousand would be a fair price for them. These we could have sawed out and hauled during the winter so as to have lumber on hand next summer. There is nothing new from our explorations, in fact, everything has been dead the past eight days. Work will be again resumed on Wednesday. The show at South Pewabic and Adams still continues good. Considerable copper now again showing in the Transverse. Hoping you will be successful in the purchase of Penn. & 24, and wishing you *you* a happy new year.

I remain, yours resp'ly,

WM. B. FRUE.

P. S.—Sibley's draft you will please present yourself. I have written him to that effect.

188 EXHIBIT 2.

1866.		
Nov.	8	2,000
"	10	10,970
"	14	19,960 40

Nov.	16	4,988 39
"	22	2,675 00 & 5c.
Dec.	31	25,401 48
1867.		
Feb'y	4	14,480 94
"	13	11,544
"	23, 4450	5,940 93
March	22	13,438 66
"	30	2,900
		114,299 80 & 5c.

189 EXHIBIT 3.

HOUGHTON, *Mich.*, *Nov. 8th*, 1866.

CHAS. H. PALMER, Esq.:

DEAR SIR: Enclosed find draft on R. H. Rickard, New York, for two thousand dollars, for my one thousand dollar interest in section 26, and my one thousand dollar interest in 6.

Yours, resp'ly,

WM. R. NOBLE.

190 EXHIBIT 4.

ADAMS MINING COMPANY,
Houghton, Mich., Nov. 10th, 1866.

CHAS. H. PALMER, Esq.:

DEAR SIR: Enclosed find the following drafts on account of stock:

Isle Royale, $5,525, @ 1 %, favor Alex. Pope, cl'k, for				$500
1st Nat'l Bank, Houghton, on Imp. & Traders' Nat. Bank, New York, No. 489				$8,190 00
Shelden & Columbian,	No. 225, at c't for	Graham Pope, cl'k,	Ton. "	$650 00
Do. "	No. 226, " " "	W. R. Noble,	"	$1,000 00
Quincy,	No. 3481, " " "	Thomas Pearce,	"	$300 00
Franklin,	No. 4364, " " "	Thomas Kinney,	"	$170 00
Do.	No. 4361, " " "	Frank Kent,	"	$160 00
Making, Dec. 10				$10,970 00

The balance of 50 % on the stock subscribed for will go forward next week, there being some I have not yet received.

Yours, resp'ly,

WM. R. NOBLE.

191 EXHIBIT 5.

HOUGHTON, *Nov. 14th*, 1866.

CHAS. H. PALMER, Esq.,
Boston, Mass.:

DEAR SIR: Enclosed find the following drafts on ⅜ of stock:

Franklin,	No. 4379, @	s't, fav. Enoch Roberts	$130 00
"	No. 4367, @	" " W. R. Noble	300 00
"	No. 4369, @	" " George Palmer	125 00
"	No. 4368, @	" " W. Moon	200 00
Huron,	No. 605, @ 10	s't " W. L. Hulbert, cl'k	100 00
Pewabic,	No. 1641, @	s't " John C. Hodgson	150 00
"	No. 1642, @	" " Richard Paull	200 00
Shelden & Col'n,	No. 230, @	" " W. R. Noble	400 00
Quincy,	No. 3483, @	" " Phil. Schererman	500 00
"	No. 3489, @	" " John Morrison	300 00

Quincy,	No. 3486, @ "	" Wm. Arthur	400 00
1st Nat. Bank, Houghton, on Cent. Nat. Bank, New York, No. 2615, your fav			17,155 40
Making			$19,960 40

Yours, resp'ly,

WM. R. NOBLE.

192 EXHIBIT 6.

CHAS. H. PALMER, Esq.:

DEAR SIR: Enclosed find the following drafts on account of stock:

1st Nat. Bank, Houghton, on Imp't & Traders' B'k, N. Y., No. 526, for			$3,488 39
Smelting Works, No. 2010, fav. Saundy, cl'k, Stern, Gov. Cushman			900 00
Pewabic,	No. 1609, "	Chas. Smith	100 00
Franklin,	No. 2374, "	Wm. Wagner	200 00
Quincy,	No. 3487, "	John Cliff	200 00
Isle Royale,	No. 5528, "	A. Pope, cl'k	100 00
Making			$4,988 39

Yours, resp'ly,

WM. R. NOBLE.

193 EXHIBIT 7.

ADAMS MINING COMPANY,
Houghton, Mich., Nov. 22d, 1866.

CHAS. H. PALMER, Esq.:

DEAR SIR: Enclosed find the following drafts on ⅜ stock:

First Nat. Bank, Grem Baym, 5th Nat. Bank, Chicago, No. 11428, fav. Jno. Williams			500 00
H. Lewis on E. T. Lomey, No. 1, fav. yourself			1,250 00
Frunt Chir. M'g.Co., No. 4370, fav. W. R. Noble, cl'k			375 00
Minnesota "	No. 2405, "	Welland & Co	500 00
Huron "	No. 4211, "	W. S. Hurlburt, cl'k	50 00
Making, Dec. 17			$2,675 00

Yours, re'p'ly,

WM. R. NOBLE.

194 EXHIBIT 8.

SOUTH PEWABIC ROLLING MILLS,
Houghton, Mich., Feb'y 4th, 1867.

CHAS. H. PALMER:

DEAR SIR: Enclosed find the following drafts on ⅜ stock sales Wm. B. Frue:

1st Nat'l Bank of Houghton, No. 2858, on Central Nat'l Bank, N. York, at sight for		$4,000 00
Appleton Nat'l Bank, No. 2132, on Nat'l Park Bank, N. York, at sight, for		"1,719 07
Asher F. Leopold, on Leopold and Austrian, Chicago, Jan'y 29, '67, at sight, for		329 16
W'm R. Noble, on R. H. Rickard, N. York, Feb'y 21, '67, at sight for		" 809 43
Do. " E. T. Loring, Boston, " " " " "		" 111 74
Isle Royale M'g Co., No. 5582, @ 1 ⅜	1 ⅜ "	" 426 75
South Pewabic Copper Co. No. 32	at s't "	" 233 30
Adams M'g Co., No. 71,	" " "	" 138 28
Pewabic " " No. 1702,	" " "	" 200 00
Do. " " No. 1705,	" " "	" 170 00
Quincy " " No. 3509,	" " "	" 100 00
Franklin " " No. 712, $100; No. 713, $100; No. 580, $50; No. 582, $50, at sight, for		" 300 00
Franklin M'g Co., No. 4486, 10 a. s., for		" 375 00
Shelden and Columbian Copper Co., No. 245, $209.30; No. 263, $487.50; No. 267, $1,550.00, at st., for		"2,246 80

Grand Portage Copper Co, No. 1887, $92.60; No. 1884, $153.72, 5 d. s., for	$246 32
Do. " " No. 1882, at 1 d. s., for	" 148 24
Do. " " No. 1886, " s't, for	"2,926 84
Making March 5th	$14,480 94

Yours, resp'ly,

WM. R. NOBLE.

195 EXHIBIT 9.

ADAMS MINING COMPANY,
Houghton, Mich., Feb'y 13th, 1867.

CHAS. H. PALMER, Esq.:

DEAR SIR: Enclosed find the following drafts on ¾ sales of stock:

Smelting works, No. 1763, @ s't,	for	$172 87
Do. No. 1747, @ "	"	150 00
Do. No. 1748, @ "	"	200 00
John Duncan, Feb'y 7th, on Joseph E. Gay & Co., New York,	"	680 00
John Matthews, Negaunee, No. 415, fav. Barney Farran, on 9th Nat'l Bank, N. York, for		100 00
1st Nat'l Bank of Houghton on Cent. Nat'l Bank N. York, No. 2878, for		8,000 00
Pewabic M'g Co., No. 1747, at 5 d. s.,	"	200 00
Shelden & Columbian, No. 269, at s't,	"	401 21
Hancock M'g Co., No 2868, at 90 d. s.	$20 00	
Pewabic " " No. 4591, " " 5.00; No. 8988, do. 10.00	15 00	
Franklin " " No. 4518, 427.94; No. 793, 50.00; No. 979, 100.00; No. 968, 100.00; No. 970, 100.00	777 94	
Calumet M'g Co., No. 766, 5.00; No. 602, 5.00	10 00	
Quincy " " No. 2878, 5.00; No. 5535, 20.00	25 00	
Hecla " " No. 10, No. 27, No. 146, No. 5, No. 157, No. 77, for $20 ea.—$120.00; No. 2, No. 39, for $5 ea.—10.00; No. 42, No. 162, for $10.00—20.00	150 00 *	
Huron M'g Co., No. 6018, No. 5950, No. 6024, No. 6026, No. 5886, No. 5967. No. 5912, No. 5892, for $20 ea	160 00	
Huron M'g Co., No. 522, No. 479, No. 414, No. 327, No. 456, No. 398, No. 561, for $5 ea	35 00	
Huron M'g Co., No. 7850, No. 7923, No. 7892, No. 8099, No. 8030, No. 7696, No. 7964. No. 7695, for $10 ea	80 00	
Huron M'g Co., No. 4602, fav. Northrup & Butler	366 88	
		1,639 92
Making		$11,544 00

Yours, resp'ly,

WM. R. NOBLE.

196 EXHIBIT 10.

ADAMS MINING COMPANY,
Houghton, Mich., Feb'y 23td, 1867.

CHAS. H. PALMER, Esq.:

DEAR SIR: Enclosed find following drafts on ¾ stock:

Grand Portage, No. 1897, @ 10 d's, for	4,000 00
Do. No. 1894, @ 5 d's, "	450 00
Adams, No. 75, @ s't "	725 00
Do. No. 74, @ " "	190 93
J. A. Hubbell on C. D. Head & T. H. Perkins, Feb'y 15th, at s't	575 00
Making March 10th	$5,940 93

Yours, resp'ly,

WM. R. NOBLE.

197 EXHIBIT 11.

ADAMS MINING COMPANY,
Houghton, Mich., March 22nd, 1867.

CHAS. H. PALMER, Esq.:

DEAR SIR: Enclosed find the following drafts on ¾ stock, &c.:

Kearsage, No. 1, @ s't, fav. Wm. B. Frue	$4,641 98
Ossipee, No. 1, @ " " "	3,796 68

* These are 90 d's' drafts, which I have collected 100 days' interest on, and will be accounted in final settlement.

Adams, No. 88, @ s't, fav. Wm. B. Frue	500 00
South Pewabic, No. 63, @ s't for Wm. B. Frue	500 00
1st Nat'l Bank, Houghton, No. 1033, Imp. & Traders B'k, N. Y	1,500 00
South Pewabic, No. 621, fav. Wm. R. Noble, treas. G. T. R. R. Co	1,250 00
Adams, No. 87, " " " " " "	1,250 00
Making April 5th	$13,438 66

Yours, resp'ly,

WM. R. NOBLE.

Enclosed is list of Kearsarge & Ossipee stockholders.

198 EXHIBIT 12.

SOUTH PEWABIC COPPER COMPANY,
Houghton, Mich., March 30th, 1867.

CHAS. H. PALMER, Esq.:

DEAR SIR: Enclosed find following drafts on ⅔ stock purchases, &c.:

John Senter, at s't, fav. myself, on Duncan, Sherman & Co., New York, for	1,400 00
Wm. B. Frue, No. 2, on R. H. Rickard, fav	1,500 00
Making April 18	2,900 00

Yours, resp'ly,

WM. R. NOBLE.

199 EXHIBIT 13.

(5 notes.)

No. 5.

$3,200] NEW YORK, *Feb'y 14th*, 1867.

Pay to the order of A. H. Sibley thirty-two hundred dollars, value received, and charge the same to account of

CHAS. H. PALMER.

To E. T. LORING, Esq.,
11 *Change Avenue, Boston.*

[2 cent stamp.]

(Indorsed:)

Pay American Exchange National Bank, or order.

A. H. SIBLEY.

Pay Nat'l Webster Bank, Boston, or order.

T. H. VULTEE, *Cash.*

Paid C. S. Brown for Nat'l Webster Bank.

No. 6.

$5,000.] NEW YORK, *February 27th*, 1867.

At sight (without grace), pay to the order of A. H. Sibley five thousand dollars, value received, and charge the same to account of

CHAS. H. PALMER.

To E. T. LORING, Esq.,
11 *Change Avenue, Boston.*

[2 cent stamp.]

(Indorsed:)

Pay American Exchange National Bank, or order.

A. H. SIBLEY.

Pay Nat'l Webster Bank, Boston, or order.

T. H. VULTEE, *Cash.*

Paid C. S. Brown for Nat'l Webster Bank.

No. 7.

$6,250.] NEW YORK, *Feb'y 28th*, 1867.

Pay to the order of A. H. Sibley six thousand two hundred and fifty dollars, value received, and charge the same to account of

CHAS. H. PALMER.

To E. T. LORING, Esq.,
11 *Change Avenue, Boston.*

[2 cent stamp.]

(Indorsed:)
Pay Am. Ex. National Bank, or order.

A. H. SIBLEY.

Pay Nat'l Webster Bank, Boston, or order.

F. H. VULTEE, *Cash.*

Paid C. S. Brown for Nat'l Webster Bank.

No. 8.

No. 21.

$4,500.00.] NEW YORK, *April 11th*, 1869.

At sight, pay to the order of A. H. Sibley four thousand five hundred dollars, value received, and charge the same to account of

CHAS. H. PALMER [Erased in the original].

To E. T. LORING, Esq.,
No. 11 *Change Avenue, Boston, Mass.*

[2 cent stamp.]

Across the face: April 12. E. T. Loring.

(Indorsed:)
Pay to Am'n Exchange National Bank, or order.

A. H. SIBLEY,
By E. J. SIBLEY, *Att'y.*

Pay Nat'l Webster Bank, Boston, or order.

F. H. VULTEE, *Cash.*

(Stamp:) Paid Webster Bank, Boston.

No. 9.

No. 22.

$300.00] NEW YORK, *April 19th*, 1867.

At sight, pay to the order of A. H. Sibley three hundred dollars, value received, and charge the same to account of

CHARLES H. PALMER.

To E. T. LORING, Esq.,
No. 11 *Change Avenue, Boston, Mass.*

[2 cent stamp.]

(Indorsed:)
Pay to American Exchange National Bank, or order.

A. H. SIBLEY,
By E. J. SIBLEY, *Att'y.*

Pay National Bank of Commerce, Boston, or order.

T. S. VULTEE, *Cash.*
E. S. HUNT, *Prest.*

1867.		
Feb'y 14	$3,200	
" 27	5,000	
" 28	6,250	
April 11	4,500	
" 19	300	
	19,250	
Lands adjoining Torch Lake	6,356	21
	25,606	21

200 EXHIBIT A 1.

Wm. B. Frue in a/c with Chas. H. Palmer.

To 5,000 sh's Kearsage, sold @ $10	50,000	
" 2,211 " W. B. F. & etc., @ 2.66⅔	5,896	
" 939 " " " @ 1.16⅔	1,095	50
" 2,000 " Ossipee, sold @ 11.50	23,000	
" 501 " W. B. F. & etc., @ 4.83⅓	2,421	50
" 4,750 " " " @ 3.33⅓	15,833	33
" 3,000 " in sec. 35 & 36, @ 1.25	3,750	
" 2,600 " Torch Lake M'n'g Co., @ 1.50	3,900	
" 4,200 " Iroquois installment of 50 c. per sh	2,100	

CREDIT.

1866.		
November 8. By sundry drafts	3,060	
" 14. " " "	19,960	40
" 16. " " "	4,988	39
" 17. " " "	10,970	
December 10. " " "	2,675	
1867.		
January 20. " " "	18,500	
February 4. " " "	14,480	94
" 13. " " "	9,954	08
" 23. " " "	1,496	93
" " " " "	4,450	
April 1. " draft on N. Y	1,500	
" " " " " Ossipee M'n'g Co	4,641	28
" " " " " So. Pewabic "	500	
" " " " " Adams "	500	
" " " " " Kearsage "	3,796	68
" " " " " So. Pewabic "	1,250	
" " " " " Adams "	1,250	
" 13. " cash am't draft, favor of W. B. F.	2,900	
September 1. " sale of Adams' stock 3,982.70, int. 110.02; rec'd in a/c d"ft on A. H. Sibley for 6,901.48	4,092	72
201 June 27. By d'f't on Hecla M'g Co	150	
" " " Hancock "	20	
" " " Huron "	641	98
" " " Franklin "	777	94

These items do not appear in a/c current between C. H. P. & E. T. L., the former having used the funds in N. Y.

202 EXHIBIT A 2.

SOUTH PEWABIC COPPER COMPANY,
TREASURER'S OFFICE, NO. 11 CHANGE AVENUE,
Boston, Dec. 10th, 1866.

A. H. SIBLEY, Esq.,
New York:

DEAR SIR: Your favor of the 8th is at hand this morning with copy of an agreement with C. C Douglass, & by advice of associates I replied by telegraph as follows: "Accept; will send funds by mail. Deed to me in trust." The funds will go through the hands of Mr. Palmer. I have no doubt in this purchase you have done the very best you could, & I hope it will prove a fortunate one. Still I must say, to be frank about the matter, I am disappointed that you could not secure D. & S. entire interest in sec. 26. They are very hard customers to deal with; therefore I have not much hopes of your being able to do anything with them for the other tracts to which you refer. Still would like for you to be on the lookout for them, as they will be very valuable to us as wood lands if nothing more. I notice your remarks on granting some little
203 time for payments on your interest in Kearsarge & Co. So far as I can individually control the matter you can depend on the accommodation, & no doubt my associates will acceed' to it.

Yours, truly,

ELISHA T. LORING.

Ex. A 2.

204 EXHIBIT A 2.

BOSTON, *Dec. Xth.*

A. H. SIBLEY,
Twenty-two, Pine St., N. Y.:

Accept. Will send funds. Deed made to me in trust.

E. T. LORING.

205 EXHIBIT A[7].

Articles of agreement & association of the Ossipee Mining Company.

Organized under and by virtue of an act passed by the legislature of Michigan entitled "An act to authorize the formation of corporations for mining, smelting, or manufacturing iron, copper, mineral coal, silver or other ores and minerals, and for manufacturing purposes," approved February 5th, 1853, and an act supplementary thereto approved February 6th, 1855, and other acts supplementary thereto or amendatory thereof.

Be it known unto all men that James A. Dupee, Joseph W. Clark, and Horatio Bigelow, of the city of Boston and commonwealth of Massachusetts, do hereby associate ourselves together for the formation of of a body corporate and politic under the provisions of the acts of the legislature of the State of Michigan above cited and referred to, and do hereby adopt, declare, and establish these presents as the articles of agreement & association of said company or corporation, which shall be known by the name of the Ossipee Mining Company.

206 ARTICLE 1. The said company is formed for the object and

purpose of engaging in the mining of copper, iron, silver, and other minerals and ores, and for acquiring, holding, selling, and conveying all property, real and personal, necessary or convenient for carrying on the same and for the doing all acts and the exercise of all the powers necessary, usual or incidental to the conducting of the said business of mining or any part thereof not contrary to the laws of the State of Michigan.

ARTICLE 2. The capital of said company shall be five hundred thousand dollars, divided into twenty thousand shares of stock, each share of which shall be, when fully paid in, twenty-five dollars.

ARTICLE 3. There has been paid in upon the capital stock of said company the sum of one hundred thousand dollars, invested in lands at that valuation.

ARTICLE 4. The names of the stockholders, their respective residences, and the number of shares held by each are as follows, viz:

	James A. Dupee, Boston	5,000 shares.
	Joseph W. Clark, Boston	5,000 "
207	Horatio Bigelow, Boston	10,000 shares.
		20,000 "

Making in all twenty thousand shares.

ARTICLE 5. There shall be two offices for the transaction of the business of said company, one of which shall be located at the mine, in the county of Houghton and State of Michigan, and one in the city of Boston, in the county of Suffolk and State of Massachusetts, where the meetings of the stockholders and directors of said company shall be held.

ARTICLE 6. This corporation shall continue for the period of thirty years.

In witness whereof we have hereunto set our hands and seals this day of , in the year of our Lord, one thousand eight hundred and sixty-six.

JAS. A. DUPEE.
J. W. CLARK.
HORATIO BIGELOW.

In presence of—the word "Keweenaw" being erased, & the words "Houghton" & in the 11th line the word "Company" interlined before signing—

A. S. BIGELOW.

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

208 Be it remembered that on this fifteenth day of October, in the year one thousand eight hundred and sixty-six, before me, Sam'l S. Curtis, a commissioner in and for the said commonwealth of Massachusetts, appointed by the governor of the State of Michigan, to take the acknowledgment and proof of the execution of deeds and instruments of writing under seal, to be used and recorded in the said State of Michigan, and to administer oaths and affirmations, appeared James A. Dupee, Joseph W. Clark, and Horatio Bigelow, and severally acknowledged that they executed the within & foregoing instrument for the uses and purposes therein mentioned; and I further certify that the persons who made the said acknowledgments are known to be the individuals described in, and who executed the said instrument.

In testimony whereof I have hereunto set my hand and official seal, at the city of Boston, in the county and commonwealth aforesaid, the day and year first above written.

[L. S.] SAM'L S. CURTIS,
Commissioner of the State of Michigan.

[U. S. rev. stamp, 5 c't, cancelled.]

209 EXHIBIT A[8].

Articles of agreement & association of the Kearsarge Mining Company.

Organized under and by virtue of an act passed by the legislature of Michigan, entitled "An act to authorize the formation of corporations for mining, smelting or manufacturing iron, copper, mineral coal, silver, or other ores and minerals, and for manufacturing purposes," approved February 5th, 1853, and an act supplementary thereto approved February 6th, 1855, and other acts supplementary thereto or amendatory thereof.

Be it known unto all men that James A. Dupee, Joseph W. Clark, and Horatio Bigelow, of the city of Boston and commonwealth of Massachusetts, do hereby associate ourselves together for the formation of a body corporate and politic, under the provisions of the acts of the legislature of the State of Michigan above cited and referred to, and do hereby adopt, declare, and establish these presents as the articles of agreement and association of said company or corporation, which shall be known by the name of the Kearsarge Mining Company.

ARTICLE 1. The said company is formed for the object and purpose of engaging in the mining of copper, iron, silver and other minerals and ores, and for acquiring, holding, selling, and conveying all prop-
210 erty, real & personal, necessary or convenient for carrying on the same and for the doing all acts and the exercise of all the powers necessary, usual or incidental to the conducting of the said business of mining or any part thereof not contrary to the laws of the State of Michigan.

ARTICLE 2. The capital of said company shall be five hundred thousand dollars divided into twenty thousand shares of stock, each share shall be, when fully paid in, twenty-five dollars.

ARTICLE 3. There has been paid in upon the capital stock of said company the sum of one hundred thousand dollars, invested in lands at that valuation.

ARTICLE 4. The names of the stockholders, their respective residences, and the number of shares held by each are as follows, viz:

James A. Dupee, Boston	5,000	shares
Joseph W. Clark, "	5,000	"
Horatio Bigelow, "	10,000	"
	20,000	"

Making in all twenty thousand shares.

211 ARTICLE 5. There shall be two offices for the transaction of the business of said company, one of which shall be located in the village of Houghton, in the county of Houghton and State of Michigan, and one in the city of Boston, in the county of Suffolk and State of Massachusetts, where the meetings of the stockholders and directors of said company shall be held.

ARTICLE 6. This corporation shall continue for the period of thirty years.

In witness whereof we have hereunto set our hands & seals this fourteenth day of September, in the year of our Lord one thousand eight hundred and sixty-six.

JAS. A. DUPEE,
J. W. CLARK,
HORATIO BIGELOW.

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

Be it remembered that on this 17th day of September, in the year one thousand eight hundred and sixty-six, before me, Saml. S. Curtis, a commissioner in and for the said commonwealth, appointed by the governor of the State of Michigan, to take the acknowledgment and proof of the execution of deeds and instruments of writing, under seal, to be used and recorded in the said State of Michigan, and to administer oaths and affirmations, appeared James A. Dupee, Joseph W.
212 Clark, and Horatio Bigelow, and severally acknowledged that they executed the within and foregoing instrument, for the uses and purposes therein mentioned; and I further certify that the persons who made the said acknowledgments are known to me to be the individuals described in and who executed the said instrument.

In testimony whereof I have hereunto set my hand and official seal, at the city of Boston, in the county and commonwealth aforesaid, the day and year first above written.

[L. S.] SAML. S. CURTIS,
Commissioner of the State of Michigan.

[U. S. revenue stamp, 5c., cancelled.]

213 EXHIBIT B[1].

ANNUAL REPORT OF THE OSSIPEE MINING CO.

To the Secretary of State, Lansing, Michigan:

In accordance with the fifth section of the general mining laws of the State of Michigan, the undersigned being a majority of the directors of the Ossipee Mining Company report as follows:

1.	The amount of capital actually paid in is		$144,689	
2.	" "	invested in real estate is	125,000	
3.	" "	of personal estate	11,400	58
4.	" "	of their debts, as near as can be ascertained	5,115	
5.	" "	of their credits, do. do.	27,139	32

And that the annexed is a true statement of the names of the stockholders and the number of shares held by each.

E. T. LORING,
JAMES BECK,
E. D. BRIGHAM,
Majority of Directors.

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

On this twenty-fifth day of July, A. D. 1867, before me, Samuel S. Curtis, a commissioner in and for the said commonwealth, appointed by the governor of the State of Michigan, to administer oaths & affirma-

tions and to take the acknowledgments of deeds, etc., etc., personally appeared the above-named Elisha T. Loring, James Beck, and E. D. Brigham, and severally made oath that the above report by them subscribed is true, to their best knowledge and belief.

[L. S.] SAML. S. CURTIS,
Commissioner of the State of Michigan.

214 *Stockholders of the Ossipee Mining Co., June* 29, 1867.

Ames, J. A	20	Loring, E. T	2,100
Bigelow, H	1,600	Loring, E. T., tr	10,524
Biscobank, Jno	40	Lord, Carlisle	50
Brubacker & Co., H. B	20	Langdon, J	5
Burr, Abby S	50	Lewis, Henry	175
Clark, Jas. W	1,600	Lewis, Sumner	50
Chussell, J	5	Moon, Wm	10
Dupee, Jas. A	800	Meyer, Joseph	15
Dupee, Beck & Sayles	375	Martin, John	55
Ellenbecker, J	5	Miller, Peter	10
Frue, Wm. B	80	McCrystal, Jno	25
Frue, Wm. B., tr	1,711	Pope, Graham	50
Forster, E. S	40	Quinn, Jas. H	15
Forster, Theo. M	50	Romer, Edw	50
Hamel, Joseph	10	Steavens, Wm	30
Harris, Wm	50	Stevens, W. V	20
Harris, Steph'n	25	Streeter, W. H	20
Hall, Peleg	250		
Hodgson, Jno. P	60		20,000
Krellintz, August	5		

LA FAYETTE BURR, *Sec'y.*

215 ANNUAL REPORT OF THE OSSIPEE MINING CO.

To the Secretary of State, Lansing, Michigan:

In accordance with the fifth section of the general mining laws of the State of Michigan, the undersigned being a majority of the directors of the * * * Mining Company, report as follows:

1. The amount of capital actually paid in is	$155,271	50
2. " " invested in real estate is	125,000	
3. " " of personal estate	7,029	16
4. " " of their debts, as near as can be ascertained.	17,250	41
5. " " of their credits, do. do.	14,729	50

And that that the annexed is a true statement of the names of the stockholders and the number of shares held by each.

E. T. LORING,
JAMES BECK,
Majority of Directors.

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

On this eleventh day of August, A. D. 1868, before me, Samuel S. Curtis, a commissioner in and for the said Commonwealth, appointed by the governor of the State of Michigan, to administer oaths and affirmations, and to take the acknowledgments of deeds, etc., etc., personally

appeared the above named Elisha T. Loring and James Beck, and severally made oath that the above report by them subscribed is
216 true, to their best knowledge and belief, a vacancy existing in board of directors by the death of E. D. Brigham, esq.

[L. S.] SAM'L S. CURTIS,
Commissioner of the State of Michigan.

Ames, J. A	20
Adams, Jas. W	25
Bigelow, Horatio	1,600
Biscobank, John	40
Brubaker, H. B. & Co	20
Burr, Abby S	50
Brady, Geo. W	100
Beesley, Geo	75
Chussell, I	5
Caperton, J	100
Clark, Jas. W	1,600
Dupee, Jas. A	800
Dupee, Beck & Sayles	275
Ellenbecker, J	5
Emery, Simon	25
Edwards, Richard	100
Frue, Wm. B	80
" " " tr	1,466
Forster, E. S	40
" T. M	50
Hamel, Jos	25
Harris, Wm	50
Harris, Stephen	25
Hall, Peleg	250
Hodgson, J. P	70
" " T	50
Krellwitz, August	5
Loring, E. T	2,150
" " " tr	8,819
Lord, C	
Langdon, I	5
Lewis, Henry	175
" Sumner	50
Loring, A. T	75
Labram, Fred'k	20
Meyer, Jos	15
Martin, John	55
Miller, Peter	10
Moon, Wm	10
McCrystal, John	25
Mockler, John	10
Masten, F. I	50
Pope, Graham	50
Quinn, Jas. H	15
217 Romer, Edward	50
Steavens, Wm	30
Stevens, W. V	20
Streeter, W. H	20
Sibly, A. H	1,370
Watson, Isiah P	25
	20,000

July 1, 1868.

LA FAYETTE BURR, *Sec'y.*

218 ANNUAL REPORT OF THE OSSIPEE MINING CO.

To the Secretary of State, Lansing, Michigan:

In accordance with the fifth section of the general mining laws of the State of Michigan, the undersigned, being a majority of the directors of the Ossipee Mining Company, report as follows:

1. The amount of capital stock actually paid in is	$165,527 01
2. " " " invested in real estate is	125,000 00
3. " " " *of* personal estate	10,594 00
4. " " of their debts as near as can be ascertained	14,119 11
5. " " of their credits do. do.	5,898 17

And that the annexed is a true statement of the names of the stockholders, and the number of shares held by each.

E. T. LORING,
JAS. BECK,
HORATIO BIGELOW,
Majority of Directors.

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

On this twenty-second day of July, A. D. 1869, before Samuel S. Curtis, a commissioner in and for said commonwealth, appointed by the governor of the State of Michigan to administer oaths and affirmations and to take the acknowledgments of deeds, &c., &c., personally appeared the above named E. T. Loring, James Beck, and Horatio Bigelow, and severally made oath that the above report, by them subscribed, is true to their best knowledge and belief.

[SEAL.]

SAMUEL S. CURTIS,
Commissioner of the State of Michigan.

219 *Stockholders of the Ossipee Mining Co., Dec. 31st, 1868.*

Ames, J. A	20	Krellwitz, August	5
Adams, Jas. W	25	Loring, E. T	2,659
Bigelow, Horatio	1,600	Loring, E. T., tr	8,035
Biscobank, John	40	Langdon, J	5
Brubacker & Co., H. B	20	Lewis, Henry	175
Burr, Abby S	50	Lewis, Sumner	50
Brady, Geo. W	100	Loring, A. T	75
Beesley, Geo	75	Labram, Fred'c	20
Clark, Jas. W	1,600	Meyer, Jas	15
Chassell, J	5	Martin, John	55
Caperton, J	100	Miller, Peter	10
Dupee, Jas. A	800	Moon, Wm	10
Dupee, Beck & Sayles	200	McCrystal, Jno	25
Down, Elizabeth	50	Mockler, John	10
Ellenbicker, J	5	Marsten, F. J	50
Emery, Simon	25	Newcomb, Wm	50
Edwards, Richard	100	Pope, Graham	50
Frue, Wm. B	80	Quinn, Jos. H	15
Frue, Wm. B., tr	1,466	Romer, Edward	50
Forester, E. S	40	Steavens, Wm	30
Forester, T. M	50	Stevens, W. V	20
Hamel, Jos	25	Streeter, W. H	20
Harris, Wm	50	Sibley, A. H	1,370
Harris, Stephen	25	Senter, John	75
Hall, Peleg	250	Sayles, Henry	75
Hodgson, John T	70	Watson, J. W	25
Hodgson, Jonathan	100		
Hodgson, John C	50		20,000

220 ANNUAL REPORT OF THE OSSIPEE MINING CO.

To the Secretary of State, Lansing, Michigan:

In accordance with the fifth section of the general mining laws of the State of Michigan, the undersigned, being a majority of the directors of the Ossipee Mining Company, report as follows:

1. The amount of capital actually paid in is	$166,652	01
2. " " invested in real estate is	125,000	00
3. " " of personal estate	10,594	
4. " " of their debts as near as can be ascertained	14,192	63
5. " " of their credits do. do	14,251	18

and that the annexed is a true statement of the names of the stockholders, and the number of shares held by each.

E. T. LORING,
JAMES BECK,
Majority of Directors.

Horatio Bigelow, esq., a director, being absent in Europe, his name cannot be had to make a "majority" of directors.—S. S. C., com'r.

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

On this fourteenth day of July, A. D. 1870, before me, Samuel S. Curtis, a commissioner in and for said commonwealth, appointed by the governor of the State of Michigan to administer oaths and affirmations, and to take the acknowledgments of the execution of deeds, etc., etc., personally appeared the above-named Elisha T. Loring and James Beck, and severally made oath that the above report by them subscribed is true, to their best knowledge and belief.

[L. S.] SAML. S. CURTIS,
Commissioner of the State of Michigan.

221	Jos. A. Ames	20
	H. Bigelow	1,500
	Jno. Biscobank	40
	H. B. Brubaker & Co	20
	A. S. Burr	50
	Geo. N. Brady	100
	Geo. Beesley	75
	L. S. Brigham	750
	A. S. Bigelow	100
	Jos. W. Clark	1,600
	Jno. Chasell	5
	J. Caperton	100
	Frances Carguy	25
	Dupee, Beck & Sayles	1,000
	Elizt. Down	50
	J. Ellenbecker	5
	Simon Emery	25
	Rich'd Edwards	100
	W. B. Frue	80
	" " " tr	1,441
	E. S. Forster	40
	T. M. Forster	50
	Jno. Hamel	25
	Wm. Harris	50
	Steph'n Harris	25
	Peleg Hall	250
	Jno. P. Hodgson	70
	Jno. C. Hodgson	50
	Jonathan Hodgson	100
	A. Krellwitz	5
	E. T. Loring	2,459
	E. T. Loring, tr	7,285
	J. Langdon	5
	Henry Lewis	175
	Sumner "	50
	A. T. Loring	75
	Fred'c Latran	20
	Joseph Meyer	15
	John Martin	55
	Peter Miller	10
	Wm. Moon	10
	Jno. McCrystal	25
	Jno. Mockler	10
	F. J. Master	50
	J. Q. McKernan	25
	Sam'l McDonald	13
	W. H. Newcomb	25
	Graham Pope	50
	C. H. Palmer	200
	Jas. H. Quinn	15
	Edw. Rome	50
	Thos. Roberts	12
	Wm. Steavens	30
	W. V. Stevens	20
	W. H. Streeter	20
	A. H. Sibley	1,370
	John Senter	75
	Henry Sayles	75
	Isiah C. Watson	25
		20,000

LAFAYETTE BURR, *Sec'y.*

JULY 12, 1870.

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

On this twenty-second day of July, A. D. 1869, before Samuel S. Curtis, a commissioner in and for said commonwealth, appointed by the governor of the State of Michigan to administer oaths and affirmations and to take the acknowledgments of deeds, &c., &c., personally appeared the above named E. T. Loring, James Beck, and Horatio Bigelow, and severally made oath that the above report, by them subscribed, is true to their best knowledge and belief.

[SEAL.]

SAMUEL S. CURTIS,
Commissioner of the State of Michigan.

219 *Stockholders of the Ossipee Mining Co., Dec. 31st, 1868.*

Ames, J. A	20	Krellwitz, August	5
Adams, Jas. W	25	Loring, E. T	2,659
Bigelow, Horatio	1,600	Loring, E. T., tr	8,035
Biscobank, John	40	Langdon, J	5
Brubacker & Co., H. B	20	Lewis, Henry	175
Burr, Abby S	50	Lewis, Sumner	50
Brady, Geo. W	100	Loring, A. T	75
Beesley, Geo	75	Labram, Fred'c	20
Clark, Jas. W	1,600	Meyer, Jas	15
Chassell, J	5	Martin, John	55
Caperton, J	100	Miller, Peter	10
Dupee, Jas. A	800	Moon, Wm	10
Dupee, Beck & Sayles	200	McCrystal, Jno	25
Down, Elizabeth	50	Mockler, John	10
Ellenbicker, J	5	Marsten, F. J	50
Emery, Simon	25	Newcomb, Wm	50
Edwards, Richard	100	Pope, Graham	50
Frue, Wm. B	80	Quinn, Jos. H	15
Frue, Wm. B., tr	1,466	Romer, Edward	50
Forester, E. S	40	Steavens, Wm	30
Forester, T. M	50	Stevens, W. V	20
Hamel, Jos	25	Streeter, W. H	20
Harris, Wm	50	Sibley, A. H	1,370
Harris, Stephen	25	Senter, John	75
Hall, Peleg	250	Sayles, Henry	75
Hodgson, John T	70	Watson, J. W	25
Hodgson, Jonathan	100		
Hodgson, John C	50		20,000

220 ANNUAL REPORT OF THE OSSIPEE MINING CO.

To the Secretary of State, Lansing, Michigan:

In accordance with the fifth section of the general mining laws of the State of Michigan, the undersigned, being a majority of the directors of the Ossipee Mining Company, report as follows:

1. The amount of capital actually paid in is	$166,652	01
2. " " invested in real estate is	125,000	00
3. " " of personal estate	10,594	
4. " " of their debts as near as can be ascertained	14,192	63
5. " " of their credits do. do	14,251	18

and that the annexed is a true statement of the names of the stockholders, and the number of shares held by each.

E. T. LORING,
JAMES BECK,
Majority of Directors.

Horatio Bigelow, esq., a director, being absent in Europe, his name cannot be had to make a "majority" of directors.—S. S. C., com'r.

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

On this fourteenth day of July, A. D. 1870, before me, Samuel S. Curtis, a commissioner in and for said commonwealth, appointed by the governor of the State of Michigan to administer oaths and affirmations, and to take the acknowledgments of the execution of deeds, etc., etc., personally appeared the above-named Elisha T. Loring and James Beck, and severally made oath that the above report by them subscribed is true, to their best knowledge and belief.

[L. S.]

SAML. S. CURTIS,
Commissioner of the State of Michigan.

221	Jos. A. Ames	20
	H. Bigelow	1,500
	Jno. Biscobank	40
	H. B. Brubaker & Co	20
	A. S. Burr	50
	Geo. N. Brady	100
	Geo. Beesley	75
	L. S. Brigham	750
	A. S. Bigelow	100
	Jos. W. Clark	1,600
	Jno. Chasell	5
	J. Caperton	100
	Frances Carguy	25
	Dupee, Beck & Sayles	1,000
	Elizt. Down	50
	J. Ellenbecker	5
	Simon Emery	25
	Rich'd Edwards	100
	W. B. Frue	80
	" " " tr	1,441
	E. S. Forster	40
	T. M. Forster	50
	Jno. Hamel	25
	Wm. Harris	50
	Steph'n Harris	25
	Peleg Hall	250
	Jno. P. Hodgson	70
	Jno. C. Hodgson	50
	Jonathan Hodgson	100
	A. Krellwitz	5
	E. T. Loring	2,459
	E. T. Loring, tr	7,285
	J. Langdon	5
	Henry Lewis	175
	Sumner "	50
	A. T. Loring	75
	Fred'c Latran	20
	Joseph Meyer	15
	John Martin	55
	Peter Miller	10
	Wm. Moon	10
	Jno. McCrystal	25
	Jno. Mockler	10
	F. J. Master	50
	J. Q. McKernan	25
	Sam'l McDonald	13
	W. H. Newcomb	25
	Graham Pope	50
	C. H. Palmer	200
	Jas. H. Quinn	15
	Edw. Rome	50
	Thos. Roberts	12
	Wm. Steavens	30
	W. V. Stevens	20
	W. H. Streeter	20
	A. H. Sibley	1,370
	John Senter	75
	Henry Sayles	75
	Isiah C. Watson	25
		20,000

LAFAYETTE BURR, *Sec'y.*

JULY 12, 1870.

222 EXHIBIT B².

ANNUAL REPORT OF THE KEARSARGE MINING CO.

To the Secretary of State, Lansing, Michigan:

In accordance with the fifth section of the general mining laws of the State of Michigan, the undersigned, being a majority of the directors of the Kearsarge Mining Company, report as follows:

1. The amount of capital actually paid in is		$125,519 50
2. " " invested in real estate is		100,000 00
3. " " of personal estate		1,264 25
4. " " of their debts a' near as can be ascertained		Nothing.
5. " " of their credits	do.	17,862 50

and that the annexed is a true statement of the names of the stockholders and the number of shares held by each.

E. T. LORING,
HORATIO BIGELOW,
HENRY SAYLER,
Majority of Directors.

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

On this twenty-fifth day of July, A. D. 1867, before me, Samuel S. Curtis, a commissioner in and for said Commonwealth, appointed by the governor of the State of Michigan to administer oaths and affirmations, and to take the acknowledgment of deeds, &c., &c., personally appeared the above-named Elisha T. Loring, Horatio Bigelow, and Henry Sayles, and severally made oath that the above report by them subscribed is true to their best knowledge and belief.

[L. S.] SAM'L S. CURTIS,
Commissioner of the State of Michigan.

223 *Stockholders of the Kearsarge Mining Co.*

BOSTON, *June 29th*, 1867.

Austrian, Soloman	50	Frue, Wm. B	1,631
Anthony, Chas. L	167	Frue, Wm. B., tr	3,745
Bigelow, Horatio	1,313	Forster, Theo. M	50
Biscobank, Jno	30	Gliger, Jacob	25
Brubacker, C. B	25	Gregory, Joseph	50
Bowen, Tully D	166	Harris, Stephen	25
Brigham, E. D	750	Harris, William	190
Beck, Fred'c	375	Hall, Peleg	167
Bigelow, H., tr	375	Kent, Frank	15
Burr, Abby S	50	Krellwitz, August	5
Clark, J. W. & Co	1,862	Kanzler, J. F	25
Chassell, John	5	Kinney, Thos	20
Carey, A. J	10	Kelly, Ernest	30
Clark, N. E	20	Loring, E. T., tr	2,204
Dupee, Beck & Sayles	1,500	Loring, E. T	1,750
Douglass, C. C	375	Langdon, John	5
Duncan, John	100	Lord, Carlisle	50
Ellenbecker, J	5	Lyon, A. E	25

	Leopold, Asher F	15
	Murch, John J	31
	Mette, Frank	25
	Meyer, Joseph	39
	Moraller, M. M	250
	Martin, John	55
	Matters, Isaac	10
	Miller, Peter	10
	McCullock, Wm	20
	Murch, Chas. A	50
	Martin, W. B	10
	McCrystal, John	25
	Moon, Wm	10
	Northrup, W. A	100
224	Pope, Richard	50
	Pope, Graham	50
	Russ, August	20
	Romer, Edward	45
	Scheting, Herman	25
	Stephens, Samuel	25
	Steavens, Wm	10
	Snyder, Jacob	20
	Sayles, Henry	125
	Sibly, A. H	375
	Streeter, W. H	50
	Thompson, Jas	20
	Vinton, Alex. H	200
	Wilson, Thos	50
	Wilson, James	15
	Wilson, Robt	15
	Washburne, D. E	25
	Wright, E. L	10
	Douglass, E. F	30
	Denison, J. W	1,000
		20,000

LAFAYETTE BURR,
Secretary.

225 ANNUAL REPORT OF THE KEARSARGE MINING CO.

To the Secretary State, Lansing, Michigan:

In accordance with the fifth section of the general mining laws of the State of Michigan, the undersigned, being a majority of the directors of the Mining Company, report as follows:

1. The amount of capital actually paid in is	$125,714	
2. " " invested in real estate is	100,000	
3. " " of personal estate, inventory of Jan'y 1, '68.	3,828	11
4. " " of their debts, as near as can be ascertained.	4,870	32
5. " " of their credits do. do.	22,141	22

and that the annexed is a true statement of the names of the stockholders and the number of shares held by each.

E. T. LORING,
I. N. DENISON,
HENRY SAYLES,
Majority of Directors.

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

On this eleventh day of August, A. D. 1868, before me, Samuel S. Curtis, a commissioner in and for said commonwealth, appointed by the governor of the State of Michigan, to administer oaths and affirmations and to take the acknowledgments of deeds, &c., &c., personally appeared the above-named Elisha T. Loring, I. N. Jenison, and Henry Sayles, and severally made oath that the above report by them subscribed is true to their best knowledge and belief.

[L. S.] SAM'L S. CURTIS,
Commissioner of the State of Michigan.

226	Austrian, Soloman	50
	Anthony, Chas. L.	167
	Ames, Jas. A	25
	Allen, Wm. H	25
	Adams, Jas	10
	Arthur, Jas	50
	Bigelow, Horatio	1,313
	Biscobank, John	30
	Brown, Tully D	166
	Brigham, E. D	750
	Beck, Fred'k	375
	Bigelow, Horation, tr	375
	Burr, Abby S	50
	Blandy, J. H	50
	Bea, Robert	10
	Behr, Frankel & Co	50
	Beesley, Geo	75
	Clark, J. W. & Co	1,862
	Chussell, J	5
	Carey, A. J	10
	Clark, W. S	20
	Condon, Wm	100
	Caperton, John	100
	Dupee, Beck & Sayles	1,500
	Douglas, E. F	30
	Dennison, J. N	1,000
	Duncan, John	100
	Ellenbecker, I	5
	Frue, Wm. B	1,381
	" " " tr	3,380
	Forster, T. M	50
	Foley, Wm	10
	Trathan, Henry B	5
	Gregory, Jos	50
	Harris, Stephen	25
	Harris, William	165
	Hall, Peleg	167
	Hocking, John E	20
	Hill, Hugo	10
	Hodson, John C	55
	Horking, Wm	5
	Hicks, Jos	5
	Kent, Frank	15
	Krellwitz, August	5
	Kauzter, I. F	25
	Kinney, Thos	20
	Kelley, Ernest	30
	Loring, E. T., tr	2,074
	" " "	1,750
	Langdon, John	5
	Lord, Carlisle	50
	Lyon, A. E	25
	Leopold, Asher F	15
	Lewis, Henry	25
227	Loring, A. T	50
	Labram, Fred'k	10
	March, I. J	31
	Mette, Frank	25
	Meyer, Jos	39
	Mirabee, M. M	250
	Martin, John	55
	Matters, Isaac	10
	Miller, Peter	10
	Mock, Chas. A	50
	Martin, Wm. B	10
	McCrystal, John	25
	Moon, Wm	10
	Matters, Wm	10
	McKernan, Jas	25
	" John G	35
	Northrupp, Walter A	100
	Pope, Richard	50
	Pope, Graham	50
	Ross, August	20
	Romer, Edward	45
	Robert, Prosp'ere	50
	Resch, Michael	25
	Schleting, Herman	25
	Stephens, Sam'l	25
	Steavens, William	10
	Snyder, Jacob	20
	Sayler, Henry	125
	Sibley, A. H	275
	Streeter, W. H	50
	Shelden, Geo. C	25
	" R	188
	Smith, Anna	187
	Thompson, Jas	20
	Thomas, W. E	25
	Vinton, Alex. H	200
	Wilson, Thos	50
	Wilson, Jas	15
	Wilson, Robert	15
	Washburne, D. E	25
	Wright, E. L	10
	Whatson, J. E	40
	Weydauch, Ferdinand	25
		20,000

Correct, July 1, 1868.

LAFAYETTE BURR,
Treas'r.

228 *Charles H. Parmer in ac. with Wm. B. Frue.*

1866.			
Nov.	8.	Draft W. R. Noble on R. H. Rickard	2,000 00
	"	S. Mandlebaum on Dupee, Beck & Sayles	1,000 00
"	14.	" on sundry persons to C. H. P	19,960 40
"	16.	" " " " " " " "	4,988 39
1867.			
Feb'y	23.	" " " " " " " "	4,450
1866.			
Nov.	11.	" " " " Call by E. T. L	10,970
"	22.	" " " " " " " " "	2,675
Dec.	31.	" " " " 25,401.48 less dr'ft on D. A. S., 6,901.48	18,500
1867.			
Feb'y	4.	" " " " " " "	14,480 94
"	13.	" " " " " " "	11,544
"	23.	" " " " " " "	1,490
March	22.	" " " " "	13,438 66
"	30.	" " " " "	2,900
Sept.	1.	Am't of A. H. Sibley's balance d'ft, 6,901.48	4,092 72
			112,490 11
		Balance	3,868 78

229

		By am't rec'd for 5,000 sh's Kearsarge stock	50,000
		" " " " 2,000 " Ossipee "	23,000
		2,211 sh's Kearsarge stock 2.66⅔	5,896
		939 " " " 1.16⅔	1,095 50
		501 " Ossipee " 4.83⅓	2,421 50
		4,750 " " " 3.33⅓	15,833 33
		4,200 " Iroquois " 50	2,100
		2,600 " Torch Lake " 1.50	3,900
		3,500 " section 35 & 36 1.25	4,375
		By balance	3,868 78
			112,490 11

230 COMMONWELTH OF MASSACHUSETTS:

I, Horace Gray, chief justice of the supreme judicial court of the commonwealth of Massachusetts, do certify that John Noble, esquire, whose signature is affixed to the paper hereto annexed, is clerk of said court holden at Boston, in and for the county of Suffolk, in said commonwealth, and hath the keeping of all the ancient files, records, and proceedings of said court throughout the commonwealth, down to the first day of August, A. D. 1797, as well as of the files, records, and proceedings of said court holden as aforesaid, for said county of Suffolk, subsequent to that time; and is by law the proper person to make out and to certify copies of all the records and proceedings of the said supreme judicial court previous to the said first day of August, A. D. 1797, as well as of all records and proceedings of the said court holden as aforesaid, for the said county of Suffolk, subsequent to that time; and that full faith and credit is and ought to be given to his acts and attestations, done as aforesaid, and that his attestation to the paper hereunto annexed is in due form.

In testimony whereof, I have hereunto set my hand, and caused the seal of said court to be hereunto affixed, this sixth day of June, in the year one thousand eight hundred and seventy-seven.

[SEAL.] HORACE GRAY,
Chief Justice.

231 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

To all persons to whom these presents shall come, greeting:

Know ye, that among the records of our supreme judicial court sitting

at Boston, in said county of Suffolk, for the hearing of cases in equity, at the April term of said court, in the year eighteen hundred and seventy-six, and on other days between the first Tuesday of April, in said year, and the second Tuesday of September, in said year, it is thus contained:

232 *Bill of complaint.*

COMMONWEALTH OF MASSACHUSETTS,
Suffolk ss:

Supreme judicial court, in equity.

WILLIAM B. FRUE
vs.
ELISHA T. LORING.

Humbly complaining showeth unto your honors' your orator, William B. Frue, of Silver Islet, in the Dominion of Canada, as follows, viz:

1. In the years 1866 and 1867, your orator was a citizen of Michigan, and was then and for many years had been engaged in the business of the exploration of mining lands, in the superintendence of mining works, and in practical mining. In the fall of the year 1866, your orator was exploring certain lands in the county of Houghton in said State, adjacent to those occupied by the Calumet Mining Company. He had been for many years acquainted with the defendant, Elisha T. Loring, and with one Charles H. Palmer, then a resident of Pontiac in said State of Michigan. And in the fall of said year, the said Palmer being in Boston, the said defendant, who knew that your orator was engaged in the exploration aforesaid, expressed a desire to become interested with your orator and with said Palmer in any enterprises growing out of your orator's discoveries. Other persons in Boston, friends of the defendant, were also consulted, and as was understood, were to participate in the enterprise if your orator's explorations resulted favorably.

2. Afterwards, in said fall of 1866, your orator having discovered valuable mining territory on the lands aforesaid, the said Palmer and himself entered into contracts for the purchase thereof. The said Palmer then came to Boston, and in pursuance of the original design and understanding of all parties, it was proposed to organize three mining corporations under the general laws of the State of Michigan, to which said corporations said lands should be transferred, all the stock in which should be allotted to and owned by the projectors, and which should pay for the lands conveyed to them respectively, by assessments upon stock. In fact, however, but two corporations were ever organized; and the sum of $10,000 paid in advance on lands intended to be acquired for the third corporation was forfeited. The name of this proposed corporation was to have been the "Iroquois," and the number of
233 shares of stock in it to which your orator and those whom he represented were entitled, was 4,200. The names of the two corporations actually organized, and to which lands bargained for by your orator and Palmer were actually conveyed, were the Ossipee and the Kearsarge. The capital stock of each was divided into 20,000 shares, the par value being, as required by the laws of Michigan, $25 per share. All the shares in each company were, however, allotted to and divided among the original projectors in proportion to their respective interests, they paying and agreeing to pay, as assessments upon stock, an amoun

sufficient to pay for the lands bought and held by each company, and to furnish a working capital. Under this arrangement the investment in Ossipee was $65,000 for land and $45,000 for working capital, $110,000 in all, and the assessed cost of each share of stock to each original stockholder was $5.50. So the investment in Kearsarge was $50,000 for land and $40,000 for working capital, or $90,000 in all, and the assessed cost of each share of stock $4.50. There were allotted to Frue, and others whom he represented, 5,835 shares in Ossipee, and 4,200 shares in Kearsarge.

3. It was part of the original plan that the companies being organized and the stock allotted and distributed, each stockholder should contribute a certain pro rata portion of stock, to be sold by your orator in Michigan, as was expected, for a price in advance of cost. Your orator not being in funds when the assessments upon his own stock and that of those whom he represented became due, it was further agreed between himself and said Loring that certificates of the stock belonging to him and those he represented should issue to the said defendant as trustee; and that as the plaintiff sold stock and remitted the proceeds to the defendant, who was treasurer and general financial agent of said companies, said defendant should apply the amount belonging to the plaintiff and those he represented to the payment of the assessments upon their stock, any balance remaining after paying said assessments to be accounted for and paid over in money. Accordingly, in pursuance of this arrangement, the defendant sent your orator, and your orator sold 2,000 shares Ossipee at $11\frac{50}{100}$ per share, and 5,000 shares Kearsarge at $10 per share. The proceeds in all, $73,000, were remitted from time to time to said Loring by drafts payable to the order of the said Charles H. Palmer, and indorsed and delivered to the said Loring by the said Palmer. In addition to the said sum of $73,000, the plaintiff also remitted, to be applied in payment of assessments upon stock, the sum of $41,013.31. As the result of these transactions the plaintiff, for himself and those he represented, became entitled, and is still entitled to be paid the sum of $5,131\frac{6}{100}$ in money, as more particularly appears by an account hereto annexed, marked A. He also became entitled to receive, for himself and those he represented, 4.833½ shares of Ossipee stock, the first cost of which was $26.581\frac{50}{100}$, and 1,097 shares of Kearsarge stock, the first cost of which was $4,936\frac{50}{100}$, as more particularly appears by a statement and account here annexed, marked B.

4. In pursuance of the agreement hereinbefore set forth, the said defendant caused to be issued to himself as trustee by said companies,
234 respectively and received from said respective companies, as such trustee, the shares of stock belonging to the plaintiff and others represented by him, to wit, 4,833½ shares of Ossipee and 1,097 shares of Kearsarge. Said defendant continued to hold such stock as such trustee until the year 1870, when he sold it. The plaintiff has since repeatedly demanded said stock, and called upon the defendant to account for the same, but said defendant has always refused and neglected to transfer the same to him, or to account therefor.

5. The persons originally interested in said stock and enterprise, other than the said Frue, and represented by him, and whose liabilities were assumed by him, were David Hodgdon, John C. Hodgdon, and William R. Noble. All the right and title of each of said persons has since been assigned to, and is now vested in, the plaintiff.

6. Your orator had well hoped that said defendant would have paid him the money due him as hereinbefore stated, and would have trans-

ferred and made over to him the shares of stock belonging to him as hereinbefore set forth, or would have accounted to him for the same in money at a just and proper valuation thereof.

7. But now so it is that said defendant claims that he does not owe your orator the money balance above stated, or any sum of money whatever, and is not bound to make over and transfer to him said shares or any shares of stock, or to account to him for the value thereof; but sometimes pretends that he never was trustee for your orator, and never received any money or stock as such trustee, but was trustee only of said Charles H. Palmer, and received the money and stock hereinbefore mentioned only as trustee for him, and was never bound to account to your orator, but only to said Charles H. Palmer, and that he has accounted to said Charles H. Palmer for all the money and stock hereinbefore mentioned, as paid over by and belonging to your orator, and that on the balance of account said Palmer owes the defendant the sum of $10,000, or thereabouts; and at other times pretends that he, the said defendant, has never received and is not responsible for all the moneys which your orator claims to have paid him as hereinbefore alleged, but that a certain portion thereof, to wit, the sum of $21,643.79 was received by the said Palmer, and by him applied to a purchase of land from Messrs. Douglass & Shelden, as an addition to the Ossipee location, and that a certain other portion thereof, to wit, the sum of $4,500, was received by the said Palmer, and by him applied to the purchase of certain mining stock called the Torch Lake stock, and of certain lands on S. ½ of sections 35 and 36.

8. All which claims and pretenses on the part of said defendant your orator alleges to be untrue, and to be contrary to equity and good conscience; and expressly charges and avers that, while he paid the defendant the moneys alleged by drafts sent to the said Palmer, and payable to his order and by him indorsed and delivered to the defendant, he made his remittances in that form only for the sake of having
235 additional evidence thereof by their passing through said Palmer's hands; that this mode of doing the business was distinctly agreed upon between your orator and the said Palmer, and was by the said Palmer communicated to the said defendant, who was also definitely instructed by the said Palmer that of the moneys remitted by your orator, so much as belonged to him and those he represented should be passed to his credit, and should be applied solely to the payment of the assessments upon his and their stock, any balance to be held for his benefit; that thus said defendant well knew that said Palmer's only connection with your orator's remittances was as a medium of transmission to himself, and that he could not lawfully account for the same, or for the stock in payment of which it was to be applied, to or with the said Palmer, but only to and with your orator on behalf of himself and those he represented; that, as regards the Douglass and Shelden land, the Torch Lake stock and the other lands purchased as above mentioned, the said defendant applied and permited to be applied to said purchases the moneys remitted by your orator on the special trusts aforesaid, he, the said defendant, well knowing that said purchases were made by and for the Ossipee Company, and were to be and should be paid for out of the treasury of said company, and that applying to them the moneys remitted by your orator for the special purposes aforesaid was unlawful, and a plain breach of trust.

9. In consideration whereof, and because your orator is entirely remediless in the premises according to the strict rules of the common law,

and can only have a relief in a court of equity, where matters of this nature are properly cognizable and relievable;

10. To the end, therefore, that the said defendant Elisha T. Loring may full, true, direct, and perfect answer make to all and singular the premises, but not upon oath, the oath of said defendant being hereby expressly waived, as fully, in every respect, as if the same were here repeated, and be thereunto particularly interrogated according to the best of his knowledge, information, and belief; and that said defendant may be ordered to account with your orator, and to pay to him, with interest, such sum of money as was received by him from your orator over and above the amount necessary to pay the assessments due from him on the stock as aforesaid; and that said defendant may be ordered to account with your orator for the shares of stock belonging to him as aforesaid, but sold by the defendant, and at its highest value since he became entitled to receive the same; and may be ordered to pay said value to your orator, together with any dividends declared or payable on the same; and that your orator may have such other and further relief as to your honors shall seem meet:

11. May it please your honors to grant unto your orator a writ of subpœna, to be directed to the said Elisha T. Loring, thereby commanding him, at a certain day and under a certain penalty therein to be specified, personally to appear before your honors in this honorable
236 court, and then and there to answer all and singular the premises, and to stand to, perform, and abide such order and decree therein as to your honors shall seem meet.

WILLIAM B. FRUE,
By his attorney, RICHARD OLNEY.

BENJ. F. THOMAS,
RICHARD OLNEY,
For Plaintiff.

Filed December 18, 1874.

EXHIBIT A.

DETROIT, *Michigan, June* 11, 1874.

E. T. Loring, in account with William B. Frue, Dr.

1866.				
Nov.	8.	Drafts remitted C. H. Palmer and acknowledged by E. T. L....		$2,000 00
	10.	" " " "		10,970 00
	14.	" " " "		19,960 40
	16.	" " " "		4,988 39
	22.	" " " "		2,675 00
Dec.	31.	" " " "	$25,401 48	
		Less draft on A. H. Sibley, not paid.....	6,901 48	
				18,500 00
		Amount afterward collected of A. H. Sibley and advised.....		4,092 72
1867.				
Feb.	4.	Drafts remitted C. H. Palmer and acknowledged by E. T. L....		14,480 94
	13.	" " " "		11,544 00
	23.	" " " "		5,940 93
March	22.	" " " "		13,438 66
	30.	" " " "		2,900 00
July.		Cash paid E. T. Loring at Houghton.....		2,500 00
		November assessment on fifteen shares stock Ossipee Manufacturing Company, charged on private account, paid and included in purchase.....		22 27
				$114,013 31

237 CREDIT.

By allotment Ossipee stock, 5,835 shares, $5.50	32,092 50	
By allotment Kearsarge stock, 4,200 shares, $4.50	18,900 00	
By allotment Iroquois stock, 4,200 shares, .50	2,100 00	
Boston party pro rata on sale of 2,000 shares Ossipee stock, 1,416½ shares, at $11.50	16,289 75	
Boston party pro rata on sale of 5,000 shares Kearsarge stock, 3,950 shares, at $10.00	39,500 00	
		$108,882 25
Balance due		$5,131 06

EXHIBIT B.

OSSIPEE STOCK.

		Shares.	
Ossipee stock allotted to plaintiff for himself and his constituents		5,835	
Credit by proportion of stock sold	583½		
Credit by stock given to certain persons			
Credit by consent of promotees (400 in all)	117		
Credit by stock actually deliverd	301		
		1,001½	
		4,833½	
Value at cost to plaintiff, $5.50 per share			$26,584 25

KEARSARGE STOCK.

Kearsarge stock alotted to plaintiff and his constituents		4,200	
Credit by proportion of stock sold	1,050		
Credit by stock given to certain persons			
Credit by consent of promotees (200 in all)	42		
Credit by stock actually delivered	2,211		
		3,303	
		897	
All the donated stock, paid by plaintiff from his own, to be added		200	
		1,097	
Value at cost to plaintiff, $4.50 per share			$4,936 50
Interest on amounts paid			

Filed January 4, 1875.

This paper may be filed as Exhibits A & B, referred to in bill of complaint, and as part thereof, as of this day.

RICHARD OLNEY,
For Complainant.
SOHIER & WELCH.

JANUARY 4TH, 1875.

238 This bill was filed in said court on the eighteenth day of December, A. D. eighteen hundred and seventy-four, and thereupon a subpœna was issued, as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

To Elisha T. Loring, of Boston, in said county, merchant, greeting:

We command you that you appear before our supreme judicial court next to be holden at Boston, within our said county of Suffolk, on the first Monday of January next, then and there to answer to a bill of

complaint exhibited against you in our said court by William B. Frue, of Silver Islet, in the Dominion of Canada, and to do and receive what our said court shall then and there consider in that behalf.

Hereof fail not, under the pains and penalties in the law in that behalf provided.

Witness, Horace Gray, esquire, at Boston, the eighteenth day of December, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] GEO. W. NICHOLS,
Ass't Clerk.

239 Upon which subpœna is the following return by the officer who served the same, to wit:

BOSTON, *December* 18, 1874.

SUFFOLK, *ss:*

I this day summoned the within named Elisha T. Loring to appear and answer at court, as within directed, by giving him an attested copy of this precept.

J. B. INGALLS,
Dep't Sheriff.

Service, tr. &c., 1.56; copy, 1.00; H. & C., 84—$3.40.

I hereby certify that it was necessary to use a horse and carriage in serving the within process, and that I actually used such conveyance 7 miles.

J. B. INGALLS.

This bill was entered at the rules holden on the first Monday of January, A. D. eighteen hundred and seventy-five, and thence transferred to the docket of said supreme judicial court during the September term thereof, A. D. eighteen hundred seventy-four, when and where the parties appeared, and the defendant on the first day of March, A. D. eighteen hundred seventy-five, filed his demurrer, as following, to wit:

240 *Demurrer.*

This defendant by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, doth demur in law to said bill, and for cause of demurrer saith that the said complainant hath not by his said bill made such a case as entitles him in a court of equity to any discovery or relief from or against this defendant touching the matters contained in said bill, or any of such matters; and for further cause of demurrer saith that the complainant on his statement as made in said bill hath a full and complete remedy at law; and for further cause of demurrer saith that it appears by the complainant's bill that certain persons named therein as David Hodgdon, John C. Hodgdon, and William R. Noble should be parties thereto; and for further cause of demurrer, that the complainant's title to relief as set forth in his said bill is uncertain and vague, and the grounds thereof and the facts upon which the said relief is claimed as stated by him are uncertain, vague, and contradictory; wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant doth demur to the said bill, and to all the matters and things therein contained, and prays the judgment of this honorable court whether he shall be compelled to make

any further or other answer to the said bill; and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

By his solicitors,

SOHIER & WELCH.

241 Thence the same was continued to the April term, A. D. eighteen hundred and seventy-five, and thence to the September term in the year last aforesaid, when and where the parties appeared, and on the first day of November, in the year last aforesaid, the case was heard on demurrer and reserved for the consideration of the full court.

Thereupon the case was continued unto the April term, A. D. eighteen hundred and seventy-six, when and where the parties appeared, and the following rescript was entered in said court by the order of the supreme judicial court for the commonwealth, to wit:

"Demurrer sustained; bill dismissed with costs."

Whereupon the following decree is entered:

Supreme judicial court, April term, 1876. In equity.

SUFFOLK, *ss:*

WILLIAM B. FRUE,
vs.
ELISHA T. LORING.

This case came on to be heard on bill and demurrer and was argued by counsel, and thereupon, upon consideration thereof, it is ordered,
242 adjudged, and decreed that the demurrer is sustained, and the bill be dismissed with costs.

By the court.

JOHN NOBLE, *Clerk.*

SEPTEMBER 8, 1876.

All and singular which premises we have held good, by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said court to be hereto affixed.

Witness Horace Gray, esquire, chief justice of our said court, at Boston, in said county, this seventeenth day of May, A. D. eighteen hundred seventy-seven.

[SEAL.] JOHN NOBLE, *Clerk.*

(Indorsed:) Frue vs. Loring. Exemplification of record.

243 *Bond.*

Know all men by these presents that we, Elisha T. Loring of Boston in the commonwealth of Massachusetts, and John J. Bagley, of Detroit, in the State of Michigan, are held and firmly bound unto William B. Frue, of Detroit, in the State of Michigan, in the sum of one hundred thousand dollars, lawful money of the United States of America, to be paid to the said William B. Frue or to his certain attorney, heirs, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators and each and every of them firmly by these presents. Sealed with our seals, dated the thirty-first day of July, one thousand eight hundred and seventy-seven.

The condition of this obligation is such, that whereas lately at a session of the circuit court of the United States for the eastern district of Michigan, in a suit depending in said court between said William B. Frue as plaintiff, and said Elisha T. Loring as defendant, judgment was rendered in favor of said plaintiff and against said defendant for the sum of sixty-seven thousand four hundred and eighty-two dollars and thirty-four cents; and whereas the said Elisha T. Loring proposes, as plaintiff in error, to sue out a writ of error to remove said cause to the Supreme Court of the United States to reverse said judgment:

Now, therefore, if the said Elisha T. Loring, plaintiff in error, shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make his plea good, then this obligation to be void; otherwise in full force and virtue.

(Sig.) ELISHA T. LORING. [L. S.]
(") JOHN J. BAGLEY. [L. S.]

In presence of—
ABBOT L. FABYAN.

This bond is approved and a supersedeas allowed.
Aug. 6, 1877.
(Sig'd) N. H. SWAYNE,
Asso. Jus. Sup. Court U. S.

(Indorsed:) 5115. Circuit court U. S., eastern district of Mich. Bond. William B. Frue vs. Elisha T. Loring. Bond in error. (Copy.) Filed Aug. 13, 1877. A. Mandell, cl'k.

244 EASTERN DISTRICT OF MICHIGAN, *ss:*

I, Addison Mandell, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify the above and foregoing to be a true copy of the original record of judgment in the case of William B. Frue against Elisha T. Loring in said court, the same having been carefully compared by me with such original, and is a correct transcript therefrom and of the whole thereof; and also the original bill of exceptions filed therein, together with a copy of the bond on writ of error filed in said cause.

In testimony whereof I have hereto set my hand and affixed the seal of said court, this tenth day of September, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] ADDISON MANDELL, *Clerk.*

Clerk's fees, $39.75; exp. charges 1.—$40.75.

(Indorsement on cover:) No. 316. Elisha T. Loring, plaintiff in error, vs. William B. Frue. E. Michigan C. C. U. S. Filed 23rd October, 1878.

FILED
OCT 17 1881
JAMES H. McKENNEY, Clerk

SUPREME COURT OF THE UNITED STATES.

No. 316.

OCTOBER TERM, 1880.

ELISHA T. LORING, PLAINTIFF IN ERROR,

vs.

WILLIAM B. FRUE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

ASSIGNMENT OF ERRORS

AND

BRIEF FOR PLAINTIFF IN ERROR.

C. I. WALKER, *Attorney for Plaintiff in Error.*

E. W. MEDDAUGH, Esq., } *Of Counsel.*
HON. GEO. F. EDMUNDS, }

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1880.

ELISHA T. LORING,
Plaintiff in Error.
vs.
WILLIAM B. FRUE,
Defendant in Error.

ASSIGNMENTS OF ERROR.

Afterwards, to wit, on the 28th day of October, in this same term, before the Judges of the Supreme Court of the United States, comes the said Elisha T. Loring, by C. I. Walker, his attorney, and says, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit:

First Error—In the order of said Circuit Court, made on the thirty-first day of October, in the year one thousand eight hundred and seventy-six, setting aside the judgment of non-suit granted on the eleventh day of June, in the year one thousand eight hundred and seventy-four, the same being without authority of law.

Second Error—There is also error in this, to wit: In the refusal of the said Circuit Judge to charge in accordance with the defendant's first request, which is as follows: "That no verdict "can be rendered for the plaintiff in this case, for the reason "that the Court has no jurisdiction to try the same, the order "setting aside the non-suit granted therein being without au-"thority of law."

Third Error—There is also error in this, to wit: In the giving, by the said Circuit Judge, of the following portion of his charge to the jury, viz: "I have been asked to refuse to proceed "further with the case, because the court has no jurisdiction,

"and I understand that the parties mean by this that the non-"suit having been entered many terms ago, it is not within the "power of the court to set aside that non-suit. This question "has been already disposed of by Judge Swayne, and it would "not be very becoming in me, I think, to differ from him on "this point; in fact, I do not know that I should differ from "him, were I to examine the question. I have not examined "the question, but I now overrule the motion of the gentle-"man."

Fourth Error—There is also error in this, to wit: In the following portion of the charge of said circuit judge to the jury aforesaid, viz: "The defendant insists that as to the $2,000 part "of $43,799.80, your verdict cannot, in any event, be for the "plaintiff, because, as he maintains, this money was sent by "Noble to Loring to pay for his, Noble's stock, which was al-"lotted, or to be allotted, to him. If you find the fact to be so, "then I instruct you plaintiff cannot recover this money, but, of "course, if you find the fact to be otherwise, if you find that "the money was the plaintiff's, forwarded to Loring by Noble "only as plaintiff's clerk, and received by defendant as plain-"tiff's money, and credited to the plaintiff, then the plaintiff "may recover, if you find the other facts to exist, on which the "right to recover depends, as I have before said; but if you find "that the $2,000 was Noble's, forwarded to Loring to be ap-"plied to paying for stock to be allotted to him, or which he "understood was to be allotted to him, I am inclined to think, "and I so instruct you, that plaintiff cannot recover, even though "it was placed to the credit of Frue. If it was Noble's money, "it could not be placed to Frue's credit without Noble's consent, "and the so placing of it would not make it Frue's, unless No-"ble then or subsequently assented to it. I suppose that if it "were Noble's money, and if it was forwarded to Mr. Loring, "and he, having no account that Noble had deposited the "money with Mr. Frue, and Noble had subsequently assented "to this arrangement, then Mr. Frue might recover the money "from Mr. Loring, although he might be obliged to account "therefor to Mr. Noble. Of course, I repeat, that if it was Mr. "Frue's money, there is no difficulty as to the right to recover "this sum, if the plaintiff is entitled to recover anything in the "action."

Fifth Error—There is error also in this, to wit: In the following portion of the charge of said circuit judge, given to said jury, viz: "Defendant contends that the plaintiff cannot recover "as to the $25,401.55 part of the $43,799.80, because he says the "plaintiff sent this money to Mr. Palmer, to be used by him for "a specific purpose, and not to be invested by Loring in stocks or "in anything else for the plaintiff; that this money was never "credited to Frue by Loring, but credited to Palmer, and "subsequently checked out and used by Palmer. If you "find the facts to be so, then the plaintiff cannot recover this "sum; but if you find that this money was actually credited to

"Frue by Loring, and has not been accounted for by Loring to "Frue, I do not see why Frue cannot recover it. It is perfectly "competent for the plaintiff to change the destination of the "money and to ratify the deposit to his credit, if it was so de-"posited. As it was Frue's money, if it was placed to his credit "with Loring it does not lie in the mouth of the defendant to "refuse to account for it; but I repeat that if it was sent to "Palmer to be invested by him, was placed to Palmer's credit, "not to Frue's, and was invested by Palmer, the plaintiff has no "cause of action therefor; or even if it was placed to Frue's "credit, and a portion of it was applied by Palmer, or Palmer & "Loring, to the purchase of stocks in Torch Lake, other than "Frue has received, the plaintiff cannot recover the amount so "invested, even though Frue has not received the stock pur-"chased for him in Torch Lake. If the investment was made "with his consent, or he subsequently ratified it; if the evidence "satisfies you that Loring promised the plaintiff personally, or "through Palmer, to invest the money from him, and to transfer "stock, purchased for the plaintiff, to him, and he has failed to "make the transfer—I mean this: there is some testimony to "the effect, that when the moneys were sent forward, through "Palmer to Loring, to be invested in the lands, stocks, or what-"ever you may call them, connected with the Kearsarge or the "Ossipee, that there was some agreement on the part of Loring "to invest that money in these stocks and to transfer the stocks "to Mr. Frue, and I have told you that if you find any such "agreement whilst the money was in his hands, he cannot dis-"charge himself from that obligation by simply investing the "money in stocks, but must perform his whole contract. He "must either deliver over to Mr. Frue the stocks, or must ac-"count to him for the money."

"But it is contended by the defendant that this agreement did "not relate to the money which was forwarded to Palmer to be "invested in Torch Lake, and that there is no evidence of any "such agreement, and that, in fact, they insisted that this money "was really invested by Mr. Palmer in something else—Torch "Lake or something else—certainly to the extent of 5,600 shares "of stock for Mr. Frue. Now, although that was the original "destination of the money, and though it was originally intended "to be invested by Palmer for Mr. Frue in Torch Lake, if you "shall arrive at the conclusion that it was not so invested, and "that its destination was changed; that it was placed with Mr. "Loring, and that it was mingled with the other funds of Mr. "Frue, to be used by Loring precisely as he was to use the other "moneys which had been deposited with him, and that Loring "came under the same obligation in respect to this money that "he was under in respect to the other moneys; and if that obli-"gation was to invest it in stocks and to transfer those stocks to "Mr. Frue, and he has not done it, then he is liable for this "money as well as for any other part of it; but if, on the other "hand, he came under no such agreement in respect to this "money at all; if he made no such agreement with Mr. Frue,

"then I do not see that in this action, or any other, perhaps, he "would be liable. I do not say there would be no remedy what-"ever, however."

SIXTH ERROR.—There is also error in this, to wit: The refusal of the said circuit judge to charge the said jury in accordance with the following request, then and there made to him by the counsel for defendant, viz.: "If the jury find that the plaintiff "and the defendant, together with other persons, were jointly in-"terested in the organization of certain mining corporations under "the laws of this state; and that the plaintiff, by an arrange-"ment between all the original proprietors of said corporations, "had alloted to him a certain number of shares of stock therein "upon the payment into the treasury of said company of the "actual cost thereof, and that plaintiff remitted to the defendant "money for the purpose of paying into the treasury of said "corporation the actual cost of the shares thus allotted to him, "and which the defendant actually paid for that purpose; then "the plaintiff cannot recover in this action for the money thus "remitted to the defendant and thus applied."

SEVENTH ERROR.—There is also error in this, to wit: The refusal of the said circuit judge to charge the jury in accordance with the following request, then and there made to him by the counsel for said defendant; which request is numbered 2¼ in the bill of exceptions, and in the following words, viz.: "There is "no evidence in this case that at the time defendant received "from the plaintiff the money claimed in this case, he made any "agreement to deliver to the plaintiff any of the stock in such "corporations."

EIGHTH ERROR.—There is also error in this, to wit: The refusal of the said circuit judge to charge the jury in accordance with the request, then and there made to him by the counsel for the defendant, numbered 2½ in the bill of exceptions, and is in the following words, namely: "There is no evidence but what "the defendant used the money put into his hands from the "plaintiff for the very purpose for which it was forwarded."

NINTH ERROR.—There is error also in this, to wit: The refusal of the said circuit judge to charge the jury in accordance with the request, then and there made to him by the counsel for the defendant, numbered 3 in the bill of exceptions, and is in the following words, namely: "That if, in anticipation of the act-"ual organization of such corporations, money was sent from "time to time to the defendant to pay for the stock thus to be "taken by the plaintiff in said corporations, and it was under-"stood between them that the defendant was to take stock and "hold it in trust for the plaintiff until the same was fully paid, "and the plaintiff actually paid into the treasury of said corpo-"rations the money thus sent to him, the plaintiff cannot recover "in this form of action for the money thus sent and paid, "although he may not have received their stock."

TENTH ERROR.—There is also error in this, to wit: In the

refusal of the said circuit judge to charge the jury in accordance with the request made to him by the counsel for the defendant, numbered 6 in the bill of exceptions, and is in the following words, namely: "That upon the evidence in this case the plaintiff is "not entitled to recover in this action for the two thousand dol- "lars sent by Noble on the eighth of November, 1866, and paid "to the defendant by Palmer."

Eleventh Error.—There is also error in this, to wit: In the refusal of the said circuit judge to charge the jury in accordance with the request made to him by the counsel for the defendant, numbered 9 in the bill of exceptions, and is in the following words, namely: "If the drafts remitted by said Frue to C. H. "Palmer, on the 31st of December, 1866, under instructions to "purchase the property mentioned in said Frue's letter of that "date, and said Palmer, without authority, paid said drafts, or "the proceeds thereof, over to said defendant, and subsequently "drew out the same, or any portion thereof, from the defend- "ant's hands, and applied it upon the purchase of the property "thus directed to be purchased, or a part thereof, then the plain- "tiff cannot recover in this action for said money so forwarded "and paid out."

Twelfth Error.—There is also error in this, to wit: In the refusal of said circuit judge to charge the jury in accordance with the request made to him, by the counsel for the defendant, numbered 10 in the bill of exceptions, and is in the following words, namely: "That upon the evidence in this case the "plaintiff is not entitled to recover for any portion of the money "sent by the plaintiff to Palmer in said letter of December thir- "ty-first."

Thirteenth Error.—There is also error in this, to wit: In the refusal of the said circuit judge to charge the jury in accordance with the request made to him by the counsel for the defendant, numbered 11 in the bill of exceptions, and is in the following words, namely: "If the jury believe the testimony of Mr. "Palmer, that Mr. Frue furnished the money to purchase 5,600 "shares of the Torch Lake property, and that that money was "drawn from Mr. Loring, the defendant, then the cost of said "shares is to be deducted from the money claimed by the plain- "tiff in this suit as against the defendant, in addition to the "other deductions admitted by the plaintiff."

Fourteenth Error.—There is also error in this, to wit: In the refusal of the said circuit judge to charge the jury in accordance with the request made to him by the counsel for the defendant, numbered 12 in the bill of exceptions, and is in the following words, namely: "There is no evidence that $2,000 remitted "by Noble to Palmer on the eighth of November, belonged to "Frue."

Fifteenth Error.—There is also error in this, to wit: In the refusal of the said circuit judge to charge the jury in accordance with the request made to him by the counsel for the defendant,

"then I do not see that in this action, or any other, perhaps, he "would be liable. I do not say there would be no remedy what-"ever, however."

SIXTH ERROR.—There is also error in this, to wit: The refusal of the said circuit judge to charge the said jury in accordance with the following request, then and there made to him by the counsel for defendant, viz.: "If the jury find that the plaintiff "and the defendant, together with other persons, were jointly in-"terested in the organization of certain mining corporations under "the laws of this state; and that the plaintiff, by an arrange-"ment between all the original proprietors of said corporations, "had alloted to him a certain number of shares of stock therein "upon the payment into the treasury of said company of the "actual cost thereof, and that plaintiff remitted to the defendant "money for the purpose of paying into the treasury of said "corporation the actual cost of the shares thus allotted to him, "and which the defendant actually paid for that purpose; then "the plaintiff cannot recover in this action for the money thus "remitted to the defendant and thus applied."

SEVENTH ERROR.—There is also error in this, to wit: The refusal of the said circuit judge to charge the jury in accordance with the following request, then and there made to him by the counsel for said defendant; which request is numbered 2¼ in the bill of exceptions, and in the following words, viz.: "There is "no evidence in this case that at the time defendant received "from the plaintiff the money claimed in this case, he made any "agreement to deliver to the plaintiff any of the stock in such "corporations."

EIGHTH ERROR.—There is also error in this, to wit: The refusal of the said circuit judge to charge the jury in accordance with the request, then and there made to him by the counsel for the defendant, numbered 2½ in the bill of exceptions, and is in the following words, namely: "There is no evidence but what "the defendant used the money put into his hands from the "plaintiff for the very purpose for which it was forwarded."

NINTH ERROR.—There is error also in this, to wit: The refusal of the said circuit judge to charge the jury in accordance with the request, then and there made to him by the counsel for the defendant, numbered 3 in the bill of exceptions, and is in the following words, namely: "That if, in anticipation of the act-"ual organization of such corporations, money was sent from "time to time to the defendant to pay for the stock thus to be "taken by the plaintiff in said corporations, and it was under-"stood between them that the defendant was to take stock and "hold it in trust for the plaintiff until the same was fully paid, "and the plaintiff actually paid into the treasury of said corpo-"rations the money thus sent to him, the plaintiff cannot recover "in this form of action for the money thus sent and paid, "although he may not have received their stock."

TENTH ERROR.—There is also error in this, to wit: In the

refusal of the said circuit judge to charge the jury in accordance with the request made to him by the counsel for the defendant, numbered 6 in the bill of exceptions, and is in the following words, namely: "That upon the evidence in this case the plaintiff is "not entitled to recover in this action for the two thousand dol- "lars sent by Noble on the eighth of November, 1866, and paid "to the defendant by Palmer."

ELEVENTH ERROR.—There is also error in this, to wit: In the refusal of the said circuit judge to charge the jury in accordance with the request made to him by the counsel for the defendant, numbered 9 in the bill of exceptions, and is in the following words, namely: "If the drafts remitted by said Frue to C. H. "Palmer, on the 31st of December, 1866, under instructions to "purchase the property mentioned in said Frue's letter of that "date, and said Palmer, without authority, paid said drafts, or "the proceeds thereof, over to said defendant, and subsequently "drew out the same, or any portion thereof, from the defend- "ant's hands, and applied it upon the purchase of the property "thus directed to be purchased, or a part thereof, then the plain- "tiff cannot recover in this action for said money so forwarded "and paid out."

TWELFTH ERROR.—There is also error in this, to wit: In the refusal of said circuit judge to charge the jury in accordance with the request made to him, by the counsel for the defendant, numbered 10 in the bill of exceptions, and is in the following words, namely: "That upon the evidence in this case the "plaintiff is not entitled to recover for any portion of the money "sent by the plaintiff to Palmer in said letter of December thir- "ty-first."

THIRTEENTH ERROR.—There is also error in this, to wit: In the refusal of the said circuit judge to charge the jury in accordance with the request made to him by the counsel for the defendant, numbered 11 in the bill of exceptions, and is in the following words, namely: "If the jury believe the testimony of Mr. "Palmer, that Mr. Frue furnished the money to purchase 5,600 "shares of the Torch Lake property, and that that money was "drawn from Mr. Loring, the defendant, then the cost of said "shares is to be deducted from the money claimed by the plain- "tiff in this suit as against the defendant, in addition to the "other deductions admitted by the plaintiff."

FOURTEENTH ERROR.—There is also error in this, to wit: In the refusal of the said circuit judge to charge the jury in accordance with the request made to him by the counsel for the defendant, numbered 12 in the bill of exceptions, and is in the following words, namely: "There is no evidence that $2,000 remitted "by Noble to Palmer on the eighth of November, belonged to "Frue."

FIFTEENTH ERROR.—There is also error in this, to wit: In the refusal of the said circuit judge to charge the jury in accordance with the request made to him by the counsel for the defendant,

numbered 13 in the bill of exceptions, and is as follows, namely: There is "no evidence of any agreement of Loring to hold the "$25,000 for Frue upon general account, or in the same way in "which the other moneys were sent for the Kearsarge, Ossipee "and Iroquois."

Sixteenth Error.—There is also error in this, to wit: In the refusal of said circuit judge to charge the jury in accordance with the request made to him by the counsel for the defendant, marked "A" in the bill of exceptions, and is in the following words, namely: "All the facts in regard to the purpose of the "transmission of the money by the plaintiff to the defendant, "through Palmer, rest on the testimony of Palmer and the plain-"tiff, and there is no testimony on the part of the defendant on "the subject. The facts are, therefore, not in controversy so far "as this point is concerned. This undisputed testimony shows "that articles of association were prepared for two mining com-"panies, that neither of these companies had any mining loca-"tion; that explorations were to be had, and mining locations "were to be contracted for, and that it was designed by plaintiff, "defendant and the witness Palmer (with other promoters of the "two corporations), that the money transmitted by plaintiff "should be applied by defendant for corporate purposes, includ-"ing payment for the explorations and the mining locations "upon which the corporations were to be set up, and in order "that they might be set up. It was also designed by plaintiff "that the defendant should procure stock in these two corpora-"tions, to be issued to plaintiff after said corporations should "have been set up on these lands, the cost price of which stock "should be equal to the sum of money transmitted. The defend-"ant did apply the transmitted money for corporate purposes, "including payment for the exploration, etc., and mining loca-"tions, and the latter were deeded to the two corporations, and "the defendant thereafter procured the issue of the agreed "amount of stock, and a portion was delivered to and accepted "by the plaintiff; but the defendant departed from his instruc-"tions in this, that another portion of the stock was issued to "himself as trustee, and not to the plaintiff; and there is no "evidence that defendant has converted this stock into money. "It was not possible, and, therefore, it was not the intention of "the parties that the money transmitted should be exchanged "directly for the stocks (by way of purchase) because the com-"panies were not in existence when the money was transmitted. "I therefore instruct the jury that the money was applied as "agreed; that the plaintiff's acceptance of part of the stock was "a ratification of the application of the money, and that the "money transmitted cannot be recovered back in this form of "action, the remedy of the plaintiff being by an action for com-"pensation in damages to the value of the stock."

Seventeenth Error.—There is also error in this, to wit: In the refusal of said circuit judge to charge the jury in accordance with the request made to him by the counsel for the said defend-

ant, marked "B" in the bill of exceptions, and which is in the following words, namely: "It is the province of the court to "construe the contracts of parties, verbal as well as written. "No dispute exists here as to the facts and circumstances rais- "ing the contract sued on. No contract can be inferred from "the uncontradicted facts which will justify a recovery in this "form of action."

EIGHTEENTH ERROR.—There is error also in this, to wit: In the refusal of the said circuit judge to charge the jury in accordance with the request made to him by the counsel for the defendant, and which request and refusal are in the following words, namely:

"Mr. Walker—I have two other requests that I desire to pre- "sent: If the jury believe the testimony of Mr. Palmer, that "Mr. Frue furnished the money to purchase 5,600 shares of the "Torch Lake property, and that the money was drawn from "Loring, the defendant, then the cost of said shares is to be de- "ducted from the money claimed of the plaintiff in this suit as "against defendant, in addition to the other deductions admitted "by the plaintiff."

"The Court—I will only say, in respect to that matter, that if "Mr. Palmer drew out the price of 5,600 shares and invested it "in this stock for Frue, and the stock was issued to Mr. Frue, "there would be an end of the matter, of course. If, however, "this money was invested just as though the money was to be "invested if Mr. Loring came under the same obligation in res- "pect to the other stock, then I hold that the plaintiff has a "right to recover."

EIGHTEENTH AND A HALF ERROR.—There is also a further error in this, to wit: In that portion of the charge of the circuit judge, which is as follows:

"Before the companies were organized, the promoters deter- "mined to sell stock on joint account, and in pursuance of this "arrangement they did sell by the plaintiff, Frue, five thousand "shares in the Kearsarge and two thousand in the Ossipee, re- "alizing thereform seventy-three thousand dollars. This sum "was remitted to the defendant through Palmer, and it consti- "tutes the basis of a portion of plaintiff's claims. He claims "that this stock really belonged to himself and Palmer, and the "defendant, Loring; and that his share in the proceeds is nine "thousand two hundred and seventy-six dollars, for which the "defendant must account, and is liable in this action. There is "no question, I believe, that if this stock really belonged to "these three parties, the true share of the plaintiff in the pro- "ceeds is the above mentioned sum—$9,276—and I instruct you "that if you believe that this stock belonged to these parties, "that the proceeds came to the hands of Mr. Loring, and that "he has not accounted therefor to the plaintiff, the plaintiff is "entitled to recover in this action said sum of $9,276.

NINETEENTH ERROR.—There is also error in this, to wit: That by the record aforesaid, it appears that the judgment aforesaid, in form aforesaid, was given for the said William B. Frue, against the said Elisha T. Loring, whereas, by the law of the land, the said judgment ought to have been given for the said Elisha T. Loring against the said William B. Frue.

And the said Elisha T. Loring prays that the judgment aforesaid, for the errors aforesaid, and other errors in the records and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment.

C. I. WALKER,

Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

No. 316.

ELISHA T. LORING, PLAINTIFF IN ERROR,

vs.

WILLIAM B. FRUE.

BRIEF FOR PLAINTIFF IN ERROR.

C. I. WALKER, *Attorney.*

E. W. MEDDAUGH, Esq., }
Hon. GEO. F. EDMUNDS, } *Of Counsel.*

JURISDICTIONAL QUESTION.

It is insisted upon the part of the plaintiff in error, that the circuit court had no power to set aside the judgment of non-suit entered in 1874; its jurisdiction over the same being entirely at an end; and that therefore all subsequent proceedings of said court are a simple nullity.

If we are correct in this, it disposes of the entire case.

FACTS.

The facts upon which this claim rests are as follows:

The case came on for trial, before a jury, on the eleventh day of June, 1874, and evidence taken, when the plaintiff, on the sixteenth day of the same month, voluntarily submitted and consented to become non-suit.

Record, p. 16.

A regular judgment of non-suit was entered with costs to defendant.

Ib.

NINETEENTH ERROR.—There is also error in this, to wit: That by the record aforesaid, it appears that the judgment aforesaid, in form aforesaid, was given for the said William B. Frue, against the said Elisha T. Loring, whereas, by the law of the land, the said judgment ought to have been given for the said Elisha T. Loring against the said William B. Frue.

And the said Elisha T. Loring prays that the judgment aforesaid, for the errors aforesaid, and other errors in the records and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment.

C. I. WALKER,

Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

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Record, p. 16.

A regular judgment of non-suit was entered with costs to defendant.

Ib.

In the same order leave is granted to the plaintiff "to move to set aside the judgment."

Ib.

The record does not disclose what evidence was introduced, or for what reason the plaintiff chose to become non-suit.

It may perhaps be inferred from the record that the counsel for the plaintiff came to the conclusion that the case was a proper one for equity jurisdiction, for in December following the plaintiff filed a bill in equity against the defendant in relation to these same matters in Massachusetts, where the defendant resided.

Record, pp. 119–123.

This bill was demurred to, and amongst other grounds, the one, that the plaintiff had "a full and complete remedy at law."

Ib., p. 125.

The case was argued upon this demurrer, which was sustained, and the bill dismissed on the eighth day of Sept., 1876.

Ib., p. 126.

On the seventeenth day of October, 1876,—two years and four months after the judgment of non-suit had been entered,—the plaintiff moved to set aside the same, which motion is based solely "upon the files and record in said cause, and upon the stenographer's minutes" of the former testimony.

Record, p. 16.

There was no showing by affidavit or otherwise, that plaintiff had been induced to submit to the non-suit because of accident, mistake, surprise, fraud or any other special cause. For aught that appears he did so in the free and intelligent exercise of his own judgment.

The supposition is, that after the decision in Massachusetts, he and his counsel changed their views of his *legal* rights.

On the thirty-first day of October, 1876, the non-suit was set aside.

Record, p. 17.

On the twenty-sixth day of December thereafter the defendant moved, that the last order be vacated and set aside;—one of the grounds of which motion was, that the court had no power to set aside the non-suit.

Ib., p. 17.

This motion was argued before the late circuit judge, Hon. H. H. Emmons, in his last sickness, at his residence, when he was

too feeble to examine the law, or write an opinion, and was overruled on the fourteenth day of January, 1877.

Ib., p. 18.

On the twenty-ninth of January, Loring, by his counsel, applied to this court for a writ of mandamus to the circuit court, requiring it to vacate the order setting aside the non-suit, which was denied upon the ground, that the remedy was by writ of error.

Ex parte Loring, 94 U. S., 418.

A rehearing of this motion to vacate the order setting aside the non-suit was asked for on the 31st day of May, 1877, for reasons therein set forth. This motion was argued before Judge Swayne on the 4th day of June, 1877, and on the following day an order was made refusing to vacate the order previously made setting aside the judgment of non-suit.

This refusal was without any full examination of authorities, and doubtless upon the ground, that Judge Emmons had already passed upon it.

Record, 19, 20.

The case came on for trial on the twenty-seventh day of June, 1877.

Record, p. 20.

Before proceeding to trial the counsel for defendant objected, that the court had no jurisdiction of the cause, and that it could not properly be tried.

Ib., 20.

This objection was overruled.

Ib., 87, 88, fol. 166.

When the evidence was in, defendant's counsel requested the court to charge, "that no verdict can be rendered for the plain-"tiff in this case, for the reason that the court have no jurisdic-"tion to try the same, the order setting aside the non-suit "granted therein being without authority of law."

Ib., 98.

This request was refused.

Ib., 98, fol. 181.

The great practical importance of this question, not only as affecting this case, but as affecting the permanence and value of the judgments and decisions of courts, authorizes a more elabo-

rate examination than would otherwise be justifiable, in view of the decisive weight of authority adverse to the exercise of the power attempted in this case.

I.

WAS THERE A JUDGMENT OF NON-SUIT?

It was objected in the court below, that the entry of the non-suit was not technically, and in form, a judgment; and therefore setting it aside was not the setting aside of a judgment, and cannot be governed by the same rules.

There is no force in this objection. The judgment contains all the essential elements of a judgment.

It recites:

1st. That the plaintiff "voluntarily submits and consents to become non-suit."

2d. It then gives the determination of the court therein, "it is therefore ordered judgment of non-suit," and that defendant recover costs.

3d. Leave is given to the plaintiff to move "to set aside *this judgment*."

Record, p. 16.

The plaintiff moves to set aside—not an unmeaning entry—but "the judgment of non-suit."

Ib.

The plaintiff was correct in treating this as a regular judgment, and cannot now change his ground and claim that no judgment existed.

It is true, the old form, "it is considered by the court," &c., is not used, nor is it in the slightest degree necessary. It is enough that it clearly appears, that the court has made an order which terminates the case.

Freeman on Judgments, §§ 46, 51.

Thus, in a case of non-suit, it was held that an entry, "that defendant go hence, and that he recover his costs," was sufficient; the court saying, "It is not very formal or full, but I think it is "substantially a good judgment."

Rogers v. Goswell, 51 Mo., 468.

Yet this very court had previously held that a mere judgment

for costs was not a formal judgment, as it did not end the case, but left the parties in court.

Lisle v. Rhea, 9 Mo., 172.
Boggers v. Isham, 48 Mo., 278.

To the same point are the following cases:

Warner v. Sherman, 5 Tex., 442.

The authorities on this point are collected in Freeman on Judgments, and so far as can be ascertained, there is but a single case, and that a criminal one, which holds that the terms "it is considered," &c., are essential to a judgment, and this case is at variance with a later one in the same court, where the earlier case was criticised.

Baker v. The State, 3 Pike, 491.
Ware v. Pennington, 15 Ark., 226.

No particular form of words is essential. It has often been held that the word "ordered," or the words "ordered and adjudged," are sufficient.

Freeman on Judgments, §§ 46, 51.
Taylor v. Shipton, 3 Iowa, 481.
Thompson v. Cook, 21 Iowa, 472.
Henrichsen v. Mudd, 33 Ill., 477.

In this very case Judge Swayne, in declining to set aside the order of Judge Emmons, said:

"A judgment of non-suit was entered, in rather an informal "way, but I am satisfied that it was substantially and for all "purposes of law, a judgment of non-suit, as much as if it had "followed the usual form, 'it is therefore considered,' etc., "that phrase being omitted."

There was therefore unquestionably a judgment.

Under the Michigan practice no formal judgment record is made up, as required by the English and former New York practice, but the files in the case and the journal entry constitute the record, and the same practice prevails in the United States Circuit Court.

Crane v. Hardy, 1 Mich., 56.
Norvell v. McHenry, Ib., 227.

II.

ITS EFFECT.

It was a final judgment.

The term final judgment is used in different senses.

It may be final as to the cause of action itself, or only final as to the particular suit.

Bowne v. Johnson, 1 Doug. Mich., 185.
Lockwood v. Jones, 7 Conn., 441.
Freeman on Judgments, § 16.

1st. It is of course admitted, that a judgment of non-suit is not, in general, a bar to a new suit for the same cause of action.

3 Blk., 296, 376.
Freeman on Judgments, § 261.
Derby v. Jacques, 1 Cliff., 425.
Greely v. Smith, 1 W. & M., 181.
S. C. 3 do., 236.
Homer v. Brown, 16 How., 354.

But so far as the particular cause is concerned, a judgment of non-suit is as final, as a judgment on the verdict of a jury, and the parties are out of court in the same way and to the same extent; and it is clearly within the settled definition of a final judgment, as given by Blackstone; such as at once puts an end to the action, and the parties are out of court.

3 Blackstone, 397–'8,
Harley v. Green, Barnes Notes, 317.
Tidd's Practice, 903.
Graham's Practice, 310–312.
Snow v. Corne, 1 Strange, 507.
Serle v. Barrington, 2 L'd Ray., 1370.
Forbes v. Wale, 1 W. Blk, 532.
Packard v. Hill, 7 Cow., 441.
Lockwood v. Jones, 7 Conn., 441.
Bowne v. Johnson, 1 Doug., 185.
Bett v. Davis, 1 Cal., 138.
Helm v. Shaw, 7 Bush., 623.

The test of finality is, that the judgment "determines the par-"ticular cause."

C. J. Marshall, Weston v. Charleston, 2 Pet., 464.
Freeman on Judgments, § 16.

It stands, therefore, so far as the right to set aside is concerned, like any other final judgment with this qualification.

In England,—in Michigan, where this case was tried,—in most of the States, and in the U. S. courts, non-suits can only be voluntary.

3 Chitty's Practice, 910–'11.
2 Tidd's Practice, 869.
Graham's Practice, 311.
Mincher v. Clement, 1 B. & Ald., 252.
Ward v. Mason, 9 Price, 291.
Cahill v. Kalamazoo, M. I. Co., 2 Doug. Mich., 133.
Doe v. Grimes, 1 Pet., 469.

In New York and some other States, it is otherwise.

1 Burrell's Practice, 234, 424.

Pratt v. Hull, 13 John., 334.
People v. Barnes, 12 Wend., 492.

Growing out of this fact, that a judgment of non-suit comes from the voluntary act of the party against whom it is rendered, he has not the same right as to setting it aside, or as to reversing it, as exists in other cases of final judgments.

Thus, if a non-suit is purely voluntary, the plaintiff cannot sue out a writ of error.

Evans v. Phillips, 4 Wheat., 73.
Van Wormer v. Mayor, 18 Wend., 172.
Rempland v. Macauly, 4 T. R., 436.
Marsh v. Graham, 6 Iowa, 76.
Vestal v. Burdell, 6 Blkf., 555.

If not voluntary a writ of error will lie.

Van Wormer v. Mayor, 18 Wend., 172.

So if a non-suit is purely voluntary, the plaintiff had no right even to move to set it aside.

Graham's Practice, 310.
Graham & Waterman on New Trials, 281.
Hadeg v. Green, Barnes, 311.
Scale v. Barrington, 2 Ld. Ray., 1370.
Buller v. Durant, 3 Taunt., 229.
Ward v. Mason, 9 Price, 291.
Elworthy v. Bird, 13 do., 222.
Hutchinson v. Brice, 5 Burr., 2692.
Forbes v. Lyster, 2 Hall, N. Y., 403.
Murray v. McDougal, 3 N. J. (Law), 695.
Hageman v. Moreland, 33 Mo., 86.
Harmon v. Bank, 9 Mo., 160.

On the other hand, if it is involuntary, or is submitted to, in deference to the expressed opinion of the trial judge, the plaintiff may move to set it aside.

Ib.
Sadler v. Evans, 4 Burr., 1986.
Wilkinson v. Whaly, 5 M. & G., 590.
Alexander v. Borkar, 2 Cr., & J., 132.
Buscall v. Hogg, 3 Wils., 146.
Sweet v. Lee, 3 M. & G., 452.

Out of this rule has grown the practice in some cases of voluntary non-suits, of obtaining leave to move to set it aside, as otherwise they could not even make the motion—as was done in this case, and in

Williams v. Sinclair, 3 McLean, 289.

The effect of this leave to move is simply to enable the plaintiff to make a motion to set aside the judgment of non-suit, just as he might do in relation to any other final judgment not voluntary.

It does not operate to extend the time for making the motion,

which must be made within the time limited by the rules and practice for making motions for new trial, or to set aside judgments in other cases ; and if made after the term has elapsed it is too late.

Whipley v. Dewey, 17 Cal., 314.
Hill v. St. Louis, 20 Mo., 584.
Walker v. Hale, 16 Ala., 26.
Odell v. Sargeant, 3 Kan., 80.

And leave to move cannot be made at a term subsequent to the non-suit, or, as in the English Court of Common Pleas, within four days of the commencement of the next term.

Ib.
Freeman on Judgments, § 96.
Tidd's Pr. 904, 912.

It follows, therefore, that this judgment of non-suit with leave to move to set it aside, left the case standing like any other final judgment, and the motion to set aside, or for a new trial, is to be governed by the same rule as in other cases.

III.

POWER OF CIRCUIT COURTS OVER JUDGMENTS AFTER TERM.

What then, is the power of a circuit court over its final judgments or decrees ?

1st. The power of the court over its judgments and decrees, during the term in which they are rendered, is unlimited, unless regulated by statute, or by rules having the force of statutes, and may be modified, changed or stricken out. The power of the court is purely discretionary.

Freeman on Judgments, § 90.
Doss v. Tyack, 14 How., 297, 312.

So if a motion is made and entered upon the record during the term at which the judgment was rendered, to set the latter aside, or for a new trial, and is continued for a hearing to another term, the jurisdiction of the court over the matter is retained.

Carpenter v. Hart, 5 Cal., 405.
Walker v. Hale, 16 Ala., 26.
Graddy v. Hightower, 1 Kelly, 252.
Richardson v. Comly, 1 T. B. Mon., 1.
Goddard v. Ordway, 101 U. S., 753.

But leave to make a motion at a succeeding term does not

have the effect to retain the jurisdiction. It is a proceeding unknown to the law. It is a simple nullity.

Freeman on Judgments, § 96.
Hill v. City of St. Louis, 20 Mo., 584.
Whipley v. Dewey, 17 Cal., 314.
Ashley v. Hyde. 1 Eng., 102.
Odell v. Sargeant, 3 Kan., 81.

2d. But, as a general rule, after the term has elapsed, its power over such judgment is entirely at an end, and any attempt to exercise it is simply a nullity.

Freeman on Judgments, § 96, and authorities hereafter cited.

The general rule is subject to some exceptions, which will be noticed hereafter, but all the cases demonstrate, that the rule is one not affecting merely the discretion of the court, leaving it to determine whether the rule or the exception shall prevail; but except in a few given cases, a court has *no power* over its judgments after the term.

3d. This court has very wisely determined that its judgments and decrees cannot be changed at a subsequent term. Judge Story says: "We have no power over the decrees rendered by "this court after the term has passed, and the cause has been "dismissed, or otherwise finally disposed of here."

Jackson v. Ashton, 10 Pet., 480.
Ex. parte Sibbald v. U. S., 12 Pet., 491.
Washington Bridge v. Stewart, 3 How., 423.
Bank of U. S. v. Moss, 6 How., 40.

Judge Baldwin said, in Sibbald v. The United States, ante, No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes.

These views have been recently affirmed in the case of Brooks vs. Railroad Co., 102 U. S., 107.

Other supreme courts hold the same doctrine.

Lemprett v. Whaley, 3 Scam., 170.
Real Estate Bank v. Rawdon, 5 Ark., 576.
People v. The Mayor, 25 Wend., 252.
Horn v. Gartman, 1 Flor., 197.

4th. Is it possible, in the light of these cases, that the circuit courts have so transcendent a power as is claimed and was exercised in this case?

To determine this question upon authority, let us look at the decisions as they bear upon different classes of adjudications:

A. DECREES IN EQUITY.

It has been determined by this court and other courts, sitting in equity, that a decree could not be set aside on motion made at a term subsequent to the one in which it was rendered.

The power to set aside ceases with the term.

Cameron v. McRoberts, 3 Wheat., 591.
McMicken v. Perin, 18 How., 507.
French v. Hay, 22 Wal., 245.
Doggett v. Emerson, 1 W. & M., 5.
Jenkins v. Eldridge, 1 do, 61, 62.
Hill v. City of St. Louis, 20 Mo.. 584, 587–8.
Sagory v. Bayliss, 13 S. & M., 153–5.
Bennett v. Winter, 2 John. Ch., 205.

And yet there are exceptions to this general rule in equity, as well as at law, which rest on the same grounds, as we shall see.

B. DECREES IN ADMIRALTY.

Strenuous efforts have been made to set aside decrees in admiralty, after the term at which they were granted, and the question of the power of the court has been fully considered in elaborate opinions by Judges Story and Curtis, and by Judge Wilkins, late District Judge in Michigan, and that power has been denied.

The New England, 3 Sum., 502, 503.
Avery and Cargill, 2 Gal., 386.
U. S. v. Glamorgan, 2 Curt., 236, 238.
The Illinois, Brown's Ad., 13, 15, 31, 32.

C. JUDGMENTS IN COURTS OF LAW.

Here the decisions are very numerous, and in most of the cases the question has arisen, as in this case, on writ of error, and while many of the cases recognize certain exceptions as existing, they assert the general rule in the strongest and most emphatic terms, viz., that the circuit court has no power to vacate a judgment after the term in which it is rendered has passed, unless the case is very clearly brought within some well established exception. It is not a question of judicial discretion, but an utter want of power.

Cases at law :

Bank of U. S. v. Moss, 6 How., 38.
Wood v. Luse, 4 McLean, 284.
Assignees v. Dorsey, 2 Wash. C. C., 433.
Mason v. Bunker, 118 Mass., 61.
In re College St., 11 R. I., 473.
Cook v. Wood, 24 Ill., 295 & 8.
State Savings Institute v. Nelson, 49 Ill., 171.
Spafford v. Janesville, 15 Wis., 474.
Whitney v. Kernan, 44 Wis., 562.
Huntington v. Finch., 3 Ohio St., 445.
Blair v. Russell, 1 Ind., 516.
Brackne v. Conly, 1 T. B. Mon., 3.

Holbert v. Montgomery, 5 Dana, 11.
Ashby v. Glasgow, 7 Mo., 320.
Hill v. St. Louis, 20 Mo., 584.
Harbor v. P. R. Co., 32 Mo., 426.
Smith v. Dudley, 2 Ark., 66.
Ashley v. Hyde, 1 Eng. (Ark.), 92, 100, 101.
McKnight v. Strong, 25 Ark., 212.
Odell v. Sargeant, 3 Kan., 80.
Shirley v. Conway, 44 Miss., 436.
Ledyard v. Henderson, 46 do., 260.
Moerle v. Andrew, 4 Tex., 200, 211.
Walker v. Hale, 16 Ala., 26.
Graddy v. Hightower, 1 Kelly Ga., 252.
Prescott v. Bennett, 50 Ga., 266, 274.
Green v. P. R. Co., 11 W. Va., 692.
Henderson v. Gibson, 19 Md., 234.
Townshend v. Chew, 31 do., 247.
Ransom v. Roper, 7 Ired (Law), 546.
Murphy v. Merrill, 63 N. C., 502.
Carpenter v. Hart, 5 Cal., 405.
Shaw v. McGregor, 8 do., 521.

For the purpose of showing that this question of setting aside a judgment after the term, is not one of judicial discretion, but of want of power, we quote from many of the cases, the exact language in which the court lays down the rule.

CHANCERY CASES.

In *Cameron v. McRoberts, 3 Wheat., 591*, this court said: "The circuit courts have no power to set aside their decrees in "equity on motion after the term at which they are rendered."

And this was approved in McMicken v. Perin, 18 How., 511.

In *French v. Hay, 22 Wall., 245*, Judge Swayne, who in that case recognizes, and acts upon an exception to the rule, says: "After the close of that term—except for reasons not claimed "nor shown to exist—the court had no power to revoke or modify "this decree."

In *Jenkins v. Eldridge*, 1 Wood. & M., 63, Judge Woodbury says: "The general rule on this subject is believed to be much "the same in courts of equity as in those of law; and it is, that, "after final judgment, the terms of it cannot be altered, in any "essential particulars, except on a review, or writ of error, or "appeal; or, at least, on a re-hearing, allowed after showing "sufficient cause."

In *Hill v. City of St. Louis*, 20 Mo., 587–8, the supreme court of that state say: "The question now occurs, had the circuit "court authority to make that order granting leave to file excep-"tions and make motions to set aside judgments at a future term. "If it had power to grant leave to a party to make such motions "at one future term, what deprives it of the power to grant sim-"ilar leave to a party a second, or third, or fourth term? We "say it has no such power, and it is right and just that it should "have no such power. There could never be an end to the pro-

"ceedings of a controversy between parties were such power to "be placed in the hands of a doubting and irresolute judge; "there might be no telling when a judgment is to become final. "One party is allowed, by leave entered on a record at one term, "to move to set aside the judgment at the next succeeding term; "and then the other is allowed the same privilege at a still suc- "ceeding term, *toties quoties*, and when will the matter end? It "will not do to say that this power lies in the discretion of the "judges. This is the fruitful source of judicial error, of judicial "abuse. Such a power is withheld from the courts; it is not "found in the field of discretion, as widely extended even as "some would have it."

In *Sagory v. Bayless 13 S. & M. 155*, Sharkey, C. J., says: "Whilst a court continues in session, it may, in most cases, "exercise power over its judgments and orders. But after the "term has elapsed, this power ceases; the judgments are then "final, and can only be reviewed by appeal or writ of error. "This is equally true as regards the final decrees of the court of "chancery which have been regularly enrolled."

ADMIRALTY CASES.

In the *Steamboat New England, 3 Sum., 503*, Judge Story says: "But I am not aware, that after the decree has been "enrolled or entered on record, and the term has passed, that "any court of admiralty, at least in this country, has ever enter- "tained an application for a rehearing. In the High Court of "Prize Commissioners in England, it is said to be the practice "never to rescind a decree after it has passed, or to open the "subject anew."

In *The Illinois, Brown's Adm. R., p. 15*, Judge Wilkins says: "I have very grave doubt whether a court of admiralty ought to "open a final decree, particularly after expiration of the term, "upon the ground of oversight, mistake or forgetfulness on the "part of defendant or his counsel. The English authorities are "unanimous in holding that a final decree cannot be opened "upon this ground," and then proceeds to show by a most convincing array of authorities, that the admiralty court has no such power.

In the *United States v. Brig. Glanorgan, 2 Curt., 238*, Judge Curtis lays down the rule with his usual clearness. He says: "So far as I am aware, no court, either of law or equity, has "exercised a summary control over its judgments or decrees, "after their enrollment, and after the expiration of the term at "which they were entered."

LAW CASES.

In the leading case of the Bank of the United States vs. Moss, 6 Howard, 38, Judge Woodbury examines the authorities, and

recognizes certain exceptions to the rule, but lays down the rule with great clearness. We quote his words: "A mere error in "law, of any kind, supposed to have been rendered in a judg- "ment of a court at a previous term, is never a sufficient justi- "fication for revising and annulling it at a subsequent term, in "this summary way, on motion."

In *Wood & Grant v. Luse, 4 McLean, 255*, the court says: "But by the common law, the judgment of a previous term can "not be set aside on motion, and this is the doctrine of the "Supreme Court."

In *Assignees v. Dorsey, 2 Wash., C. C., 433*, Judge Washington says: "If there was error in entering it, the court, at a sub- "sequent term, cannot set it aside, unless it was entered by the "misprision of the clerk, by fraud or the like."

Justice Lawrence of the Supreme Court of Illinois says in State Savings Institution v. Nelson, 49 Ill., 172: "The judg- "ment in this case was set aside on motion more than two years "after its rendition. The court had no power to do this. Its "power over the judgment, except to amend it in matters of "form, or to correct clerical errors, was gone when the term at "which it was rendered expired."

In *Stafford v. The City of Jonesville, 15 Wis., 477*, Dixon, C. J., says: "Except in cases of mistake, inadvertence, surprise "or excusable neglect, mentioned in the statute, where relief "may be granted within one year after notice, we know of no "law, statute or common, authorizing the court, *after* the term "at which it was entered, to vacate a judgment for error in law "or fact committed in rendering it or occurring before it was "pronounced. If such practice were tolerated, no one knows "where it would end. Parties would never be secure in their "rights, and judgments would be of as little account as the "course of the wind."

In *Huntington v. Finch, 3 Ohio, St., 477*, Bartly, J., says: "If the order setting aside the judgment in the common pleas "rested in the discretion of the court, it was not subject to re- "versal on petition in error. The court of common pleas has "ample control over its own orders and judgments during the "term at which they are rendered, and the power to vacate or "modify them in its discretion. But this discretion ends with "the term, and no such discretion exists at a subsequent term "of the court."

In *Carpentier v. Hart, 5 Cal., 407*, Murray, C. J., says: "We have repeatedly held, that after the adjournment of "the term, the court loses all control over cases decided, un- "less its jurisdiction is saved by some motion or proceeding at "the time, except in the single case provided by statute. " * * * * The reason of this rule is "obvious; there must be some finality in legal proceedings, and "a period beyond which they cannot extend. The safety and "tranquillity of parties require that their interest should not be "constantly suspended, and their repose liable to be disturbed "at any moment by the discretion of the court."

In *Walker v. Hale, 16 Ala., 27*, Dargin, J., in giving the opinion of the court, says: "A court cannot grant a new trial, after "the term is closed, at which the cause was tried, unless a mo-"tion during the term be made, and for some cause continued "until the next term."

In *Smith v. Dudley, 2 Ark., 66*, the court says: "Where a "final judgment has once been pronounced in a case and the "term at which it is given has finally expired, neither the court "or the parties to the record have any longer any power or con-"trol over it."

In *Murphy v. Merrill, 63 N. C., 502*, the doctrine is laid down in these words: "It is settled, that a regular, final judg-"ment cannot be set aside at a subsequent term on motion."

IV.

EXCEPTIONS TO THE RULE.

The courts all agree that this general rule is subject to some exceptions and limitations; and there is not active harmony as to the extent and scope of these exceptions. But a careful examination of the decided cases shows very clearly that the broad discretionary power of the courts, which existed during the term, ceases with the term itself, and in the language of the Supreme Court of Ohio, already quoted: "No such discretion "exists at the subsequent term of the court. There is an utter "want of power unless the case is brought clearly within some "recognized exception."

These exceptional cases may be divided into two classes:

1st. Where the cause for altering or vacating the judgment or decree will be taken notice of by the court; as where the record shows a clear want of jurisdiction over the party on the subject matter.

Freeman, § 98.
Ex parte Crenshaw, 15 Pet., 123.
Harris v. Hardeman, 14 How., 334.
Shuford v. Cain, 1 Abb. (U. S.), 302.
Jagger v. Coon, 5 Mich., 31.
Hervey v. Edmunds, 68 N. C., 243.

Or, where a manifest irregularity appears on the face of the proceedings, as want of notice.

Freeman, § 97.
French v. Hay, 22 Wal., 249.
Hunter v. Ycatman, 3 Ohio, 18.
McKee v. Bank, 7 Ohio, 188.
Reynolds v. Stansbury, 20 Ohio, 344.
Dedrick v. Richley, 19 Wend., 112, 113.

Or, where there is a clear mistake of the clerk in entering the judgment, or it is erroneous in form.

Freeman, § 70, 71.

U. S. v. McKnight, 1 Cr. C. C., 84.
U. S. v. Smith, 1 Cr. C. C., 127.
Bank v. Wistar, 3 Pet., 431.
Bank of U. S. v. Moss, 6 How., 35.
Stevens v. Cowan, 6 Watts, 511.
O'Connor v. Mullen, 11 Ill., 57.

2d. Where the cause for the alteration or vacation of the judgment must be shown to the court by affidavit or other proper evidence;

As, where a judgment is taken against a defendant on the record after his death.

Hooe v. Barber, 4 H. & M., 439.
Holmes v. Honie, 8 How. Pr. R., 383.

Or, against an infant without the appointment of a guardian *ad litem.*

Keaton v. Banks, 10 Ired., 381.

Or, where the judgment has been obtained by the fraud of the party in whose favor it is.

Freeman, § 99.
Bank of U. S. v. Moss, 6 How., 39.
Edson v. Edson, 108 Mass., 590.
Drake v. Smythe, 44 Iowa, 410.
Molyneaux v. Huey, 81 N. C., 106.

But it will not be set aside for the fraud of a third person.

Murphy v. Merritt, 63 N. C., 502.

3d. Where sickness or other accident has prevented the party against whom the judgment is rendered from attending court at the proper time; there being no laches, and the motion being made promptly.

Den v. McAllister, 4 Wash., 393.

So, where the judgment has been obtained by mistake in fact of the party against whom it is rendered, and without laches on his part or that of his counsel. But in this class of cases all necessary care must be exercised.

Freeman, §§ 113, 114.
Cannan v. Reynolds, 5 E. & B., 307.
Austin v. Evans, 2 Man. & Grang., 430.
Newton v. Weaver, 2 Cr. C. C., 685.
Herbert v. Rowles, 30 Md., 271.
Waddell v. Wood, 64 N. C., 624.
Cobb v. O'Hagan, 81 N. C., 293.
Capen v. Inhabitants, 16 Gray, 364.
Harbor v. P. R. Co., 32 Mo., 426.

Perhaps the strongest case for the plaintiff upon this last point is that of Cannan v. Reynolds, cited above. There the assignees of a bankrupt claimed and took judgment by default

for too small a sum. The defendants were aware of the mistake and purposely kept silent. Subsequently the assignees discovered the mistake, and within three or four months moved to have the judgment set aside upon a showing of the facts. The motion was granted; but Earle and Crompton, justices, seriously doubted the power to do so.

But the power of English courts in this particular has been enlarged by statute.

Carter v. Smith, 4 E. & B., 696.

In all of these exceptional cases depending upon facts not apparent upon the record, there must be a clear and satisfactory showing of the facts relied upon as the basis of judicial action.

Den v. McAllister, 4 Wash., 393.
Joynes v. Scott, 34 Md., 58.
Mason v. Pearson, 118 Mass., 61.
In re College St., 11 R. I., 472.

But a judgment is never vacated or modified because of any error on the part of the court, or the error or misapprehension of counsel not induced by fraud.

Freeman, § 101.
Bank of U. S. v. Moss, 6 How., 38.
Assignees v. Dorsey, 2 Wash., 433.
Doggett v. Emerson, 1 Wood. & Min., 5.
Jones v. Leach, 46 Iowa, 186.
Harbor v. Pacific R. Co., 32 Mo., 423.

MICHIGAN CASES.

It was contended in the court below, that whatever may be the law elsewhere, in Michigan, where the case was tried, the supreme court of that State held the doctrine, that the circuit court has full and unlimited power to set aside its judgments at any time, and that the exercise of that power is purely discretionary, and cannot be reviewed by the supreme court; and the following cases are cited to sustain this view:

Loree v. Reeves, 2 Mich., 134.
Hurlbut v. Reed, 5 do, 30.
Van Renselaer v. Whiting, 12 Mich., 449.
Campau v. Coates, 17 Mich., 235.

If this were so, it ought not to affect this case, in the light of the overwhelming authorities the other way.

In a matter of this kind, this court will follow the general law, not the local.

In Michigan there is no statute or rule of court authorizing the exercise of any such power.

The supreme court has power to establish rules regulating new trials, and by Circuit Court Rule 31, parties have two days after

verdict or judgment to move for a new trial, the court being clothed with power to extend such time.

2 Comp. Laws Mich. (1871), § 4921.
Rule of Circuit Court No. 31.

Rule 44 of the Common Law Rules for the Districts of Michigan, provides as follow: "in cases where no special provision is "made by these rules, the statutes and the rules of the circuit "courts of this state shall govern the proceedings in this court."

But this matter of motions for new trials is especially provided for by such rules. Rule 38 of said Common Law Rules gives two days within which to move for a new trial.

In addition to this, the statute of the United States authorizes the court to extend the time for a petition for a new trial forty-two days.

R. S. of U. S., p. 184, § 987.

This matter cannot, therefore, be regulated by state practice.

But we submit that a careful examination of those cases, and the record on which they were decided, it will be found, that all of them are brought within the exceptions already mentioned, and are in harmony with the general law.

The first case is that of *Loree v. Reeves*, 2 Mich., 134. This was an attachment case, where judgment was rendered against the defendant without personal notice, and by the negligence or fraud of his attorney, and property worth ten thousand dollars was sold for $281.71.

The judgment was set aside upon a showing by affidavit.

The second is that of

Hurlbut v. Reed, 5 Mich., 30. This was a case of attachment without personal notice, and judgment without appearance. The defendant had no knowledge thereof, and at the earliest opportunity applied for a new hearing, showing that he had a defence upon the merits, and the court set aside the judgment, following the case of *Loree v. Reeves*.

The third case is that of *Van Renselaer v. Whiting*, 12 Mich., 449.

Van Renselaer recovered judgment against Whiting for $2,793.83.

At a term subsequent to the one when the judgment was rendered, Whiting applied to have the judgment set aside, showing by affidavit that he was only justly liable for $798 of the judgment; *explained his failure to make a defence* in time, and upon these *and other grounds*, moved that the judgment be vacated.

This was done by the circuit court, and Van Renselaer took the case by certiorari, to the supreme court, where it was held that it was a matter within the discretion of the circuit court,

and they could not revise it. Of course it became a matter of discretion, if there was an affirmative showing, tending fairly to bring the case within some exception.

The fourth and last case upon this point is, *Campau v. Coates*, 17 Mich., 235.

This was a proceeding before a circuit court commissioner, to recover possession of certain premises. It was appealed to the circuit court, where the plaintiff obtained judgment, which was set aside at a term subsequent to the rendition thereof.

The case as reported, does not show the grounds or basis of this action of the circuit court, or what there was before that court which authorized its action; but an examination of the record of the supreme court, which we produce, shows that the judgment was obtained by surprise, and that the defendant delayed moving for a new trial, because of a stipulation into which he entered with the other side, and by which he had been misled to his own injury.

The supreme court, following the cases already cited, supported the power of the circuit court to set aside the judgment in this case after the term.

The remarks made by Judge Cooley, in the more recent case of *Jennison v. Haire*, 29 Mich., 219, clearly indicate, that the Michigan court claims no such unlimited power. These remarks are as follows:

"While it is unquestionably true that a judgment obtained by "fraud may be set aside on application by motion, provided such "motion is made within a reasonable time, yet, where the fraud "is denied, and especially after the lapse of any considerable "time, it must be manifest to any legal mind, that the remedy "by motion is not the most suitable to be adopted."

In the case of *Norvell v. McHenry*, 1 Mich., 230, the court say:

"Although the journal is open to correction during the whole "of the term in which the entries are made, yet no amendment, "except in the mere matter of form, can be made at a subse-"quent term," thus clearly recognizing the general rule.

We claim, therefore, that the Michigan cases are not only not adverse to our position, but that they really sustain it.

The foregoing cases illustrate the exceptions that exist to the general rule, of the utter want of power of circuit courts to vacate their own formal judgments after the expiration of the term at which they were rendered.

In this case there can be no pretence, that the application for a new trial two years and four months after the judgment of non-suit is brought within any exception, that was ever recognized by any court.

It is not claimed that there was any want of jurisdiction, irregularity, accident, mistake or fraud.

As we have said, the supposable ground is, that plaintiff's

counsel came to the conclusion that they were not entitled to a judgment.

But, as we have seen, this conclusion, however erroneous, would furnish no ground of exception to the general rule.

Even these are not set forth in the motion, and the new trial is asked for without setting forth any facts or reason upon which it is based.

This is entirely without precedent, and furnishes no ground of jurisdiction to the court for the exercise of this most extraordinary power.

The plaintiff should have affirmatively set forth some clear ground for the relief he asked, within some recognized exception, and without this the Circuit Court had no power to entertain the motion.

THE DANGEROUS CHARACTER OF THE POWER CLAIMED.

The existence of such a power, as is claimed in this case, would be a most dangerous one, and a source of *immense* wrong.

Judgments, however solemn and however important, could never be relied on as final; for if, as in this case, they can be set aside two years and more after their rendition, why may they not ten years?

Such a power, as has been well said, is a gigantic and dangerous one, and, in the hands of an irresolute, vacillating judge, it would make litigation more intolerable than the gross injustice for which courts are supposed to furnish a redress.

Freeman on Judgments, § 96, and cases cited, ante.

The policy of the law has limited the time within which appeals and writs of error may be taken to the higher courts. To this court they can be taken within two years, while the time for motion for new trial may be extended to forty-two days.

R. S. of U. S., p. 188, § 1008.
do., p. 184, § 987.

By such proceedings as were taken and sanctioned in this cause, the circuit judge can *review* his own adjudications at his pleasure, and without any fixed limit as to time.

We submit therefore, not only by the weight of authority, but by the unbroken current of decisions of this court and the state courts, that the setting aside of the judgment of non-suit in this case was an act clearly beyond the power of the circuit court. Its jurisdiction over the case was at an end, and its subsequent action utterly void.

QUESTIONS ARISING ON THE TRIAL.

The other questions in the case relate entirely to the charge of the court and its refusal to charge in relation to the testimony

and its effect. The entire testimony is given in the bill of exceptions. Record, p. 87, f. 166.

I.

HISTORY.

This was an action of assumpsit, commenced in the State court by attachment (the defendant being a resident of Massachusetts), in 1872.

The declaration was upon the common counts, and the plea, the general issue.

The case was removed before the issue, in February, 1873, to the Circuit Court of the United States for the Eastern District of Michigan, and came on for trial in June, 1874, and the plaintiff submitted to a non-suit, as we have already seen.

This non-suit was set aside in October, 1876, and the cause came on for trial in June, 1877, before Judge Ballard, and resulted in a verdict for the plaintiff of $67,432.84.

The defendant, for reasons not appearing in the record, did not appear in person, and no witnesses were examined in his behalf. This probably, in part, arose from the conviction on the part of his counsel, that the court had then no jurisdiction in the case.

The principal claims made on the trial, in plaintiff's behalf, were:

1st. For $9,276, being for a part of $73,000 received by plaintiff for certain stock in the Ossipee and Kearsarge Mining Companies, sold by him at Lake Superior, and the avails of which were remitted by him to the defendant at Boston.

2d. For $15,889.32, which the plaintiff claims to have been remitted to the defendant at Boston, to pay for certain stocks in the same mining companies, the defendant having failed to deliver him the stocks after demand, including $2,000 sent by Noble to pay for his own stock, which defendant claims was Noble's money.

3d. For $25,401.48, claimed by plaintiff to have been remitted by him to one C. H. Palmer, for a specific purpose, and which sum was paid by Palmer to defendant, and by him used for other purposes.

The facts will sufficiently appear as we examine the assignments of error relating to these various claims.

II.

AS TO THE $9,276 BEING A PART OF THE $73,000.

After the organization of the companies known as the Ossipee

and Kearsarge Companies, in the fall of 1866, some stock in each company was issued to the plaintiff as trustee, to sell the same, and he sold it for $73,000 and remitted the proceeds to the defendant through Palmer, and on the trial he claims that a portion of that stock belonged to him, and that he was entitled to recover of defendant $9,276, as his share of the $73,000 thus paid over.

The court charged upon this subject as follows: He claims that this stock really belonged to himself and Palmer and the defendant, Loring, and that his share in the proceeds is $9,276, for which the defendant must account, and is liable in this action. There is no question, I believe, that if this stock really belonged to these three parties, the true share of the plaintiff in the proceeds is the above-mentioned sum—$9,276—and I instruct you that if you believe that this stock belonged to these parties, that the proceeds came to the hands of Mr. Loring, and that he has not accounted therefor to the plaintiff, the plaintiff is entitled to recover in this action said sum of $9,276."

Record, p. 88, fol. 167, 168.

To the charge of the court upon this point the counsel for defendant excepted. Record pp. 97, 98; 18½ assignment of error.

It is claimed on the part of defendant that there was no evidence in the case that authorized the court to submit to the jury the question whether the stock in question belonged to the plaintiff and Palmer, and to defendant, and this was the only theory, under the charge, on which the plaintiff was entitled to recover the sum of $9,276.

The only testimony bearing upon this point comes from the plaintiff himself, and his principal witness, Palmer.

1st. In the summer of 1866, Palmer, the associate of the plaintiff, visits Boston, and has an interview with the defendant, Loring, who, as he says, expressed a desire to become interested with Palmer and Frue in some mining investment at Lake Superior.

Palmer, p. 53, fol. 110.

2d. Palmer, on his return to Lake Superior, communicated this desire to Frue, and arrangements were made for the purchase of lands, which were afterwards conveyed to the Ossipee and Kearsarge Mining Companies.

Ib.
Frue, p. 21, fol. 58.

3d. At the same time plans were arranged for the organization of two corporations, and it was discussed, and to some extent

arranged, who should be interested in the stock of such contemplated organizations.

Frue, pp. 21, 23, fol. 59, 60.
Palmer, p. 53, fol. 110.

4th. Palmer returns to Boston to complete these arrangements. Frue says it was the last of October or the first of November, although the facts show that it must have been much earlier.

5th. The articles of association for the organization of these corporations, the Ossipee and the Kearsarge, were executed by Dupee, Clark and Bigelow, of Boston, who were afterwards interested in the same, and heavy stockholders.

Palmer, p. 76, fol. 148.

Exhibits A7 and A8, pp. 108 to 111.
Reports of Stockholders, pp. 111 to 118.

The Ossipee articles were executed on the 15th of October, and filed in the office of the Secretary of State October 22d. The Kearsarge articles were executed on the 17th of September, and filed on the 24th of September, 1866.

Record, pp. 84, 85.
Articles, pp. 108, 110.

There is some discrepancy as to the date when these companies were practically organized for business, and both Frue and Palmer say that they were not so practically organized until about January, 1867, but this is entirely at variance with their own testimony and admitted facts.

Palmer, p. 55, fol. 114.
do., p. 62, fol. 125.
do., pp. 76, 77, fols. 148, 149.
Frue, p. 39, fol. 88.

It is clear that a portion of the land purchased for the Ossipee (the Douglas purchase), was purchased after the organization of that company, and that purchase was made early in December.

Frue, p. 23, fol. 61.
Record, p. 84, fol. 161.
Loring's Letter, p. 108.

So the stock in question, sent to Frue to sell, must have been sent much earlier, as he commenced making remittances for the same on November 10th.

Exhibits, pp. 102, 103.

This matter of time is not important as affecting this question.

6th. The capital actually invested in the Ossipee company was $110,000, making the shares to cost $5.50 each.

Frue, p. 23, fol. 61.
do., p. 25, fol. 64.
Palmer, p. 74, fol. 115.

7th. The capital of the Kearsarge was $90,000, making the shares to cost $4.50 each.

8th. Portions of this stock were distributed among various persons, as original promoters and stockholders, there being some change from the original allotment. Under this final allotment Frue was to have for himself and associates, 4,200 shares in the Kearsarge, and 5,835 shares in the Ossipee.

Frue, pp. 22, 23, fols. 60, 62.

Various other persons were stockholders.

Reports, pp. 111 to 118.
Palmer, pp. 70, 71, fols. 138, 140.

9th. Besides the stock thus allotted to individuals, it was determined to sell stock in each of these companies, at an advance from cost, for the general benefit of all the promoters. This was originally suggested in the interview between Frue and Palmer at the Lake, before the organization of the companies, but this prior plan then agreed upon was not carried out.

Frue, p. 27, fols. 68, 69.
Palmer, p. 54, fol. 112.

After the organization of the companies, the defendant Loring became the president, treasurer and financial agent of these companies.

Palmer, p. 56, fol. 115.
do., p. 62, fol. 125.
Frue, p. 28, fol. 70.

As such officer he caused to be issued 2,000 shares of stock in the Ossipee and 5,000 of the Kearsarge to William B. Frue, as trustee, and delivered the same to Palmer to be sent to Frue, for the purpose of sale, and Frue sold the same as follows :

2,000 shares of Ossipee at $11.50, - - - -	$23,000
5,000 do. of Kearsarge at $10.00, - - - -	50,000

And this money was remitted to Loring, who was president and treasurer.

Palmer, p. 57, fol. 117.
Frue, p. 28, fols. 69, 70.

It seems that the sale of some of this stock had been arranged

for by Frue before the companies were organized, or the stock actually issued.

Frue, p. 39, fols. 88, 89.
do., pp. 27, 28, fol. 69.

10th. There is no evidence that this stock, so sold, was the individual property of Frue, Palmer and Loring, or any one of them. On the contrary it was the joint property of all the original promoters, including many other persons—or of the corporations themselves.

The evidence fully shows this.

Frue himself testifies that "It was stock belonging to the original promoters," and was sold "for their joint benefit."

Frue, p. 28, fol. 70.
do., p. 39, fol. 88.

Palmer says that the stock to be sold was "the stock of the company to be formed."

Palmer, p. 54, fol. 112.

The stock, then, belonged jointly to all the promoters. It was sent by Loring, as president and treasurer, for he could send it in no other capacity, for it was in no sense individual stock.

The money was remitted to him in the same capacity, for the joint benefit of all. This clearly appears from Frue's own testimony.

"He is president of the company, and I had to account to Mr. Loring for this stock."

Frue, p. 28, fol. 70.

The very manner in which Palmer testifies that Loring received and credited the money, shows that he received it as treasurer, for he entered it an account kept with "a great many people."

Palmer, pp. 54, 55, fol. 113.
do., p. 57, fol. 117.

The very remittance by Frue shows the same thing. If a portion of this $73,000 belonged to Frue individually, he would not have remitted it to Loring; but the sale of the stock was for the joint benefit of *all*, and the proceeds were paid over to the treasurer of all.

We submit therefore, that there is no evidence that authorized the court to submit to the jury the question of individual ownership.

But there is still another, and we submit fatal objection to the plaintiff's right to recover for any portion of this $73,000.

On the plaintiff's theory a portion of this sum belonged to him, and was voluntarily paid into Loring's hands to hold for him. Loring thus became his agent, and was holding this money rightfully.

There is no evidence :

1st. That Frue ever gave to Loring any instructions as to the disposition thereof, or,

2d. That he ever made any demand upon him for this money, or for any portion thereof.

He demanded stocks to pay for which he claims to have remitted money, but he demands no money.

Until such demand, and a neglect or refusal on the part of the agent, no action lies.

Cooley v. Belts, 24 Wend, 203.
Taylor v. Bates, 5 Cow., 376.
Ferris v. Paris, 10 John, 285.
Buller's N. P., 148, citing.
Poulter v. Cornwall, 1 Salk., 9.
Topham v. Braddick, 1 Taunt., 572.
Rathbun v. Ingals, 7 Wend., 320.
Burns v. Pillsbury, 17 N. H., 66.

III.

AS TO $2,000 SENT BY NOBLE TO LORING BEING PART OF THE $15,839.82.

It is insisted, on behalf of the plaintiff in error, that the court erred in its refusal, and in its charge upon this subject.

The defendant below requested the court to charge : "That upon the evidence in this action, plaintiff is not entitled to recover for the $2,000."

This charge the court declined to give.

Record, p. 96, fol. 178.

On the contrary, the court submitted to the jury to find whether this $2,000 was or was not Frue's money, and forwarded to Loring by Noble only as Frue's clerk, and charged, that if they should so find, then the plaintiff was entitled to recover.

Record, p. 91, fol. 171.
do., p. 96, fol. 198.

These points are covered by the 4th, 10th and 14th assignments of error.

We submit that there is no testimony tending to prove that this $2,000 was Frue's, or that he was entitled to recover therefor.

1. There is no evidence that Noble was Frue's clerk, or in his employ in any capacity ; on the contrary, Frue himself testifies that he was book-keeper for several mining companies of which Frue was the superintendent.

Record, p. 25, fol. 65.

2. It was clearly understood from the first, and as early as October, that Noble was to have stock in the corporations which were to be organized, and were organized in the fall of 1866, and his name was put on the list by Frue.

Frue's testimony, p. 51, fols. 106, 107.
do. do., p. 37, fol. 85.

Noble and the Hodgsons were spoken of as the "friends" and "associates" of Frue, to whom stock was to be assigned.

"Frue and associates," Record, p. 38, fol. 85.
"Myself and associates," Record, p. 38, fol. 86.

3. Stock was actually allotted to Noble by name, and this in the Boston allotment, to which Loring was a party.

Thus, 375 shares of the Ossipee stock and a certain amount of the Kearsarge were thus allotted.

Palmer, pp. 70, 71, fols. 138, 140.

See also,

Palmer's testimony, p. 72, fol. 141, a distinct amount allotted to Noble.
Palmer's testimony, p. 73, fols. 142, 144.

Frue admits that it was so understood outside, but says the names of Noble and the Hodgsons were put down for his protection, but he does not pretend that Noble was not to own the stock thus allotted to him.

Frue's testimony, p. 38, fol. 85.
do. do., p. 46, fol. 99.

4. The money sent forward by Noble was clearly his own, and there is no testimony tending to show that it belonged to Frue.

The letter in which the $2,000 was enclosed makes no reference to Frue. On the contrary, it is sent to pay for his own interest in the lands on which the companies were organized.

Exhibit 3, Record, p. 102, fol. 189.

This letter was shown to Loring, and a copy, or the original, was left with him, and he was thus fully informed as to who sent the money, and the object for which it was sent.

Palmer's testimony, p. 60, fol. 122.

Frue does not, in his own testimony, claim that this money or any portion of it was his, or that it even came into his hands. Noble asked where he should send it, and Frue told him, and this he calls sending it by his instruction, but he distinctly states that he sent forward none to his knowledge.

Frue's testimony, p. 36, fol. 83.
do. do., p. 37, fol. 84.
do. do., p. 46, fol. 100.

We submit that there is not a scintilla of evidence tending to show that this $2,000 belonged to Frue, or that it was sent forward to apply on his account, or that he had or has any legal claim thereto.

On the contrary it was sent forward by Noble to pay on his own interests and without the slightest reference to Frue's interest, and Loring must have so received it.

And under the wise rulings of this court, it requires something more than a scintilla of evidence to authorize a court to submit a question to a jury.

IV.

AS TO THE $13,889.32 BEING THE REMAINDER OF THE $15,889.32.

SIXTH ASSIGNMENT OF ERROR.

The amount of money remitted by Frue and Noble to Palmer, and by the latter paid to Loring, was $114,390.80 Of this $73,000 was remitted as the proceeds of stock sold, $2,000 to pay for Noble's interest, $25,401.48 for a special purpose, and was not to be paid to Loring; leaving $13,889.32, which was sent forward to pay for Frue's stock in the Ossipee and Kearsarge companies, and his share of loss on the Iroquois investment, being $2,100, it leaves $12,789.32 to pay for stock.

Record, Frue, p. 24, fol. 63.
do., do., p. 30, fol. 73.
do., do., p. 33, fol. 79.
do., Palmer, p. 51, fols. 107, 108.
do., do., pp. 53, 54. fols. 111, 112.

The testimony of both Frue and Loring assumes, that the money was applied to the purposes for which it was sent, and that the stock was actually paid for, and issued to Loring precisely as was expected.

Frue, p. 26, fol. 66.
do., p. 30, fols. 72, 73.
do., p. 31, fol. 75.
do., p. 42, fols. 97, 98.
Palmer, p. 55, fols. 113, 114.
do., pp. 69, 70, 71, fol. 137.
See Exhibit B, pp. 111, 119.

There is no evidence to the contrary.

Frue did demand the stock and Loring did not furnish it, and this gave a good cause for a special action of assumpsit, for not delivering the stock.

But we submit that an action on the money counts, cannot be maintained for the money thus paid to Loring and applied as directed, to the payment of the stocks allotted to Frue.

The defendant made two requests to charge upon this subject, which were refused.

2d and 3d Requests, p. 9, 6th and 9th Assignments of Error.

This refusal we claim was error.

This money was not paid to Loring to be paid back to Frue, nor was there any express or implied promise to pay it to him.

The promise was to pay this money for stock, and to deliver the stock to Frue, and the action should be a special one for not delivering.

1 Chitty on Pleading, 340 to 346.
C. &. O. Canal Co. v. Knapp, 9 Pet., 541, 565.
Barnum v. Stone, 27 Mich., 332.
Nightingal v. Devisme, 5 Burr, 2589.
Spratt v. M'Kinney, 1 Bibb., 594.
Brooks v. Scott, 2 Munf., 344.
Allen v. Ford, 19 Pick., 217.

V.

THE $25,401.48 ITEM.

Among the sums sought to be recovered in this suit was the sum of $25,401.48, which Frue remitted to Palmer in drafts in the letter of December 31, 1866, and which were endorsed to Loring by Palmer.

The testimony relating to it is uncontradicted, and is all in the record, and the questions arising are twofold.

1st. As to the inferences of fact which the jury were at liberty to draw therefrom.

2d. As to the application of legal principles to the facts so testified to.

Exceptions are taken by the defendant both to the charge of the court and its refusal to charge as requested upon this point. These are covered by the 5th, 11th, 12th, 13th, 15th and 18th assignments of error, but those especially relied upon are the 5th, 12th and 15th.

FACTS.

This letter of December 31st was signed by Frue in person. It excludes the idea that the remittances were on account of the Ossipee and Kearsarge, on which all parties had a common inter-

est. It instructs Palmer to make the purchase "of section 24 and Penn," and if more money is needed, Palmer (who was Frue's general attorney in fact), is authorized to pledge, as collateral, Frue's Central.

Letter, Exhibit 1, pp. 100, 101.

Frue testifies that he dictated the letter—that it related to "an outside concern," that he had reason to believe Mr. Loring did not intend to invest in, and that it was wholly different from Ossipee and Kearsarge.

Frue, p. 42, fols. 91-94.
do., p. 84, fol. 160.

This letter of December 31 was shown to Loring by Palmer, and the drafts were endorsed by Palmer and deposited with Loring.

Palmer, p. 52, fols. 108, 109.

Palmer does not testify that this amount was in any way placed to Frue's account by Loring. His testimony on this subject is vague and inconsistent, but it will be found on careful examination, that it relates to the money sent to pay for Frue's interest in stock or for stock sold, and does not extend to this remittance.

Palmer, p. 52, fols. 108, 109.
do., pp. 54, 55, fol. 113.
do., pp. 77, 78, fols. 149, 150.

The matter then stands in this way. Drafts are sent to Palmer by Frue, with authority to use the proceeds to purchase certain property named. He endorses the drafts to Loring, and shows him the letter, and Loring gets them cashed. Loring receives these funds of Palmer and is in no privity with Frue, and Palmer only can call him to account.

Palmer, as he says, after consulting with Loring, made up his mind not to purchase the property mentioned, but does conclude to purchase a portion of it for himself, Loring and others, with a general understanding that Frue might, if he chose, have an interest therein, and he did purchase or cause to be purchased, some Torch Lake stock (being the same as "Penn," named in Frue's letter), to the amount of about $25,000, and drew on Loring for $21,000 of the amount, and paid the balance with a draft furnished by Loring.

Palmer, pp. 63-66, fols. 127-139.
do., pp. 78-81, fols. 151-156.

There is no evidence that there were any other funds in Loring's hands subject to Palmer's draft than these remitted in the letter of December 31.

It is true that Palmer speaks of other parties becoming inter-

ested in this stock and furnishing Loring money therefor, but it is entirely clear that he knew nothing of any money having then been paid to Loring.

Palmer, p. 64. fol. 129.
do., p. 80, fol. 154.

And Palmer admits that a portion of these drafts were paid from "money sent from the Lake," which must have been the remittance of December 31st, as all other moneys sent from the Lake were sent for other purposes.

Palmer, p. 80, fol. 154.

This purchase of Torch Lake stock was not made under the instructions of Frue, by his authority, or with his knowledge, and never received his subsequent sanction.

There is no evidence that he knew that the $25,000 was paid to Loring by Palmer.

Or that he had any communication upon this subject with Loring, either oral or written, through Palmer or otherwise.

Or that he ever knew just what interest was purchased in Torch Lake. He simply "understood that certain purchases were made."

Frue, p. 43, fol. 94.

There is no evidence that any of this stock was ever allotted or transferred to Frue or held by him. Palmer attempts to create the impression that this was the case, but he has no knowledge on the subject. "That was expected to be." "Frue was to be admitted." "Loring arranged this." "I had nothing to do with it."

Palmer, p. 65, fol. 131.
do., p. 79, fol. 152.
do., p. 81, fol. 155.

Or that Frue ever claimed to own any of this stock.

He says he has received no statement from any one, of his interest in this stock, or any stock itself.

Frue, p. 50, fols. 105, 106.
do., p. 84, fol. 160.

It is true that he says he called for a statement "to show what I had," but does not state upon whom he called, but says, "it was never furnished me by Mr. Loring." If he had had any communication with Loring on this subject, it would have been mentioned.

Frue, p. 43, fol. 94.

Under no circumstances revealed in the testimony, could Frue have been compelled to receive from Loring, or any one, any

portion of this Torch Lake stock. His only claim was against Palmer for the money sent him, and not used for the purpose for which it was sent.

Upon this state of facts, the defendant's counsel, among other requests, asked the court to charge on this subject as follows:

1st. "That upon the evidence in this case, the plaintiff is not "entitled to recover for any portion of the money sent by the "plaintiff to Palmer in said letter of December 31st."

2d. "There is no evidence of any agreement of Loring to hold "the $25,000 for Frue upon general account, or in the same way "in which the other moneys were sent for the Kearsarge, Ossipee "and Iroquois."

Tenth and Thirteenth requests, p. 99, fol. 183.

The court refused to charge thus, but did, among other things upon the subject, charge as follows:

"There is some testimony to the effect that when the moneys "were sent forward through Palmer to Loring, to be invested in "the lands, stocks, or whatever you may call them, connected "with the Kearsarge or the Ossipee, that there was some agree-"ment on the part of Loring to invest that money in these stocks "and to transfer the stocks of Mr. Frue, and I have told you that "if you find any such agreement whilst the money was in his "hands, he cannot discharge himself from that obligation by "simply investing the money in stocks, but must perform his "whole contract. He must deliver over to Mr. Frue the stocks, "or must account to him for the money."

"But it is contended by the defendant that this agreement "did not relate to the money which was forwarded to Palmer to "be invested in Torch Lake, and that there is no evidence of any "such agreement, and that in fact they insisted that this money "was really invested by Mr. Palmer in something else—certainly "to the extent of 5,600 shares for Mr. Frue. Now, although "that was the original destination of the money, and though it "was originally intended to be invested by Mr. Palmer, for Mr. "Frue, in Torch Lake, if you shall arrive at the conclusion that "it was not so invested, and that its destination was changed, "that it was placed with Mr. Loring, and that it was mingled "with the other funds of Mr. Frue, to be used by Loring pre-"cisely as he was to use the other moneys which had been "deposited with him, and that Loring came under the same "obligation in respect to this money that he was under in "respect to the other moneys; and if that obligation was to in-"vest in stocks, and to transfer those stocks to Mr. Frue, and "he has not done it, then he is liable for this money as well as "for any other part of it."

Record, p. 92.

To the refusal to charge as requested, and to this part of the charge, the defendant excepted.

Record, pp. 97, 98, fol. 181.

And he now assigns error thereon.

Assignment of Errors, Nos. 5, 11, 12, 15, pp. 2, 3, 5 and 6,

There is not the slightest evidence tending to show, either,

1st. "That its destination was changed" by Frue, who alone had power to change it, or,

2d. That it "was mingled with the other funds of Mr. Frue," or,

3d. That it was "to be used by Loring precisely as he was to use the other moneys which had been deposited with him," or,

4th. "That Loring came under the same obligation in respect to this money that he was under in respect to the other money," or,

5th. That "that obligation was to invest it in stocks, and to transfer those stocks to Mr. Frue."

We submit that there was manifest error, both in the charges, and in the refusals to charge on this point.

In conclusion we submit, upon the whole record, that manifest error was committed by the Circuit Court, and that the judgment should be reversed.

C. J. Walker

Geo. F. Edmunds

for P. E.

OFFICE SUPREME COURT U. S.
FILED
OCT 31 1881
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

No. 71.

OCTOBER TERM, 1881.

ELISHA T. LORING, PLAINTIFF IN ERROR,

vs.

HELEN L. FRUE, EXECUTRIX OF THE LAST WILL OF WILLIAM B. FRUE, DECEASED, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

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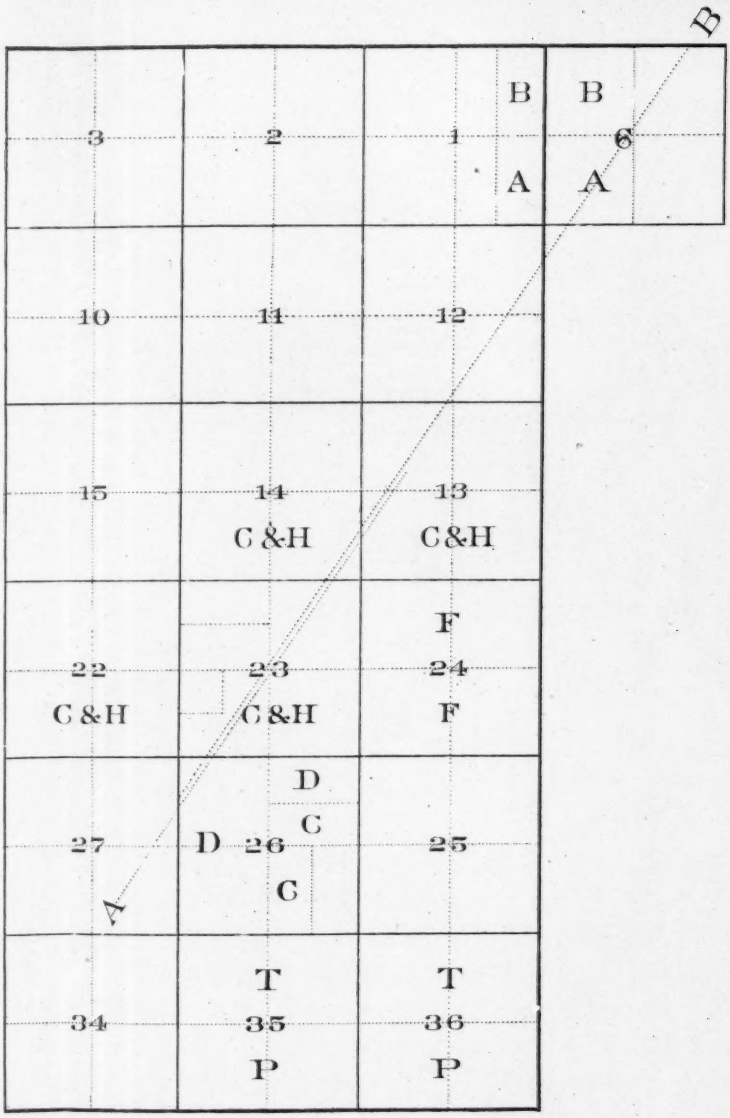

The line AB indicates the direction of the Calumet & Hecla vein

C. & H.—Calumet and Hecla.
A.—Kearsarge.
B.—Iroquois.
C.—Douglass and S. Purchase.

D.—Original Ossipee.
T.—Torch Lake, or North Half.
P.—Penn, or South Half.

F.—The lands comprising Section 24, which Frue directed Palmer to purchase, in letter of 31st December, 1866.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1881.

ELISHA T. LORING,
Plaintiff in Error,
vs.
HELEN L. FRUE, Executrix of the last will of William B. Frue, deceased,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is an action of assumpsit for money had and received brought by Frue against Loring.

The claim of Mr. Frue, briefly stated, was that from time to time, mostly between November 1, 1866, and April 1, 1867, he paid to Mr. Loring divers sums of money, which Loring undertook to so invest that the money should be represented by a certain number of shares in the Ossipee Mining Company at $5.50, and in a certain number of shares in the Kearsarge Mining Company at $4.50 per share, and to deliver the shares to Frue; and that Loring refused to deliver a portion of them. The action is brought to recover back money paid on account of the shares not delivered.

The action was originally brought in the Circuit Court for the County of Houghton, Michigan, in 1872. (Rec., 2, 3, 4, 5, 6, 7, 8, 9, 10.)

On the petition of Loring it was removed to the Circuit Court of the United States for the Eastern District of Michigan. (Rec., pp. 11, 12, 13.)

It came on for trial in the latter court at the October term, 1874, before a jury, Hon. N. H. Swayne presiding. (Rec., p. 16.)

On this trial, after the evidence was closed, the presiding judge intimated an opinion that the action was misconceived, and that the proper remedy was in equity.

Thereupon the counsel for Frue submitted to a non-suit with leave to move to set the same aside, and judgment of non-suit was entered accordingly. (Rec., p. 16.)

In December following Frue filed a bill in equity against Loring in the Supreme Judicial Court of Massachusetts to recover the value of the shares not delivered. (Rec., p. 120.)

To this bill Loring demurred, on the ground that there was a complete and adequate remedy at law. (Rec., p. 125.)

This demurrer was sustained by that court in a decision rendered September 9, 1876 (Rec., p. 126), and reported 120 Mass. R., 507.

Soon afterwards (Oct. 17, 1876), Frue moved the court below to set aside the judgment of non-suit rendered in this cause in June, 1874. (Rec., p. 16.)

This motion was heard before Hon. H. H. Emmons, Circuit Judge, and the District Judge, and on the 31st of October, 1876, an order was made setting aside the non-suit, with leave to put the cause on the docket for trial at the ensuing November term. (Rec., p. 17.)

In December following Loring moved to vacate this order, which motion coming on to be heard before the Hon. H. H. Emmons, Circuit Judge, was overruled Jan. 16, 1877. (Rec. pp. 17, 18.)

In May, 1877, Loring moved the court to rehear the previous motion to vacate the order of October, 1876, setting aside the judgment of non-suit. (Rec., p. 18.)

This motion for rehearing was heard before Hon. Noah H. Swayne and the District Judge, at the June term, 1877, and was overruled. (Rec., p. 19.)

At the same term the cause was again tried, the Hon. Bland Ballard, Circuit Judge, presiding, and the jury rendered a verdict in favor of Frue for $67,482.34 damages, and judgment was thereupon rendered in his favor against Loring for that sum and costs. (Rec., p. 20.)

Mr. Loring now brings the cause here on writ of error and bill of exceptions, to reverse this judgment.

The assignments of error are very numerous. There are in all twenty of them.

The disorder in which they are arranged is very confusing; many of them are very prolix, and some of them are to us not very intelligible. They are apparently purposely so framed as to compel this court to review

nearly the entire evidence in the case—whether with or without just cause will appear in the sequel. They seem to us to be peculiarly open to the criticisms which this court made upon the record in *Hall vs. Weare, 92 U. S., 728.*

We confess ourselves at a loss to know how to deal with them. We should hardly be excused for occupying the time of the court by discussing each of them in detail—perhaps not for treating some of them seriously.

We will endeavor to group such as relate to the same subject matter, or raise the same, or related, questions of law, and consider them together.

We stated the general nature of Frue's claim at the outset. (Ante, p. 1.)

As to the amount of money which was paid into Loring's hands, and for which neither Frue nor anybody else, except Loring, ever received any equivalent, there was no controversy on the trial. Nor was it controverted that it was the understanding between the parties that this money, or at least most of it, should be represented by the shares in the two mining companies as claimed, nor was there any controversy as to the number of shares in each of these companies which Loring had in fact delivered to Frue.

ARGUMENT.

The main defense was that Loring did not undertake to deliver the shares. And if he did not, we concede that Frue was not entitled to recover in this action. The jury found that he did, and rendered a verdict accordingly.

Now Mr. Loring claims:

I.

That there was *no* evidence tending to show any such undertaking on the part of Loring to deliver the shares, and that the court below erred in refusing so to instruct the jury.

See 7th, 8th and 17th Assignments of Error.

This compels us to examine the testimony to see what the evidence was on this subject.

The facts which we claim the evidence tended to prove were these:

In the autumn of 1866 Frue, Loring and one Charles H. Palmer agreed to purchase jointly two certain tracts of mineral land in the vicinity of the

Calumet and Hecla mines, on Lake Superior (Rec., p. 21), and to organize a company for mining upon each tract (Rec., pp. 21, 22), with a paid up capital agreed upon, and which, in each case, was deemed sufficient to pay for the company's lands, and provide a reasonable amount with which to commence mining operations. (Rec., pp. 22, 23.)

The share which each should contribute towards the joint adventures, and the extent of their respective interests, was agreed upon at the outset (Rec., p. 22), though subsequently in some particulars modified. (Rec., pp. 22, 23.)

It was also agreed that certain other persons named should be permitted to share in these adventures, to specified amounts, on the same terms as themselves. (Rec., p. 22.)

In pursuance of this agreement the parties in autumn, 1866 (Frue, p. 21), contracted with the St. Mary's Canal Mineral Land Company for the purchase of the tract marked D, on section 26 (Rec., p. 21), on the accompanying plat, and in December, 1866, they purchased from Douglass and Sheldon (Rec., p. 23), another parcel adjoining the first, and marked C, on the plat. The cost of the two parcels was $70,000, and they organized a company for mining on the tract composed of those adjacent parcels called the Ossipee Mining Company, with a nominal capital of $500,000, divided into 20,000 shares of $25 each, which it was agreed should start with a paid up capital of $110,000, which would be sufficient to cover the costs of the lands, and leave $40,000 for working capital, and make the cost of each share to the original promoters, or parties on the "ground floor," as Mr. Frue calls them, $5.50 per share. (Rec., p. 23.)

The purchase of Tract D was consummated, and it was conveyed to
67 this company January 9, 18~~70.~~ The other tract was conveyed to Loring,
trustee, at the time of the purchase, and was by him conveyed to the com-
67 pany May 21, 18~~70.~~ (Rec., p. 84.)

The associates also, in the autumn of 1866, contracted for the purchase of lands on sections six and one, marked A on the accompanying plat, and organized a company for mining thereon, called the Kearsarge Mining Company (Rec., p. 22), with the same nominal capital divided into the same number of shares as the Ossipee Company. The purchase of this tract was consummated, and it was conveyed to the Kearsarge Company March 9, 1867. It was agreed that this company should start with a paid up capital of $90,000, which would cover the costs of its lands, namely, $50,000, and leave $40,000 with which to commence mining operations. This would make the cost of each share to the original promoters $4.50. (Rec., p. 23.)

Before either of these companies was organized 2,000 shares of the Ossipee stock were sold for $11.50 per share; and 5,000 shares of the Kearsarge at $10 per share. (Rec., pp. 28, 27, 39.)

These sales were made by Frue to parties residing in the Lake Superior region, for the benefit of all the promoters, each of whom was to contribute pro rata out of the shares allotted to him under the original agreement. Frue's contribution was 585 shares of the Ossipee, and of the Kearsarge 1,050 shares. (Rec., p. 28.)

The proceeds of these sales amounted to $73,000, and Frue's share thereof—that is, the proceeds of his shares sold—was $9,276.

Of the remaining shares Frue was entitled, under the allotment which had been agreed upon, to 5,835 shares in the Ossipee (Rec., p. 25), which, at $5.50 per share, would make his contribution to that adventure $32,092.50, and to 4,200 shares in the Kearsarge (Rec., p. 25), which, at $4.50 per share, would make the amount of his contribution to that adventure $18,900. The total to be contributed by him to both adventures being $50,992.50.

The original agreement contemplated the purchase of the location marked B on the plat, adjoining the Kearsarge, which was to be called The Iroquois Mining Company, but this was abandoned after paying $10,000 on the purchase, by mutual consent. In this Frue was to have the same interest he had in Kearsarge, and, consequently, he lost $2,100, which was credited to Loring on the trial, and in the sum for which judgment was taken. (Rec., pp. 21, 30.)

Some months elapsed between the first agreement of the parties to engage in these adventures (in October, 1866), and the completion of the land purchases, the organization of the companies, the conveyances of the land to them, and the contributions of capital agreed upon. (Rec., pp. 21, 84.)

Frue resided on Lake Superior. He was a practical miner and explorer of mineral lands. (Rec., p. 53.) He was at the time a mining captain of mining companies, of which Loring was President, and in which Palmer was a shareholder (the Adams and South Pewabic).

He had explored the lands which were to be purchased, and furnished the information upon the faith of which the purchases were made. (Rec., pp. 53, 48.) Palmer, whose residence was at Pontiac, Michigan, was the principal actor in making the purchases. Loring was a large capitalist residing in Boston, Massachusetts, and a well known operator in mining schemes.

It was agreed that the head offices of the companies to be organized should be in Boston (Rec., p. 109), and that Loring should act as the

financial agent of the promoters in carrying out their schemes; should attend to the details of organizing the companies, and distribution of the shares according to the allotment agreed upon.

The organization of the companies was under a Michigan statute, and was a very simple matter—requiring merely the execution and filing of Articles of Association.

In fact articles already made and filed by other parties, but not yet acted upon, were used for the purpose of acquiring corporate capacity for carrying out these mining schemes. This could be readily effected by transfer of the shares. (Rec., p. 109.)

Neither of the corporations could be regarded as having had any practical existence before the lands were conveyed to them as before stated.

When they were organized, Loring, in whose name a large majority of the shares always stood on the books, though he was not the real owner of a majority, became President and Treasurer of both companies, and so far as appears always continued to hold those offices.

At an early period in these transactions it was agreed between Frue, Loring and Palmer that Frue should from time to time remit the money, to be paid by him for his shares in these adventures, to Palmer, who was expected to remain in Boston for some months; that Palmer should pay it over to Loring; that Loring should thereupon credit Frue with the money on account; and that Palmer should personally see to it that it was so credited. (Rec., pp. 24, 52, 54.)

The purpose of this somewhat clumsy arrangement is obvious enough.

The whole business was necessarily in a very nebulous stage at the beginning, and must remain so until the purchases were consummated, the companies organized, and the shares distributed according to the allotment agreed upon.

The details of carrying out the schemes in Boston were necessarily intrusted to Mr. Loring, in whom, except as to his financial responsibility, his associates seem not to have had entire confidence. The amount which Frue was to remit was for him very considerable.

He was to remain on Lake Superior. He could not be present to obtain any appropriate voucher for his money as he paid it, or to obtain his shares when the companies were organized. He therefore arranged that Loring, individually, should open an account with him, and should credit him with the money as it was received, so that he, Loring, should be personally responsible for the money, or for the shares it was ultimately to represent, and he remitted the money through Palmer so that he might have certain evidence of its payment, and Palmer might see to it that it was credited.

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From time to time between November 8, 1866, and March 30, 1877, Frue remitted divers sums of money to Loring through Palmer, as agreed upon, and Loring credited them to Frue. (Rec., pp. 51, 52, 54.

The aggregate of these remittances, including $2,500 which Frue paid to Loring at Houghton, as hereinafter stated, was $62,351.80, which is in excess of the amount he was to contribute for both adventures. (See ante, p. 5.)

When the companies were organized Loring sent Frue 1,001½ of the shares in the Ossipee to which he was entitled, and 4,200 of the Kearsarge shares.

On one false or frivolous pretext or another he refused to deliver him the remainder of his shares. (Rec., pp. 26, 27, 31.)

In June, 1867, months after all this money had been remitted to him by Frue, Loring visited Houghton, Lake Superior, where Frue resided. Frue then insisted upon a settlement in respect to these transactions, and called a meeting for that purpose, at which Frue, Loring, Palmer and Noble (who was Frue's bookkeeper) were present. (Rec., pp. 25, 56.) Loring then presented a statement of the account, in which the money was all credited to Palmer, and not to Frue. He also pretended that Palmer had used some of the money in New York. Frue was indignant (Rec., pp. 25, 56, 57); said he wanted a statement of the account with himself individually. Palmer denied that he had used any of the money he had not accounted for to Loring, and Loring finally admitted that he had not.

The books kept by Noble containing the accounts of these remittances and the letters accompanying them were produced and examined, and Loring admitted the receipt of all the money (Rec., pp. 26, 57), and promised on his return to Boston to make out a correct statement of the account, and send it to Frue; and also to send him the shares to which he was entitled. (Rec., pp. 26, 58.) But he did not make out and render the statement, nor send the shares as promised.

Loring was again at Houghton in July and October, 1868. Frue was then sick (in October), and nothing important occurred, except that Frue again demanded his shares, claiming that he had overpaid for them, and Loring insisted that he did not understand the matter; that there was a balance still due. Loring then claimed that he was very hard up and must have some money, and upon this representation Frue paid him $2,500 more. (Rec., p. 27.)

Loring next visited Houghton in May or June, 1869. (Rec., p. 31.) Frue then again demanded the shares of him, and in a very peremptory manner. To this demand Loring replied that Palmer had placed the stock

in his hands as collateral—collateral to what he did not say. Frue replied: "Palmer has no right or control over my stock, and could not place the stock in your hands as collateral," and told him he had better be looking around for bail, as he would have him arrested. He says he intended to have him arrested, but Loring promised that if Frue would allow him 30 days to go to Boston and look over the accounts he would render the account and settle up the transaction. After consulting his legal advisers, Frue gave him the time, but Loring never rendered the promised statement, or sent any of the stocks. (Rec., p. 32, see also 59.)

If this is a fair statement of the evidence we need not waste time in arguing that it *tends* to prove an undertaking on the part of Loring to deliver to Frue his shares.

When Loring undertook to act as the financial agent of the promoters in carrying out their schemes and to organize the two mining companies, this implied an undertaking with each of them that the money paid to him should be applied, and the companies be organized, in accordance with the preliminary agreement between them—that is, the money which each contributed should be so applied and the companies should be so organized that each of the promoters should have the shares to which under the original agreement he was entitled.

This was clearly the scope of his undertaking with Frue, whatever may be the case with respect to other promoters who may have been present and to some extent participating in effecting the organization of the companies. For Frue, residing as he did at a great distance from Boston, and knowing that he would be unable personally to take any part in what was to be done there, insisted before contributing anything that all his remittances should be placed to his credit in account with Loring individually, and Loring agreed to and did so credit them. It was unquestionably the tacit understanding between the parties when the arrangement was made that Loring should become personally responsible that Frue should receive for his money the shares to which he was entitled by virtue of the agreement among the promoters.

Frue always claimed this from the outset, and Loring again and again admitted his obligation to deliver the shares, and again and again promised to deliver them.

Loring apparently so organized the companies that Frue did not appear on their books to be entitled to the shares, but they stood in Loring's own name. And then after promising from year to year to deliver the shares, but neglecting to do so, when Frue asks him to pay back the money he received on account of them, he has the audacity to claim that he never undertook to deliver the shares; and his counsel insist that his whole duty

to Mr. Frue was performed by simply paying Frue's money into the treasuries of the companies, taking out the shares in his own name and keeping them.

II.

The 6th, 9th and 16th assignments of error may be considered together. Each of them is based upon the refusal of the Court to give an instruction that the plaintiff was not entitled to recover if the jury found a certain state of facts which in each case negatived, or did not include, the fact that Loring undertook to deliver the shares to Frue. For example, the 6th assumes that his undertaking was merely to pay the money into the treasuries of the two companies; so the 9th assumes it. The 16th contains the same assumption, though better concealed under a great deal of ambiguous phraseology; it asks the Court to instruct the jury that Mr. Loring's undertaking was fully performed by passing the money into the treasuries of the companies and causing the shares to be issued to himself as trustee.

It seems to us a complete answer to each of these assignments of error that the Court below again and again told the jury in the most emphatic manner that Frue was not entitled to recover upon any hypothesis as to the other facts unless they found that Loring did personally undertake to deliver the shares for the money. (Rec., p. 93, 94 passim.)

Besides, the instruction referred to in the 6th assignment was substantially given. (Rec., p. 93, 94, 95.)

And the instruction referred to in the 9th assumed a fact as to which there was no evidence, that is, that the agreement was that Loring should take the stock and hold it in trust for Frue until the same was fully paid for. (Rec., p. 95.) If that had been the fact, and Loring had agreed to deliver the shares when paid for, we do not see why the plaintiff would not have been entitled to recover back the money if the shares were not delivered.

If the 16th assignment of error was designed to raise the question of whether, assuming that there was a personal undertaking on the part of Loring to procure and deliver the shares for the money remitted to him, Frue having received a portion of the shares, cannot maintain this action to recover back the balance of the money after deducting the cost of the shares received, it utterly fails to accomplish that object because the instruction asked for assumes that there was no undertaking to deliver the shares.

III.

The 5th, 11th, 12th, 13th, 15th and 18th Assignments of Error relate to the instructions given or refused in respect to a certain sum of $25,401.55 which Frue remitted to Palmer in a letter of December 31st, 1866. These will be considered together.

1. The 12th error assigned is in the refusal of the Court below to instruct the jury "that upon the evidence in this case the plaintiff is not entitled to recover for any portion" of this money; and the 15th in the refusal to instruct them that there was no evidence of any agreement of Loring to hold this money upon general account, &c.

This compels us to examine the evidence in respect to this item.

What in our view it tends to prove, is, briefly stated, this:

This money was remitted by Frue to Palmer in the letter of December 31st, 1866, to be found on pages 100 and 101 of the Record. The direction is "to be applied on purchase of lands in sections 24 and *Penn* as I understand it." By reference to the plat, ante, page 1, it will be seen that section 24 is directly east and adjoining the Calumet and Hecla mine. It is a new tract which Frue proposed to purchase on his own account. Penn appears to have been a cypher name used for the south ½ of sections 35 and 36. (See plat.) (Rec., pp. 50 and 84.)

When this letter reached Palmer in Boston, he showed it to Loring, and after consultation they concluded that in view of the relations existing between Frue and themselves, and the other associates in the Ossipee and Kearsarge ventures, it was not fair that Frue should make these purchases on his own account, and that they would disobey his instructions. (Rec., pp. 64, 65.) Thereupon Palmer paid over the money to Loring, and it was credited to Frue in the same manner the other moneys remitted by him had been credited. (Rec., pp. 52, 63, 68, 77.) Frue was afterwards informed of what had been done with this money, and acquiesced in it. This item of $25,401.55 was one of the items in the account of money remitted, produced and agreed upon at the meeting between Frue, Loring, Palmer and Noble at Houghton in June, 1867 (Rec., p. 56), the original of which will be found in the Record, pp. 101, 102, Ex. 2 (See pp. 51, 56). Loring had the money. There is no question about that. He has never accounted for it to Frue otherwise than by placing it to his credit in the general account. (Rec., p. 84.)

It appears that Loring did soon afterwards contract for the purchase of the south half of section 35 and 36 in his own name as trustee, and also purchased shares in Torch Lake, a company organized in the north half of sections 35 and 36 (Rec., pp. 64, 65 and 105), and claimed that these pur-

chases were made on account of the associates in the Ossipee and Kearsarge, and in the proportions in which they were interested in those companies, but he never accounted to Frue for any of these purchases. Frue never got any Torch Lake shares, or any interest in the south half of sections 35 and 36. (Rec., p. 84.)

If the evidence tended to prove this state of facts, we need not argue that there is nothing in the 12th and 15th assignments of error, and no excuse for making them.

2. The fifth error assigned is to the entire charge of the court relating to the $25,401.55, without pointing out in any way what portions of it are complained of.

If any portion of this charge is correct, this assignment of error cannot be maintained. It seems to us to present the case to the jury in respect to this item very fairly.

3. The 11th assignment is to the refusal of the court to give an instruction which had already been given. (See p. 92.)

4. The 13th and 18th assignments of error are identical. They assign as error the refusal of the court to give an instruction which had already been given (see p. 92), and assume as fact what there was no evidence tending to prove.

IV.

The 4th, 10th and 14th assignments of error relate to the instructions given or refused in respect to $2,000 remitted in Noble's letter of November 8, 1866.

1. The 10th error is in refusing to charge that upon the evidence Frue was not entitled to recover this $2,000. The 14th, in refusing to charge that there was no evidence that the $2,000 belonged to Frue.

What the evidence tends to prove was this:

Noble was Frue's clerk. (Rec., p. 25.) The two Hodgsons were men in his employ. They had been engaged in exploring mineral lands for him, including the very lands purchased, and upon which the Ossipee and Kearsage companies were organized. Frue was desirous to allow each of them to have some interests in these adventures. (Rec., pp. 36, 37.)

After the allotment of shares had been agreed upon between Frue, Palmer and Loring, and each had undertaken to contribute to the proposed adventures in proportion to the shares allotted to him, Frue agreed with

Noble, and also with the two Hodgsons, that each of them might have a certain number of shares at the "ground floor price" out of the total number of shares which had been allotted to him. (Rec., p. 49.)

The arrangement with each of them in respect to the shares he was to have was with Frue, and with Frue only. Neither of them ever had any shares allotted to him directly by the original promoters, or ever agreed with them to take any interests, or to contribute any money towards either of these adventures, though Frue's intention to give them some shares out of his own allotment was well known both to Palmer and Loring when the allotments were agreed upon. (Rec., p. 49.)

The money which was to pay for the Hodgsons' shares was remitted by Frue to Loring through Palmer, and credited to him like the other moneys remitted on account of the shares which had been allotted to him. All the remittances to Loring are in letters written by Noble, and with one exception (the letter of December 31), signed by Noble in his own name. (See Rec., pp. 101–105.)

The $2,000 in question Noble remitted by Frue's direction Nov. 8, 1866, in a letter to Palmer, in which he says it is "for *my* $1,000 interest in sec. 26, and my $1,000 interest in sec. 6."

On receipt of this letter Palmer paid the money to Loring as a remittance on account of Frue's shares, and Loring so credited it. (Rec., pp. 35, 38, 46, 49.)

This $2,000 was agreed upon as one of the credits to which Frue was entitled on account of his shares at the meeting and examination of the accounts between Frue, Loring, Palmer and Noble at Houghton, in June 1867. (Rec., pp. 25, 26, 56, 57, 101.)

If this is a fair abstract of the evidence, certainly the court below was right in refusing to charge that as matter of law Frue was not entitled to recover this money, and also in refusing to instruct the jury that there was no evidence that the money was Frue's. If it was Noble's money it became Frue's by being remitted and applied to discharging at the same time Noble's obligation to Frue for the shares he was to have from Frue, and Frue's obligation for the shares which had been allotted to him by agreement among the original promoters.

Gray v. Reardon, 2 Cranch. C. C., 219.

2. The fourth error assigned is to the entire instruction given by the Court in respect to this $2,000. If any part of it is correct, this assignment cannot be sustained. We do not see any error in any part of it to the prejudice of Mr. Loring. We merely call attention to one paragraph in which the learned Judge says: "I suppose that if it were Noble's money and it was forwarded to Mr. Loring and he having no account that (with?)

Noble had deposited (credited?) the money with (to the credit of?) Mr. Frue, and Noble had subsequently assented to this arrangement, then Frue might recover the money from Mr. Loring," etc., "even though *he* might be obliged to account therefor to Mr. Noble." Now, at the meeting in June, 1867, before referred to, Noble was advised that the money was placed to Frue's credit, and made no objection to it.

The truth is there was no misunderstanding between any of the parties about this $2,000, nor as to whom it should be credited, and all this hubbub about it is based simply upon the language of Noble's letter, which, read in the light of the circumstances and the relations of the parties, could mislead nobody.

V.

The assignment of error numbered 18½ complains of that portion of the charge relating to Frue's proportion of the moneys realized from sales of stock on joint account—part of the $73,000 which he forwarded to Loring.

The instruction complained of is found on page 88, the last paragraph.

It is manifestly unfair to dismember a sentence and complain of part of it, when the remainder sufficiently answers the objection. But the instruction was right and was warranted by the evidence. Frue testified that he was entitled to proceeds of 583½ shares of Ossipee sold, and of 1,050 shares of Kearsarge (p. 29), and this money he sent forward with the other moneys to Loring (pp. 28, 51).

Loring credited to Frue, and acknowledged the receipt of the money in the accounting in June, 1867, at Houghton; and also by giving Frue credit for his proportion by deducting it from the cost of his shares in each company, in the account Ex. B, 3 (p. 119). The Circuit Judge could not have done otherwise than leave the evidence to the jury, with the qualification, several times repeated (p. 89), that if the stock belonged to the companies, and not to the parties, Frue could not recover for it.

VI.

We are advised it will be claimed that even if Loring did undertake to deliver shares for the money, and wrongfully refused to do so, Frue is not entitled to recover the money back, and the Court ought to have so instructed the jury.

As we have before said, we do not clearly see how this question is raised by the assignments of error, but we will consider it very briefly.

Whether Frue is entitled to recover the money depends simply upon whether under the circumstances Loring *ought* to pay it back.

That he *ought* to do so, it seems too plain for argument.

He received the money from Frue and placed it to Frue's credit. He undertook so to invest it for Frue that it should be represented by a certain number of shares in each of the two mining companies to be organized by him and to deliver the shares to Frue. He refused to deliver most of the shares. He assigns no reason for not delivering them. He renders no account of what he did with the money, or what has become of the shares. Such being the facts, a denial of his obligation to repay the money offends the moral sense; it shocks the conscience.

If in equity and good conscience he ought to pay back the money, the law will compel him to do it.

And this action for money had and received is the appropriate remedy for recovering it. For, although Loring never in fact promised to pay it back, the law, for the purpose of the remedy, will imply such a promise.

Moore vs. Mandlebaum, 8 Mich., 433.
Allan vs. McKean, 1 Sum., 278.
Cary vs. Curtis, 3 How., 236, 255.
McCullough vs. McCullough, 14 Penn. St., 295.
Strong vs. Bliss, 6 Metc., 393.
Larabee vs. Badger, 45 Ill., 440.
Nash vs. Towne, 5 Wall., 689, 701–2.
Hill vs. Rewee, 11 Metc., 268.
Jewett vs. Cunard, 3 Wood. & M., 323.
Eastwick vs. Hugg, 1 Dall., 222.
Moses vs. McFarlane, 2 Bur., 1005.

It is true the facts out of which Loring's obligations to repay the money arise are somewhat complicated, but this is no objection to the remedy. They were equally complicated in the first two cases above cited. No long and complicated accounting is necessary to ascertain the balance due. The amount remitted to Loring is liquidated and agreed upon. There is no dispute as to the number of shares he received or the credit Loring is entitled to on account of them. The other credits to which he is entitled are few in number, and there is no dispute about them.

It is also true that Frue might have resorted to other remedies for the enforcement of his rights, but there is none more appropriate than this if he is content with a mere return of the money; and with him, and not with Loring, is the right of election.

Lyon vs. Annable, 4 Conn., 350.
Nash vs. Towne, 5 Wall., 689.
Lightly vs. Coulston, 1 Taunton, 112.
Foster vs. Stewart, 3 Maule & Selw., 197.

VII.

It seems to be claimed, though we think there is no assignment of error which covers this ground (see 16th error), that Frue can not maintain this action for money had and received, because a portion of the shares have been delivered to him and he has accepted them. Why not? It is true that Loring undertook to invest the money in a certain number of shares in each of the companies, but the prices of the shares was fixed—the Ossipee shares at $5.50 each, and the Kearsarge at $4.50. That is what Loring paid for them. Frue received some of the shares in each of these companies. There is no difficulty in ascertaining just what credit Loring is entitled to for such shares as he did deliver, and what balance of money remained in his hands after giving these credits. Such being the case, Frue's remedy to recover this balance is in no way affected by his receipt of a portion of the shares.

Hill vs. Rewee, 11 Metc., 268.
Johnson vs. Johnson, 3 Bos. & Pul., 162.
Arthur vs. Saunders, 9 Port. (Ala.), 626.
Young vs. Adams, 6 Mass., 182.
1 Add. on Cont., 460.

Even if Loring had delivered all the shares, there would have been a considerable balance in his hands which Frue would be entitled to recover in this form of action.

VIII.

On the first trial of this cause, His Honor Judge Swayne having instructed the jury to find a verdict for Loring, on the ground that Frue's remedy was in equity, and not by an action at law for money had and received (see Op. App., p. 6), Frue submitted to a non-suit, with leave to move to set the same aside, and judgment of non-suit was entered accordingly (Rec., p. 16). This was in 1874. In October term, 1876, the court, on motion of Frue, made at that term, set this non-suit aside (Rec., pp. 17-19).

The first three assignments of error raise the question whether the Circuit Court had power to set aside this non-suit.

It is claimed that the court below had no such *power*, because the motion to set aside the non-suit was not made before the expiration of the term in which it was entered.

The argument of Mr. Loring's counsel, if we understand it, is briefly this:

That the judgment of non-suit, with leave to move to set the same aside, was a *final judgment;* that, as a general rule, the Circuit Courts of the United States have no *power* to set aside a *final judgment* on motion, unless the motion is made before the expiration of the term at which the judgment was rendered, and that this case is not within any of the exceptions to that rule.

This seems to us a very extraordinary argument to establish a very extraordinary proposition. But it is urged with so much zeal and pertinacity, and apparent earnestness, that we will give it brief attention. And

1. As to the nature of the judgment of non-suit.

We all know what a non-suit submitted to on a trial is. The utmost care and vigilance will not always enable a plaintiff to get his case fully and fairly before a jury, especially on a first trial. This may be prevented in many ways, such as the unexpected absence of a material witness, the adverse ruling of the court in respect to the admissibility of evidence, or the unanticipated, and it may be erroneous, charge of the court in regard to some question of law involved in the case.

The law does not compel a plaintiff thus circumstanced to submit to an adverse verdict, or to take the chances of it. It permits him to retreat, and unless his case is destitute of merits, to renew the contest; usually upon the terms of paying to his adversary the costs of the first trial.

This he does by submitting to a non-suit, with leave to move to set the same aside, by which he, in effect, says: "I will not prosecute this suit further at present, and never unless I hereafter see fit to move the court to set aside the non-suit, and the court grants this motion."

See Hammergen vs. Schurmeir, 3 Fed. Rep., 77.

The judgment of non-suit is but the entry of this transaction upon the record.

The suggestion of a non-suit often comes from the court itself, and is made because it doubts the correctness of its own rulings adverse to the plaintiff, and desires to re-examine them under circumstances more favorable to the formation of correct conclusions.

If the plaintiff on mature consideration thinks his action can be maintained—that defects in his evidence on the first trial, if any such there were, can be supplied; or where he has been compelled to submit to the non-suit by adverse rulings of the court, that he can satisfy the court that these rulings were erroneous, he moves the court to set aside the non-suit, and permit him to have another trial.

The granting or refusing this motion is a matter wholly in the discretion of the court, and unless the plaintiff's case appears to be altogether destitute of merits, or the non-suit has been caused by his own inexcusable

negligence, the court grants the motion almost as a matter of course. Especially will the court grant it if the non-suit has been submitted to in deference to its own rulings, and on further investigation it entertains a doubt even as to the correctness of those rulings.

For, it is simply a question whether the plaintiff shall be permitted to proceed with that suit, or be driven to commence a new one for the same cause of action.

If this is a fair view of the nature of a non-suit with leave to move to set the same aside, it is clear that the so-called judgment of non-suit is not in any sense a final judgment. It is little more than the record of the plaintiff's agreement not to prosecute the suit any further unless he thereafter moves the Court to grant him leave to do so, and the Court grants this leave.

It determines nothing in respect to the matters in controversy. It is not a bar to another action for the same cause. It, of course, cannot be reviewed or reversed on writ of error.

If in any proper sense it can be called a judgment at all, it is in its nature interlocutory.

It cannot have the effect to put an end to the particular cause unless or until the right to move to set it aside, which is expressly reserved and is one of the terms upon which the non-suit is submitted to, is in some way barred.

It resembles more nearly than anything else an interlocutory judgment by default under the old common law practice.

It is possible that unreasonable and unexcused delay in making the motion might be treated by the Court in the exercise of its discretion as an abandonment of the cause, and the motion might be properly denied on that ground.

See Alexander vs. Barber, 2 Cr. and Jer., 133.

And if the defendant desired to expedite the cause and bring it to a final determination, we have no doubt the Court on his application might properly grant an order requiring the plaintiff to move within a time fixed, or that the judgment of non-suit should be made absolute.

But we know of no Federal or Michigan statute which limits the time within which the plaintiff must move to set aside such a non-suit, and no rule of Court which does so in express terms, or as we think by fair construction. And there are several cases in which non-suits have been set aside on motion made after the term.

People vs. Barnes, 12 Wend, 492.
Sadler vs. Evans, 4 Burr., 1986.
Alexander vs. Barber, above.
Shilato vs. Theed, 6 Bing., 753.
Sweet vs. Lee, 3 Mann. & Gr., 452.

In *People vs. Barnes*, the non-suit was involuntary, and was rightly ordered on account of the defects in the plaintiffs' evidence, and yet the Court, Nelson J. delivering the opinion, set it aside to prevent the plaintiffs' claim from becoming barred by the statute of limitations, on a motion made four years after the non-suit.

The counsel for Mr. Loring, with all his remarkable diligence, has been unable to find a single case where it has been held that the court had no power to set aside a non-suit on motion made after the term, except *Whelpley v. Dewey*, 17 Cal., 314, and that decision is based entirely upon a local statute which was construed to limit the time for moving to set aside a non-suit to the close of the term.

The other cases cited by him to support this proposition (see Brief, p. 8) are still less applicable.

A motion to set aside a non-suit does bear a considerable resemblance to a motion to set aside a verdict and for a new trial; and in *Whelpley v. Dewey*, above cited, it was held that it was within the statutory limitation of the time for moving for a new trial. But we submit that this decision overlooks an important distinction. The granting a new trial involves depriving the successful party of the benefit of a verdict and possibly a judgment on the merits, and this is therefore a cogent reason why the motion for it should be promptly made, which does not exist in the case of a motion to set aside a non-suit.

The 38th rule of the court in which this cause was tried limits the time for moving for a new trial to two days after the rendition of the verdict, &c. For the reasons above stated we do not think it can fairly be construed to apply to motions to set aside non-suits, and so far as we know never has been understood so to apply.

But suppose it does apply. It is a Michigan rule, and in *People v. Judge of Wayne Circuit Court*, 20 Mich., 222, the Supreme Court of that State said "it was not intended in any way to interfere with the common law discretion of the court, but only to fix a time beyond which no one could move as a matter of right and without leave," and on this ground they refused a mandamus to compel the Circuit Court to vacate an order for a new trial on the ground of newly discovered evidence, not moved for until the fourth day of the term succeeding that in which judgment was rendered, and then without previous leave granted. And as to the power to dispense with a strict compliance with its own rules, this and all other courts hold the same doctrine.

U. S. v. Breitling, 20 How., 252.
Ex parte Poultney, 12 Pet., 472.
Walt v. Brockville Nat. Bank, 8 Rep., 580.
See 88th General Equity Rules.

If a judgment of non-suit is not a final judgment we need not inquire

(2.) As to the limits of the power of the Circuit Court to review their final judgments.

But we will consider it briefly for the purpose of showing that the court below had power to set aside the non-suit, even if it was final.

The *general rule* which the counsel contends for, viz.: that the Circuit Courts have no power to set aside final judgments upon motion made after the close of the term, as a rule of the *common law* limiting the *powers* of courts of original jurisdiction, forms no part of the jurisprudence of England, or of most of the States of this Union. (*a*)

There may be found here and there what chemists would call a "trace" of it in loose dicta, but that is all.

This court, however, has decided in

Cameron v. McRoberts, 3 Wheat., 591, and
Bank of United States v. Moss, 6 How., 38,

that where a cause has been heard and decided on its merits in the Circuit Court, and final judgment rendered, the court has no *power*, on motion made after the term, to review its decision, and vacate or modify its judgment, on the ground of any supposed errors of law or fact involved in and determined by the judgment; but the party conceiving himself aggrieved by the decision must be left to his remedy by writ of error, or appeal, or such other remedies as the law allows him.

This is the utmost limit of the rule which these cases can fairly be held to establish, and they are the only decisions of this court relating directly to this subject, except *McMicken v. Perrin*, 18 How., 507, 511; and what was there said upon it by the learned judge who delivered the opinion was

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(*a*) As to *England*, see Cannon vs. Reynolds, 5 Ell. & Bl., 301; *New York:* Delaney vs. Brownell, 4 John., 136; Millspaugh vs. McBride, 7 Paige, 509; Tripp vs. Vincent, 8 Paige, 176; Crooks vs. Maxwell, 6 Blatch., 468; *New Jersey:* Robertson vs. Miller, 3 Green Ch., 451; Brinkerhoff vs. Franklin, 21 N. J. Ch., 334–6; *Pennsylvania:* Allan vs. McClelland, 12 Penn. St., 328; Breden vs. Gilliland, 67 Penn. St., 34; *Virginia:* Erwin vs. Vint, 6 Munf., 267; 6 Leigh, 399, 439; 4 H. & Munf., 438; *Maryland:* Kemp vs. Ridgley, 18 Md., 130; Taylor vs. Sendall, 34 Md., 38; 14 Md., 564; *South Carolina:* Barnes vs. Branch, 2 McCord; Sintall vs. Bradford, 2 Bay, 333; *Michigan:* Van Rensselaer vs. Whiting, 12 Mich.. 450; Campau vs. Coates, 17 Mich., 235; People vs. Judge of Wayne Ct. Ct., 20 Mich., 220; Loree vs. Reeves, 2 Mich., 133; Hurlbut vs. Reid, 5 Mich., 30; 1 Doug., 417; Harr. Ch., 265; Unrecognized in any of the *New England States* until the recent decision of Mason vs. Bunker, 118 Mass., 61. See Hall vs. Lamb, 28 Vt., 85; 5 Rh. I., 348. And doubtless many other States might be added.

so unnecessary to the determination of the case that it can hardly be regarded as an authoritative application of the rule to that case. (*b*)

We shall not question these decisions.

The rule they establish, as a limitation of the time within which a disappointed suitor, who has appeared, and whose cause has been actually litigated, and has passed into judgment upon the merits, may move to vacate or modify the judgment on the ground of errors of law or fact—and that is what it practically is—is not unreasonable, and not likely to work great hardship.

We apprehend (and the counsel for Mr. Loring appears to concur with us in this view) that the reason and ground of these decisions is that the power of a court to review its decisions upon the merits in a case which has been litigated before it, and has passed into final judgment, is a dangerous power, and one which is very liable to abuse; that it prevents reliance upon the finality of judgments, and that where there is other remedy for possible errors, the power ought to be confined within the limits prescribed.

Judgment of non-suit, conceding it to be final, is not within the rule or the reason of it. It is not an adjudication upon any matter of law or fact involved in the case. The setting it aside involves no review or reversal of any decision upon the merits of the controversy. It merely involves a decision that under the circumstances, which are personally known or are made to appear to the court, the plaintiff ought to be permitted to proceed with his cause, rather than be compelled to bring a new suit for the same cause of action. None of the evils the rule was designed to prevent can arise from the exercise of the power to set aside a voluntary non-suit on motion made after the term.

If, as counsel assumes, *U. S. Bk. v. Moss* lays it down as a *general rule* that the Circuit Court cannot review and reverse its judgments unless upon

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(*b*) Jackson v. Ashton, 10 Pet., 480; Ex parte Sibbald, 12 Pet., 488; and Washington Bridge Co. v. Stewart, 3 How., 413, merely decide that where a cause has been heard and determined by this court, and the term has expired, and the cause has been remanded to the court below to carry its judgment or decree into effect, the cause is no longer pending here, and this court has no jurisdiction to rehear it. Brooks v. Railroad Co., 102 U. S. R., 107, and prior cases of the same kind, merely decide that whether the cause has been certified back or not, this court will not entertain a petition for rehearing unless it is made before the close of the term. These, we apprehend, are the limitations which all appellate tribunals have imposed upon their own powers to rehear causes they have once decided, and also upon the rights of suitors to ask for a rehearing.

People v. The Mayor, 25 Wend., 252.

These cases, though cited by counsel, we submit have no bearing upon the question before us.

motion made during the term, it will be admitted that there are and must be numerous exceptions to it. This case, even if the judgment was final, not being within the reason of the assumed general rule, is within the exceptions, though there is not and probably never will be any decision to that effect because the judgment is not final.

There are various expressions in the books which tacitly imply or directly assert (though seldom explicitly), as a reason for the supposed general rule, that when final judgment has been rendered and the term has ended, the court has no longer any jurisdiction over the cause or the parties, for any purpose, unless it is preserved by some pending motion—that the parties are "out of court," &c.

But it is manifest that this cannot be so, for if it were, there could be no exceptions to the general rule—no cases in which courts could set aside or modify final judgments on motion made after the term.

(3.) Within what time a motion to set aside a non-suit shall be made is in its nature a matter of practice or procedure.

Under the Michigan practice there is no limitation of the time, or none except by rule, strict compliance with which may be dispensed with. (See ante, p. ~~17.~~) 18

And there is no question as to the *power* of courts of original jurisdiction to set aside non-suits on motion made after the term. (See Michigan cases cited, ante, p. 19, note.)

Under the Practice Act of 1872 (U. S. Rev. St., pp. 173–4, Sec. 914), the practice and modes of proceeding in the courts of record of Michigan, in respect to setting aside non-suits, should govern in determining whether the motion to set aside the non-suit in this case was made in time.

S. T. DOUGLASS,
Attorney for Defendant in Error.

SAMUEL T. DOUGLASS,
JOHN H. BISSELL,
Of Counsel.

APPENDIX.

CHARGE OF JUDGE SWAYNE ON THE TRIAL, JUNE 11, 1874.

We have had very little time for deliberation in this case, but there is no difficulty as to the legal principles involved, according to our view of the case. There is no difficulty as to the facts. You seem not to be able, with all your knowledge of the case, your preparation and your examination of it, to agree among yourselves. We shall therefore simply announce the principles of law, so far as it is necessary to do so, which we think are applicable to the evidence, and then you can determine for yourselves whether or not it is worth while to go to the jury, if we shall permit you to do so; but we are inclined to think that another course may be a better one, which I shall presently indicate.

This is a case for money had and received, and, without reference to the authorities, that were referred to in the discussion this morning, in any view of the law of the case, it is necessary that the plaintiff, in order to recover, should show an equitable right to do so; he must show that Mr. Loring has money in his hands which he is bound, in equity and good conscience, to pay over to Mr. Frue.

Mr. Frue charges him with the receipt of $114,000 and a fraction, transmitted through Mr. Palmer. A question is raised which it may be well at once to dispose of, as to the effect of the transmission, in that way, from the plaintiff to the defendant. It seemed to us that the proof, and the only proof, on the subject was that Palmer received this money, not in his own right, but solely for the purpose of paying it over to Loring, the defendant, and that Loring knew that and received it with that understanding, and was directed to keep account with Frue and not with Palmer. It is in proof that when Palmer learned that the account was kept with him and not with Frue, he objected, and in that connection used strong language. So far as this part of the case is concerned, it strikes my learned brother and myself to be exactly the same as if the money had been transmitted directly from Frue to Loring without the intervention of a third party, as was remarked by one of the counsel. Palmer, in the eye of the

law, was a mere conduit for passing the money from one party to the other, and it appears that that service he faithfully and honestly performed.

There is another consideration connected with the general aspect of the case that may as well be disposed of. We are aware of no testimony that shows any undertaking on the part of Loring to Frue. There was a general understanding when the lands were to be bought that the original associates were to contribute their respective shares as agreed upon, of the money to be received for that enterprise, and that, when the enterprise was consummated, so far as the creation of the several corporations was concerned, each of the parties was to have a share of the stock of each corporation corresponding with the amounts of money that he had paid; but the testimony, as we recollect it, failed to disclose any special understanding on the part of Loring. It is true that he was to be the financial agent, but we do not understand that there was any special agreement on his part creating any particular duty on his part or liability on his part to the plaintiff. Perhaps there was no specific understanding on the subject, because it was apprehended that there could be no doubt as to the rights of the respective parties, and no difficulty as to their being carried out. So far as the plaintiff was concerned, no doubt it never entered his mind, nor did it into the mind of anybody else, that the company would fail, or his associates would fail, in giving him all that he was entitled to. We therefore lay out of view that aspect of the case; but that does not change the law of the case as I have stated it, that is, that the question here is whether Loring has any money in his hands that he is equitably bound, under the circumstances of the case, as disclosed in the evidence, to pay over to the plaintiff, and which money he has refused to pay.

Now, we think that it is very clear that from the $114,000 and a fraction must be deducted the $21,000, which never came to the hands of Loring, but which was invested without his interposition in another way. So far as that money is concerned we are aware of no ground of legal, moral or equitable liability on his part. It does not belong to the transaction involved in this controversy between the parties.

There must also be laid out of view, as we think, the money advanced by Noble and transmitted through Palmer to Loring. That was not Capt. Frue's money, and upon no principle, legal or equitable, can he call upon Loring to account for it. The same remark applies to the moneys advanced by the Hodgsons. That money was not the money of Frue, and he has no legal or equitable claim to recover it back any more than Palmer has.

Now, as to the residue in the bands of Palmer. The question recurs again as regards that residuum: is there any legal or equitable obligation resting upon the defendant to pay that money, or any part of it, to the plaintiff? In order to give a proper solution to that question, it is neces-

sary to recur generally, but it will be sufficient to do so briefly, to the facts in outline, of the case, as they have been disclosed in the evidence.

These parties—I speak of the associates—entered into an agreement that certain land should be purchased, that certain moneys should be advanced by them respectively, Capt. Frue being one of the associates—that those moneys should be invested in the purchase of lands; that corporations were to be formed—two, at least, which were to take the legal title of those lands; that another portion of the money was to constitute what was designated by one of the witnesses, and perhaps more, as a working fund to belong to each corporation. Then, subsequently, the proof discloses that there was an understanding among the associates that other investments should be made. The Iroquois purchase is one of them, and the Torch Lake purchase is another. I believe those are all, but there was some testimony in regard to section 6 and section 24, but not having the knowledge of details, which undoubtedly the counsel have, I do not know whether those lands belong to the Torch Lake or the Iroquois purchase, or not, nor perhaps is it very material. I am dealing with principles and not with the details of fact. Now, this money reached the hands of defendant Loring as the financial agent of this association. It was his right to hold it for the purpose for which it came into his hands. It was his duty to invest it according to the understanding and agreement of himself and associates. Aside from the propositions of technical law which were adverted to in the discussion this morning, the question of fact arises whether that money was also invested by the defendant Loring or not. There is no doubt, as I understand, that he paid out of the moneys which so came into his hands for the lands conveyed to the Ossipee corporation, and I do not understand that it is questioned that he so paid out of those moneys the amount to be paid to make up the working fund, as it has been designated, of that corporation; and I understand that the same remarks are applicable to the Kearsarge corporation. There were perhaps other disbursements connected with these corporations and their operations—whether or not, I do not know, nor is it material to the principle that I propose to lay down. I hold it to be matter of clear law, under the circumstances of this case, that in so far as moneys received for purposes mentioned was applied by the defendant, Loring, to those purposes, there is not the shadow of a liability upon his part. If he had entered into an agreement, which is not shown, to procure from those corporations respectively the stock to which the plaintiff was entitled, that would have made no difference at all. The money having been appropriated according to the agreement of the plaintiff himself, he is estopped upon the principles of equity, good faith and of the law which is applicable to such a state of facts, from claiming the money back from the defendant Loring. He is also estopped upon a prin-

ciple of technical law, which is founded in good sense, in right reason and in justice, that after these investments were made and the stock was issued, and a portion of it sold as the agent of the association by the plaintiff, Frue, Frue received that stock after having sold it, honestly transmitted the proceeds of the sale to Loring, as the financial agent of the company, and it is presumed handed over the stock to the party or parties entitled to it. There was a clear recognition, affirmation and ratification, if any were needed, of the investment which had been made, and which doubly estops Frue from setting up any claim to that identical money. But adverting for a moment to the other aspect of the case in which it has been presented by counsel, and which seemed to be insisted upon at one time, and perhaps it is still relied on, Loring, even if he were not liable to procure, had agreed to procure and hand over that stock, and failed to do so, that would not create any liability upon his part—upon the principles of the law of money had and received—to this plaintiff for the money so received and so invested. Now, it appears by the testimony that was given this morning, that the stock was issued by Loring as trustee, and that if there has been any breach of duty on his part to the plaintiff touching that stock, it is that he still holds it. Most clearly the remedy of the plaintiff is against the corporation as trustee if the stock has not issued, and against Loring as trustee if the stock has issued—as seemed to be proved this morning. That is his right; he can not have any claim to the indentical money which he authorized to be invested in a particular way, and which Loring, pursuant to that authority, invested.

This same line of remarks is equally applicable to the other investments which are proved, but to the extent and effect of that proof, as a matter of fact, it is not necessary that I should advert; indeed, my memory and understanding, and it is so with my learned brother, the district judge, as to the details of that testimony, are not such as enable me to do so; but if Capt. Frue sanctioned the investment of the $21,000 by Palmer as it was invested, that would be another reason why there could be no liability in regard to that sum on the part of the defendant; but I have already said enough on that subject in its other aspect.

If outside of the operations and concerns of the two corporations he authorized an investment, as I understood him to say he did in the Iroquois property, whatever may have been the shape of it, certainly he has no claim, legal or equitable, whatever may have been the result, to recover back his aliquot share of that money, or any share of that money; and so with regard to the Torch Lake property. If there were an investment made by Loring as the financial agent of the association, with the sanction of the association, with which the association was connected, upon the law of money had and received, and of good conscience and right reason, of course there could be no liability upon the part of the defendant.

Now, whether these principles applied to the evidence will cover the entire amount which was received by Mr. Loring from Frue I am not prepared to say. If such is the result, the case is clearly at an end as regards that portion of the facts disclosed in the evidence.

A question, however, of more difficulty, perhaps, and perhaps not—I have not considered that subject so fully—arises in regard to the amount received, which I understand to be $73,000 for the stock sold by Frue as the agent of the association, and by him transmitted to Loring. If that money has been invested with other moneys that came to Loring as the financial agent of the association, then there is no ground for inquiry. There can be no doubt of the proper solution of any question, especially of law, that may arise in regard to that particular case ; but if that money is still in the hands of Loring, if it has not been invested, then another and a different question to this than which I have averted might present itself and require a solution ; but I must say that my present impression is that under the general aspect and character of the case, as disclosed in the evidence, the remedy of the plaintiff must be in equity, and that it cannot be at law. I do not say that this association was a copartnership. The rule in the law of copartnership is that one member of a firm cannot sue the others, or another, or bring any suit at law against the other members of the copartnership affairs, unless there has been some distinct covenant or agreement which is the foundation of the claim of liability sought to be enforced. I think, under the circumstances of this case and the analogies of law, good sense and a right administration of justice require that that same principle should be applied here. Some authorities, one at least, which has been adverted to, and there are many others, seem to recognize it. Here is this joint association, creating corporations, buying lands, and in many instances selling stocks, having a long, complicated account, of which this stock so sold, and constituting the $73,000, is but a single element in the compound mass. Now, it is perfectly clear that in that case, under these circumstances, with reference to that part thereof, that justice can be no more done by the verdict of a jury, than could be done under like circumstances in the case of a partnership. We therefore hold, as at present advised, that the law is that Frue, the plaintiff, is not entitled, under the case as presented as regards this section of it, to recover for money had and received.

I have suggested this course to my learned brother, and I am authorized to say that he concurs in it. Accounts have been presented and analytical statements made; and sitting here and listening to them, they remind me a little of Gray's description, in his long story, of an old English castle: "Windows that exclude the light and passages that lead to nothing," for that is the position of the court as regards those statements. They are multifarious; they are insisted upon one side; they are contradicted on the

other, and both sides appeal to the evidence and say it is thus and so, and we do not know—we have not time to examine it. We cannot reconcile these jarring conflicts of views. I have said to my learned brother that the best administration of justice and the best performance of our duty under the circumstances of the case will be to instruct this jury to return a verdict for the defendant, and to direct a motion for a new trial to be entered, and if it shall be found when these facts shall have been examined, as he will examine them at his leisure, if there is any element, even admitting of doubt as regards the right of the plaintiff to recover, he will set the verdict aside, and grant a new trial without costs. If, on the contrary, the facts of the case, the results of the evidence when weighed and examined, shall bring the whole case within the legal principles which I have announced, then, of course, the motion for a new trial will be overruled and the gentlemen will be left to take their bill of exceptions and take the case up to the higher court if they shall see fit to do so.

OPINION OF MR. JUSTICE SWAYNE, DELIVERED JUNE 5, 1877.

This is a motion to vacate an order granted by Judge Emmons, setting aside the non-suit heretofore granted in this case.

It may be proper to remark that when my attention was called to the case I considered it, as to my hearing, entirely from the standpoint of authority and right. I had no doubt then, and I have no doubt now, that it is competent for another judge of equal authority in this state to modify or set aside that order. Judge Emmons could have done it, and it is equally within the competency of any other judge holding this court to exercise the same power. It did not occur to me at the moment, but it did upon subsequent reflection, that this power unquestionably exists. As regards its exercise, there is a question of delicacy and propriety to be considered of a rather serious nature. The matter asked to be settled had not fully attracted my attention to its nature. If it had done so I should have declined, as I did in another case, which came up this morning under the same circumstances, to have heard the argument upon either side, or to have heard any argument whatever. I consider the conclusion I have come to in this respect by no means a sound precedent, on the contrary one rather to be avoided than followed; but having heard the argument, notwithstanding that such is the result of my reflections, it seems to me that there is no proper course but to go through with it. I have considered with considerable care, and I will now proceed very briefly to dispose of the motion.

The history of this case is as follows: It was a jury trial. The case proceeded several days, and at the close of the evidence in the case, a motion was made by the defendant's counsel to strike out a large portion of the testimony that had been given, upon the ground, as I recollect, that the testimony related clearly to a trust and a partnership, and that the Circuit Court, therefore, in an action at law, could not properly entertain jurisdiction of the case. My attention, and that of my brother Longyear, had before been drawn to this point. We had considered it together with some care, and I had looked into the authorities, and it seemed perfectly clear that it was a case of trust, and if not of trust, of partnership, and therefore an action at law could not be maintained; that a court of equity was the only proper forum for the determination of the case. I looked into Perry on trust, and Collyer on partnership, lest my recollection regarding those subjects might be at fault. The authorities seemed to be uniform that in a trust case equity had exclusive jurisdiction, and that in partnership cases the resort must be to equity, unless there had been a settlement between the partners, and a balance found due from one to the other, the accounts being adjusted, and that there was an express or implied promise to pay a balance to the plaintiff in the action. I therefore announced that I felt it my duty, as advised in regard to the case, to direct a verdict for the defendant, but with the understanding that my brother Longyear, who had more time to devote to the case than I could spare, should consider the evidence with all possible care, in the light of the legal propositions, and if he found any reason to doubt the soundness of the conclusions at which we had arrived, he should set aside the verdict and allow a new trial, the costs to abide the event of the suit. This was announced in the course of the forenoon, and the next morning, to our surprise, the plaintiff's counsel came in and announced they would suffer non-suit, and that judgment of non-suit might be entered. That terminated our connection with the case. A judgment of non-suit was accordingly entered, in rather an informal way, but I am satisfied it was substantially, and for all purposes of law, a judgment of non-suit as much so as if it had followed the usual form, "It is therefore considered," etc., that phrase being omitted. Before proceeding further I may say that, if leave was given to move to set aside the non-suit, that is a part of the entry. It is proper, perhaps, before proceeding further in this connection, to say that if a motion to set aside the non-suit had been made, it could, of course, have been continued from term to term, as long as the purposes of justice might seem to have required it; but that motion was not made. It will, perhaps, be proper to add in regard to this point, that the practice of the Circuit Courts in this respect is very common. In some of the districts, particularly in the southern part of the circuit, it is something of almost constant occurrence that one party or the other asks

that a suit at law or in equity shall be continued in the Circuit Court from term to term, until some case pending in the State court which will affect the rights of the parties in that litigation shall have been brought to a close. No motion was made, and the question was, of course, presented upon which this case turns, and to which I will presently advert.

It is disclosed to us that in this state of things, the plaintiff having become non-suit at his own motion, and the courts of the United States having no power to order a non-suit, went to Massachusetts, the home of the defendant, and there filed his bill in equity against the defendant, having abandoned the case at law in the Circuit Court. The case, it seems, was prepared and conducted there for the plaintiff by very eminent counsel, but the court there came to the conclusion that the jurisdiction was at law (I have not seen the opinion of the court), and dismissed the case upon that ground. I have to remark in this connection, though perhaps it is not material, that I am not surprised at that result there. If the case had been at law there they would have given the parties the substantial benefit of equity proceedings. They have an equity system there which I think is most admirable, and these complicated accounts and dealings would, under that system, have been referred to a referee, who would have reported the facts, and the final disposition would have come up on exceptions and motion to affirm; and that would have been substantially what would have been accomplished by an equity proceeding in this court. We have no power to refer as they have there, and the remedy at law there is much more comprehensive than it is here. I have not seen the opinion, but I presume it was upon this ground that the court held as it did; it is according to my understanding of the authorities, and I have been over many of the reports. I think it must have been upon that ground that the court dismissed the bill, and very justly. There was a remedy there at law as effectual as it is in chancery, but that is not so here.

But to proceed with the case. The party having returned, comes here and moves to set aside judgment of non-suit, some four or five terms having elapsed—the number is not material—after the judgment of non-suit was entered upon the motion of the plaintiff, and with his express consent—it could not have been done otherwise—and the question is thus presented pure and simple: whether or not the courts of the United States can set aside a judgment of non-suit at law; and it does not seem to me to make much difference whether it is a judgment of non-suit or any other judgment. In looking into the authorities upon this subject I find the rule much more liberal, much less stringent and exclusive than I had supposed. I had the impression, as I know many others who have not had occasion to examine the subject as it has been presented in the discussion of this case,

that the rule is inflexible; that in the absence of fraud or mistake a judgment of non-suit cannot any more than a decree in equity, substantially upon the same footing, be set aside at a subsequent term; that both are *ultra vires.* In examining this subject, however, in the light of the authorities which have been produced upon the argument before the court, and in the light of the argument which has been submitted on both sides, it seems to me very clear that this power as to judgments of non-suit, and as to other judgments, is properly exercised, liberally exercised, largely exercised in promoting the ends of justice, which should always be kept in view in all judicial action. Judge Emmons, after very full examination of the subject, as it seems to be conceded, arrived at the conclusion that under the special circumstances of the case it was proper to set this judgment of non-suit aside, and to place the case upon the docket of the court for retrial. I am now invited, and have undertaken, the task of reviewing and examining the soundness of that determination.

The result in this case has been produced by the action of the plaintiff, and it seems to me that, aside from other considerations, it invests the plaintiff with a very strong equity in respect to this motion. But before proceeding to consider the subject in that aspect very fully, it is proper to remark that the validity of Judge Emmons' action is to be considered in two aspects.

1. Had he power and authority as a matter of law, irrespective of the State law upon the subject, to make the order which is here under consideration? And,

2. If authority in that aspect of the case was wanting, had he the requisite authority under the State law and practice upon that subject?

As regards the first point, in addition to what I have already said, the leading authorities which have been referred to in the case, including that in the 6th of Howard, which is usually regarded as the leading adverse authority to the exercise of this power, seemed to favor this view. In the case in the 6th of Howard, while the general unqualified power to set aside a decree is denied, the general language of the court in qualification and explanation of the rule in that case, seems to me, under the circumstances, broad enough to cover this case. If this motion be denied to this plaintiff through the action of the court—mistake or not mistake, that is not material—this plaintiff, through the action of the court, is denied all remedy, because it is conceded that his entire claim was barred by the statute of limitations. I can not doubt, after the fullest reflection upon the subject, that if this power can be exercised in any case, if any discretion is given to the court with reference to the equitable considerations and circumstances which surround a case, this case falls within the rule.

As regards the other aspect of the case—that is, with reference to the State law and practice—after what I have already said, it is not necessary to decide that point; but I will say that, before the comprehensive act of 1872, upon this subject, was passed by Congress, Judge Woodbury, a judge of great learning and ability, and who brought large resources both of mind and learning to examination of every question which it was his duty to consider, decided in the case of *Clark vs. Schier, 1 W. and M. Rep., 374,* that the State law of Maine upon this subject was obligatory upon the courts of the United States. His opinion is luminous with research and sound reflection, and is one of very great ability. I think, therefore, to say the least, it may very well be doubted whether or not this case is not within the law and practice of the courts of Michigan upon the subject. If it be within the competency of this court, upon that ground, to act with regard to this matter as the Supreme court of Michigan would act under like circumstances, it seems to me from the authorities that if it were before the Supreme Court, just as it has been before this court, that court would not hesitate to grant the relief sought.

One or two other remarks will conclude what I have to say upon this subject. Let it be conceded that the matter is one of doubt. I am inclined to think, upon the fullest reflection, that if the motion be denied, the plaintiff will have no remedy by writ of error, because I am disposed to think that the granting of the relief invoked in this case by the plaintiff was an act of discretion, and wherever the matter is one of discretion, or the result is the result of the exercise of discretion, nothing is better settled than that a court of appeal cannot review the exercise of that discretion by a lower tribunal. It is beyond the sphere of their authority and the reach of their jurisdiction. Then, if we overrule this motion, the position of the plaintiff is such that he cannot try the case. His demands are finally barred. This would be contrary to the fixed principles of reason and justice. A court ought not to adopt a conclusion fraught with such consequences, unless inevitably constrained by legal principles which admit of no doubt, and which allow no escape from the force of such conclusion. On the other hand, if the doubt received its resolution in favor of the plaintiff, then the plaintiff goes on, and if the determination be against the defendant, the Supreme Court has said—and there is no room for doubt upon this subject; there can be none—that the defendant, after the case has been brought to a close, can take it up by writ of error, and if this point shall have been determined erroneously by Judge Emmons, that would be a good reason for the reversal of the judgment.

The denial of the motion then involves a great sacrifice on the part of the plaintiff. As to the defendant, it involves nothing but the labor of the trial and the costs of the action. The resolution of the doubt the other way, if there be doubt, would involve the entire loss of the plaintiff's case. Neither equity nor any other process known to the law, unless there be fraud, which is not claimed in this case, can arrest the running of the statute of limitations.

I think, therefore, that under all the circumstances of this case, and there is no controversy about the facts, it is the duty of this court to decline to revoke the order of Judge Emmons, and that is the judgment of this court.

14-228

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~322.~~ 76

WILLIAM C. CONNER, SHERIFF OF THE CITY AND COUNTY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

WILLIAM H. LONG, ASSIGNEE IN BANKRUPTCY OF BENJAMIN H. SPAULDING.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 28, 1878.

SUPREME COURT OF THE UNITED STATES

No. 322.

WILLIAM C. CONNER, SHERIFF OF THE CITY AND COUNTY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

WILLIAM H. LONG, ASSIGNEE IN BANKRUPTCY OF BENJAMIN H. SPAULDING.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between William H. Long, assignee in bankruptcy of Benjamin H. Spaulding, and William C. Conner, sheriff of the city and county of New York, a manifest error hath happened, to the great damage of the said William C. Conner, as is said, and as appears by his complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the capital in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this seventeenth day of January, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the one hundred and second.

[SEAL.] JOHN I. DAVENPORT,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is allowed.
Jan'y 17, 1878.

SAM'L BLATCHFORD.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages numbered from three to ninety-nine inclusive, contains a true and complete transcript of the record and proceedings had in the said court in the case of William C. Conner, sheriff of the city and county of New York, plaintiff in error, against William H. Long, assignee in bankruptcy of Benjamin H. Spaulding, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this 14 day of August, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the said United States the one hundred and third.

[SEAL.] JOHN I. DAVENPORT,
Clerk.

(Indorsed:) U. S. circuit court. Filed Jan. 23, 1878. John I. Davenport, clerk.

3 U. S. circuit court for the southern district of New York, in the second circuit.

Pleas before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings in the city of New York, of the term of October, 1877, to wit, of the 23rd day of November, in the year of our Lord one thousand eight hundred and seventy-seven.

Witness the honorable Alexander S. Johnson, one of the judges of the said circuit court.

JOHN I. DAVENPORT,
Clerk.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered, that, heretofore, to wit, on the third day of April, 1876, in April term, 1876, before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings in the city of New York, came William H. Long, assignee, by Carter & Eaton, their
4 attorneys, and brought into the said court, before the aforesaid judges thereof, then there, their certain record from the superior court of the city of New York, against William C. Connor, sheriff, &c., of a plea of trespass on the case upon promises; which said record follows in these words, that is to say:

5 Superior court of the city of New York.

WILLIAM H. LONG, AS ASSIGNEE,
against
WILLIAM C. CONNOR, SHERIFF, &C.

CLERK'S OFFICE,
Superior Court of the City of New York.

I, Thomas Boese, clerk of the superior court of the city of New York, having compared the annexed papers on removal from superior court of the city of New York to U. S. Supreme Court in the above entitled action, with the originals on file in this office, do certify that the same are correct transcripts therefrom, and of the whole of said original.

In witness whereof I have hereunto subscribed my name and affixed the seal of the supreme court of the city of New York, this third day of April, A. D. 1876.

[L. S.] THOMAS BOESE,
Clerk.

Fees, $3.50.

6 *Order of removal.*

At a special term of the superior court of the city of New York, held at the court-house in the said city on the 27th day of March, 1876—

Present, Hon. William E. Curtis, justice.

WILLIAM H. LONG, AS ASSIGNEE, &C.,
against
WILLIAM C. CONNOR, SHERIFF, &C.

The plaintiff herein having, on the 20th day of March, 1876, filed a

petition praying for a removal of this cause for trial into the circuit court of the United States for the southern district of New York, and it appearing by the said petition that this is a suit of a civil nature now pending in this court, and that the matter in dispute exceeds, exclusive of costs, the sum of five hundred dollars, and that it arises under the Constitution and laws of the United States, and that it is a con-
7 troversy between citizens of different States, and that this cause has not yet been tried, and it further appearing that said petition was filed before the term at which this cause could first be tried, and the plaintiff having made and filed, together with the said petition, a bond, as required by law, and an order to show cause having been granted herein on the said 20th day of March, 1867, requiring the defendant to show cause why the prayer of the said petition should not be granted:

Now, on motion of Carter and Eaton, attorneys for plaintiff, and on reading and filing proof of due service of the said order, to show cause, and no one appearing in opposition thereto, it is ordered that the said petition and the said bond be, and they hereby are, accepted, and that the said cause be, and it hereby is, declared to have been removed into the circuit court of the United States for the southern district of New York.

And it is further ordered that this court do proceed no further herein.

8 A copy.

THOMAS BOESE, *Clerk.*

(Endorsed:) N. Y. superior court. William H. Long, as assignee, vs. William C. Connor, sheriff. Copy. Order of removal. Carter and Eaton, atty's for pl'ff, 346 Broadway, N. Y.

9 Super'or court of the city of New York.

WILLIAM H. LONG, ASSIGNEE IN BANKRUPTCY of Benjamin H. Spaulding, plaintiff,
against
WILLIAM C. CONNOR, SHERIFF OF THE CITY and county of New York, defendant.

To the superior court of the city of New York:

The petition of William H. Long, by Carter and Eaton, his attorneys, respectively shows to the court:

That an action is pending in this court, in which your petitioner is sole plaintiff and one William C. Connor is sole defendant.

That this action is brought by your petitioner, as assignee in bankruptcy of one Benjamin H. Spaulding, to recover the value of certain property heretofore wrongfully converted by the defendant to his own use, with damages for the detention thereof.

10 That the matter in dispute exceeds, exclusive of costs, the sum of five hundred dollars, as appears by the complain*ant* herein.

That your petitioner is a citizen of a different State from that of which the defendant is a citizen; that your petitioner is, and was at commencement of this action, a citizen of the State of Massachusetts, and that the defendant is, and was at the commencement of this action, a citizen of the State of New York.

That this is a suit arising under the Constitution and laws of the United States, it being a suit to enforce a right conferred upon your petitioner as assignee in bankruptcy of the said Benjamin H. Spaulding by the

provisions of Title LXI of the Revised Statutes of the United States, and more particularly by section 5044 of the said Revised Statutes.

That issue was joined on the 18th day of March, 1876.

That this cause has not yet been noticed for trial, and the first term at which this action could be tried is the next April term of this court.

11 That your petitioner hereby offers a bond, with good and sufficient surety, for his entering in the circuit court of the United States for the southern district of New York, on the first day of its next session, a copy of the record in this action, & for paying all costs that may be awarded by the said circuit court, if said circuit shall hold that such suit was wrongfully or improperly removed thereto, and also for there appearing and entering special bail, if special bail was originally requisite herein.

Your petitioner therefore prays that this cause may be removed for trial into the next circuit court of the United States to be held in the district where this action is pending, to wit, into the next circuit court of the United States for the southern district of New York, pursuant to the statutes of the United States in such cases made and provided; and that this court do accept the surety offered by your petitioner as aforesaid, and do proceed no further in the said cause; and for such
12 further or other order or relief in the premises as to the court may seem just.

WILLIAM H. LONG,
By CARTER & EATON,
Att'ys.

CITY & COUNTY OF NEW YORK, *ss:*

William B. Hornblower, being duly sworn, says that he is a member of a law firm of Carter & Eaton, and one of the attorneys for the plaintiff in this action; that the foregoing petition is true to his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true; that the reason why this petition is sworn to by the deponent & not by the petitioner is that the petitioner is not a resident of the State of New York, and is not at present within the State of New York.

New York.

W. B. HORNBLOWER.

Sworn to before me this 20th day of March, 1876.

JOHN F. GULLIVER,
Notary Public, N. Y. Co.

13 (Endorsed:) N. Y. superior court. William H. Long, assignee, vs. William C. Connor, sheriff of the city and county of New York. Petition for removal into U. S. court. Carter & Eaton, plaintiff's attorneys.

14 *Order to show cause.*

At a special term of the superior court of the city of New York, held at the court-house in the city of New York, on the 24th day of March, 1876.

Present, Wm. E. Curtis, justice.

WILLIAM H. LONG, ASSIGNEE IN BANKRUPTCY of Benjamin H. Spaulding,
against
WILLIAM C. CONNOR, SHERIFF OF THE CITY and county of New York, defendant.

The plaintiff, William H. Long, assignee, &c., herein, having filed a

petition for the removal of this cause into the circuit court of the United States for the southern district of New York; and having also filed a bond with good and sufficient surety as required by law:

Now, on motion of Carter and Eaton, attorneys for the said
15 plaintiff, William H. Long, it is ordered that the defendant show cause, at a special term of this court to be held at the chambers thereof, in the court-house in the city of New York, on the 29th day of March, 1876, at 10½ o'clock in the forenoon or as soon thereafter as counsel can be heard, why the prayer of the said petition should not be granted; and let a copy of the said petition and of this order be served forthwith upon defendant's attorneys.

And it is further ordered that in the mean time and until a hearing and decision can be had under this order, all proceedings in this action be and they hereby are stayed, not exceeding twenty days.

A copy.

THOMAS BOESE, *Clerk.*

16 Know all men by these presents that we, William H. Long, of the city of and State of Massachusetts, and held and firmly bound unto William C. Connor in the sum of two hundred and fifty dollars, lawful money of the United States of America, to be paid to the said William C. Connor, his executors, administrators or assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, dated the sixth day of March, one thousand eight hundred and seventy-six.

Whereas an action is now pending in the superior court of the city of New York, in which the above-named William H. Long, as assignee in bankruptcy of one Benjamin H. Spaulding, is plaintiff, and the above-named William C. Connor is the defendant; and whereas the said William H. Long is about to petition the said court for a removal of the said cause into the circuit court of the United States for the southern
17 district of New York:

Now, the consideration of the above obligation is such that if the said William H. Long shall duly enter in the said circuit court of the United States for the southern district of New York, on the first day of its next session, a copy of the record in the said action, and if the said William H. Long shall well and truly pay all costs that may be awarded by the said circuit court if the said court shall hold that the said suit was wrongfully or improperly removed thereto, and if the said William H. Long shall there appear and shall enter special bail, if special bail was originally requisite in the said action, then this obligation to be void; otherwise to remain in full force and effect.

(S'g'd) WILLIAM H. LONG. [L. S.]
(S'g'd) CHARLES MILES, JR. [L. S.]

In the presence of—
(S'g'd) JAS. B. BELL,
As to Charles Miles, jr.

Witness:
(S'g'd) JOHN F. GULLIVER.

18 STATE OF MASSACHUSETTS,
County of Suffolk, City of Boston, ss:

Before me personally appeared on this tenth day of March, 1876, William H. Long, to me known, and known to me to be the person de-

scribed in and who executed the foregoing instrument, and acknowledged to me that he executed the foregoing instrument, and acknowledged to me that he executed the same for the uses and purposes therein designated.

Witness my hand and official seal as a commissioner of deeds for the State of New York.

[L. S.] (S'g'd) JAS. B. BELL,
Commissioner of Deeds for the State of New York, residing in the City of Boston.

(Certificate of secretary of state annexed.)

CITY AND COUNTY OF NEW YORK, *ss:*

Before me personally appeared on this 14th day of March, 1876, Charles Miles, jr., to me known, and known to me to be the person described in and who executed the foregoing instrument, and ac-
19 knowledged to me that he executed the same for the uses and purposes therein designated.

(S'g'd) JOHN F. GULLIVER,
Notary Public, N. Y. Co.

CITY AND COUNTY OF NEW YORK, *ss:*

Charles Miles, jr., being duly sworn, says that he resides at No. 46 West 34th street, in the city of New York; that he is a freeholder within this State, and is worth the sum of five hundred dollars over and above all his debts and liabilities, and exclusive of property exempt from execution.

(S'g'd) CHARLES MILES, JR.

Sworn to before me this 14th day of March, 1876.

JOHN F. GULLIVER,
Notary Public, N. Y. Co.

(Endorsed:) N. Y. superior court. William H. Long, assignee.
20 &c., against William C. Connor. Bond. Security on removal to U. S. court. Carter & Eaton, pl'ff's att'ys, 346 Broadway, N. Y.

21 *Order modifying extension of time.—Exhibit B.—Original extension by the court.*

Superior court of the city of New York.

WILLIAM H. LONG, AS ASSIGNEE, &C.,
against
WILLIAM C. CONNOR, SHERIFF, &C.

On the annexed affidavit and on motion of Carter & Eaton, plaintiff's attorneys, it is ordered that the order granted on the 14th day of March, 1876, extending the defendant's time to answer, be and hereby is modified so as to require the defendant to serve his answer on or before the 18th day of March, 1876, unless the defendant will stipulate to accept short notice of trial for the April term of the United States circuit court for the southern district of New York, if this action shall have been duly removed into the said court after the expiration of the time granted by the said order and before the 1st day of April, 1876. And let a
22 copy of this order be served this day upon defendant's attorneys.

Dated March 15, 1876.

WM. E. CURTIS.

23 Superior court of the city of New York.

WILLIAM H. LONG, AS ASSIGNEE, &c.,
against
WILLIAM C. CONNOR, SHERIFF, &c.

CITY AND COUNTY OF NEW YORK, *ss:*

William B. Hornblower, being duly sworn, says that he is one of the attorneys for the plaintiff herein; that this is a suit by the plaintiff as assignee in bankruptcy of one Benjamin H. Spaulding, to recover the sum of six thousand six hundred dollars from the defendant for the wrongful conversion of certain property of the plaintiff as such assignee; that the principal questions involved are questions of law depending upon the construction of the bankrupt law; that the case is properly triable in the United States court, and that under the provisions of the act of Congress approved March 3rd, 1875, the plaintiff is entitled to have the same removed for trial into the United States court at
24 any time before the term at which the same could be first tried; that the amount in controversy is over five hundred dollars; that the plaintiff is a citizen of Massachusetts, and the defendant is a citizen of the State of New York; and that the plaintiff claims a right founded upon a statute of the United States, to wit, Title LXI of the Revised Statutes of the United States, entitled "bankruptcy;" that the plaintiff desires to remove the same into the United States court for trial; that the reason why the suit was begun in the State court was because that was a more convenient, speedy and economical method of getting the case at issue, the practice in the United States court involving the payment of marshal's and clerk's fees and being subject to awkward questions of statutory construction, owing to the conflicting decisions as to how far the practice in the Federal courts is governed by the State statutes or by the rules of court.

And deponent further says that the complaint herein was served on the 23rd day of February, 1876, within twenty-four hours (ex-
25 cluding an intervening legal holiday) after notice of appearance had been received by plaintiffs' attorneys; that the answer herein was due on the 14th day of March, 1876; that on the 13th day of March, 1876, defendant's attorneys requested an extension of time to serve their answer; that plaintiff's attorneys thereupon offered a stipulation, a copy of which is hereto annexed, marked Exhibit A; that defendant's attorneys declined to accept the said stipulation and applied to his honor, Judge Curtis, for an extension of time to serve the said answer; that his honor, Judge Curtis, on the 14th day of March, 1876, granted an order extending the time to serve the said answer for ten days, a copy of which order is hereto annexed, marked Exhibit B; that the only reason given in the affidavit on which the said order was procured as a reason for the said extension was that counsel was very busy.

And deponent further says that the time for the defendant to answer under the said order will not expire until the 24th day of March,
26 1876; that if deponent should have the said cause removed into the United States court before the said time shall expire, it would raise a very inconvenient question as to when or how the said answer should be served; that deponent can find no precedents as to the matter, and it is exceedingly doubtful whether the defendant would be obliged to serve his answer until twenty days after the first day of the next term of the United States circuit court; that the next term of

the said court begins on the 3rd day of April next; that deponent desires to give notice of trial for the said term; that the last day to give such notice of trial will be the 20th day of March, instant; that the next term of the said court after the said April term is the October term, and unless plaintiff can give notice of trial for the said April term, this case cannot be placed on the calender of the said court until next October; that the delay will be very prejudicial to the estate which the plaintiff represents.

And deponent further says that he verily believes the answer
27 of the defendant will be a very simple one, consisting of a general or special denial; that the issues involved are principally questions of law, the principal question of fact, if any, being as to the value of the property in controversy, and that he verily believes the answer can be prepared in twenty-four hours.

W. B. HORNBLOWER.

Sworn to before me this 15th day of March, 1876.

JAMES P. ROGERS,
Com'r of Deeds.

28 EXHIBIT A.

Supreme court of the city of New York.

WILLIAM H. LONG, AS ASSIGNEE IN BANKruptcy of Benjamin H. Spaulding, plaintiff,
against
WILLIAM C. CONNOR, SHERIFF OF THE CITY and county of New York, defendant.

We hereby consent that the defendant's time to answer herein be extended eighteen days, provided, however, and it is hereby stipulated to that effect, that if, before the time hereby granted, this action shall have been removed into the circuit court of the United States, the defendant's answer shall nevertheless be served in all respects as if this action had not been removed, the answer to be entitled in the State court and to be served within the time hereby limited, or such further time as may be granted, and to comply with the requisites pre-
29 scribed in the code of procedure of the State of New York, and the plaintiff to be at liberty to demur to the said answer, or to reply, if a reply be proper, and the defendant shall be at liberty to demur to such reply in all repects as if this action had not been removed; and the pleadings so served shall constitute part of the record of this court.

And it is further stipulated that any future extension of time to serve pleadings shall be upon the conditions above set forth, whether such conditions be or be not expressly inserted in such extension.

And it is further stipulated that the defendant shall accept short notice of trial for the April term of this court, or of the United States circuit court if this cause shall have been removed thereto before the last Monday of March, 1876.

Dated, March 13th, 1876.

CARTER & EATON,
Pl'ff's Att'ys.

30 EXHIBIT B.

Affidavit of merits.

Superior court of the city of New York.

WILLIAM H. LONG, AS ASSIGNEE, &C., PLAINTIFF,
against
WILLIAM C. CONNOR, SHERIFF OF THE CITY and county of New York, defendant.

CITY AND COUNTY OF NEW YORK, *ss:*

William C. Connor, the defendant in the above-entitled action, being duly sworn, doth depose and say that he has fully and fairly stated the case in the above action to Aaron J. Vanderpoel, his counsel in this action, who resides at No. 1 West 16th street, in the city of New York, and that he has a good and substantial defence upon the merits thereof, as he is advised by his said counsel, after such statement made as aforesaid, and verily believes to be true.

WM. C. CONNOR,
Sheriff.

Sworn to before me this 14th day of March, 1876.
CHARLES W. WELSH,
Notary Public, N. Y. Co.

31

32 Superior court of the city of New York.

WILLIAM H. LONG, AS ASSIGNEE, &C.,
against
WILLIAM C. CONNOR, SHERIFF, &C.

CITY AND COUNTY OF NEW YORK, *ss:*

Almon Goodwin, of said city, being duly sworn, deposes and says: I am one of the attorneys for the defendant in the above action; said action is brought to recover the sum of six thousand six hundred dollars for the alleged wrongful detention of property. The complaint herein was served on the 23rd day of February, 1876; the defendant's time to answer herein expires to-day, and my firm have requested further time of the plaintiff's attorneys, but it has been refused. Owing to numerous and pressing professional engagements I have been unable to prepare said answer, but I believe an extension of twenty days would be a reasonable and just extension of time in which to prepare and serve the same.

33 A. GOODWIN.

Sworn to before me this 13th day of March, 1876.
B. J. DOWRAS,
Notary Public, N. Y. Co.

Upon the annexed affidavit of Almon Goodwin let the defendant have ten days' additional time to answer herein.
N. Y., March 14th, 1876.

WM. E. CURTIS, *J.*

34 *Notice of retainer and demand of complaint.*

New York superior court.

WILLIAM H. LONG, AS ASSIGNEE IN BANKRUPTCY of Benjamin H. Spaulding,
against
WILLIAM C. CONNOR, SHERIFF OF THE CITY and county of New York.

You will please take notice that we are retained by and appear for the defendant in this action, and hereby demand that you serve a copy of the complaint herein upon us, at our office, 2nd floor Tribune building, in the city of New York.

Dated New York, Feb'y 21st, 1876.

Yours, &c.,

VANDERPOEL, GREEN & CUMING,
Attorneys for Def't.

To CARTER & EATON, Esq'r's,
Plaintiff's Attorneys.

35 *Answer.*

Superior court of the city of New York.

WILLIAM H. LONG, AS ASSIGNEE IN BANKRUPTCY of Benjamin H. Spaulding, plaintiff,
against
WILLIAM C. CONNOR, SHERIFF OF THE CITY and county of New York, defendant.

The defendant above named appearing herein by Vanderpoel, Green & Cuming, his attorneys, and answering the complaint of the plaintiff—

Denies any knowledge or information sufficient to form a belief as to any of the matters contained in the first clause or subdivision of said complaint.

And answering the second clause or subdivision of said complaint, defendant denies that he has wrongfully converted to his own use any property whatever of the plaintiff, or any moneys received by defendant as in the complaint alleged or otherwise.

36 And further answering defendant admits and avers that on or about the twentieth day of July, 1875, one Alfred J. Dickerson commenced an action in the supreme court of the State of New York against one Benjamin H. Spaulding, and that on or about the twentieth day of July, 1875, a warrant of attachment was duly issued in said action against the property of said Spaulding to this defendant as sheriff of the city and county of New York, and that thereupon and on or about said twentieth day of July, 1875, this defendant under and by virtue of said warrant of attachment levied upon certain personal property that appeared to belong to said Spaulding, which said process the defendant begs leave to refer to on the trial of this action for greater accuracy as to the contents thereof, but defendant denies that the said levy so made by him as aforesaid was excessive or more than enough to satisfy the claim of the plaintiff in said attachment, or that said property so levied upon was or is of the value of six thousand six hun-

dred dollars, or of any greater value than the sum of one thousand and forty-three $\frac{18}{100}$ dollars.

37 And further answering, this defendant admits and avers that on or about the thirty-first day of July, 1875, under and by virtue of an order duly made in said action in which said warrant was issued made by the honorable T. R. Westbrook, one of the justices of said supreme court, directing this defendant, as sheriff as aforesaid, to sell the said property so attached by him as aforesaid as perishable, this defendant did as such sheriff, and not otherwise, in due form of law sell the said property as perishable, and did realize upon such sale the sum of one thousand and forty-three $\frac{18}{100}$ dollars and no more; and defendant denies that such sum was an inadequate price for said property, or that said property was worth the sum of six thousand six hundred dollars or any greater sum than one thousand and forty-three $\frac{18}{100}$ dollars, or that it was not perishable property or that said order made by the said justice was null or void.

And further answering, defendant denies any knowledge or information sufficient to form a belief whether at any time a petition

38 in bankruptcy was in fact filed against the said Spaulding, or whether if such petition was in fact filed, the same was so filed within four months from the time of issuing the attachment aforesaid, or whether the said Spaulding was at any time adjudicated a bankrupt, or whether any assignment of the property of said alleged bankrupt was ever made to the plaintiff, or whether said attachment was ever dissolved by operation of law or otherwise, and upon information and belief this defendant denies that all or any of the proceedings of said supreme court made by virtue of or in furtherance of said warrant of attachment were null and void, or whether said order directing the sale of said property as perishable was obtained subsequent to the filing of said alleged petition in bankruptcy; and defendant denies that he knew or in any way had any notice or intimation of said alleged proceedings in bankruptcy until subsequent to such sale, and until after the payment over by this defendant of the money so received by him upon such sale as hereinafter set forth.

39 And further answering, this defendant admits and avers that thereafter, and on or about the fifteenth day of September, 1875, he received an execution issued out of the supreme court, and purporting to be based upon a judgment recovered therein in said action, wherein said Alfred J. Dickerson was plaintiff and said Benjamin H. Spaulding was defendant; but defendant denies any knowledge or information sufficient to form a belief whether said judgment was premature or irregular, and he avers that said execution was regular upon its face, and this defendant had no knowledge, notice, or intimation of irregularity in the entry of said judgment, if any there was; or defendant denies that he knew that said judgment and execution, or either of them, was illegal or void, and upon information and belief this defendant avers that the same were legal and of full force and effect, and that this defendant was fully authorized and was by law compelled to act thereunder.

And defendant further admits and avers that upon the receipt

40 of said execution he paid over to the plaintiff therein, the said Alfred J. Dickerson, the proceeds of the property so levied upon by him and sold as aforesaid, less only his lawful fees and expenses.

And defendant denies any knowledge or information sufficient to form a belief whether said judgment has ever been vacated or set aside, as in the complaint alleged, or otherwise.

Defendant denies that by reason of the detention alleged in the complaint the plaintiff has sustained damage to the amount of three hundred dollars, or any damage whatever.

Defendant denies that by reason of the matters in the complaint set forth, or of any act or acts of this defendant, plaintiff is entitled to the judgment in the complaint prayed for, or to any judgment or relief in the premises.

SECOND DEFENSE.

And for a further, separate, and distinct defense to the matters in the complaint set forth denying the same as the same are hereinbe-
41 fore denied, defendant, upon information and belief, avers that the plaintiff has commenced an action in this court against the said Alfred J. Dickerson, in said complaint mentioned, to recover the amount of money paid by this defendant to said Dickerson on or about the fifteenth day of September, 1875, upon said execution, as in said first defense is more fully set forth, and to which defendant here refers, and that said action is now pending and undetermined.

Wherefore defendant demands judgment for the dismissal of the complaint, and for his costs and disbursements of action.

VANDERPOEL, GREEN & CUMING,
Attorneys for Defendant, 16 *Tribune Building*, *N. Y. City.*

CITY AND COUNTY OF NEW YORK, *ss:*

William C. Connor, the defendant in this action, being duly sworn, deposes and says that the foregoing answer is true, to his own knowledge, except as to the matters therein stated on information and
42 belief, and as to those matters he believes it to be true.

WM. C. CONNOR, *Sh'ff.*

Sworn to before me this 18th day of March, 1876.

JOSEPH M. TOONE,
Notary Public, N. Y.

43 *Summons for relief.—Com. not served.*

Superior court of the city of New York.

WILLIAM H. LONG, AS ASSIGNEE IN BANKruptcy of Benjamin H. Spaulding, plaintiff,
against
WILLIAM C. CONNOR, SHERIFF OF THE CITY and county of New York, defendant.

To the defendant:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the superior court of the city, county of New York, at the city of New York, and to serve a copy of your answer to the said complaint on the subscribers at their office, No. 346 Broadway, in the city of New York, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated New York, January 21st, 1876.

44 CARTER AND EATON,
Plaintiff's Attorneys, 346 *Broadway*, *New York City.*

45 *Complaint.*

Superior court of the city of New York.

WILLIAM H. LONG, AS ASSIGNEE IN BANKruptcy of Benjamin H. Spaulding, plaintiff,
against
WILLIAM C. CONNOR, SHERIFF OF THE CITY and county of New York, defendant.

The above named plaintiff complains of the above named defendant, and shows to the court—

I. That on or about the 23rd day of July, 1875, a petition for an adjudication of bankruptcy against one Benjamin H. Spaulding was duly filed in the district court of the United States for the district of Massachusetts; that thereafter, and on the 4th day of September, 1875, the said Spaulding was duly adjudged a bankrupt by the said court; and that thereafter the said plaintiff was duly chosen and appointed assignee in the said bankruptcy proceedings by the said court, and thereafter, by an instrument of assignment, dated the 21st day
46 of September, 1875, executed by Peter C. Bacon, esq., one of the registers of the said court in bankruptcy, and under the seal of the said court, all the estate and effects belonging to the said Spaulding, or to which the said Spaulding was entitled on the said 23rd day of July, 1875, were duly assigned and conveyed to the said plaintiff, as assignee in bankruptcy, as aforesaid, and the plaintiff entered upon his duties as such assignee and is still acting as such assignee.

II. And the plaintiff further shows to the court that the defendant has wrongfully converted to his own use certain property of this plaintiff, to wit, certain straw goods, of the value of six thousand six hundred dollars, or thereabouts; and also the moneys received by the said defendant upon the sale of the said goods, as hereinafter stated; that the said defendant converted the said goods and the said moneys in the manner following, as plaintiff is informed and believes, to wit: That on or about the 20th day of July, 1875, one Alfred J. Dickerson commenced an action in the supreme court of the State of New York
47 against the aforesaid Benjamin H. Spaulding to recover the sum of two thousand and eighty-six $\frac{11}{100}$ dollars, with interest thereon from the 4th day of June, 1875; that on or about the 20th day of July, 1875, a warrant of attachment against the property of the said Spaulding was issued to the defendant herein, as sheriff of the city and county of New York; that thereupon, and on or about the said 20th day of July, 1875, the said defendant levied under the said warrant of attachment upon certain property of the said Spaulding; that the said property was greatly in excess of the amount necessary to satisfy the claim of the said Dickerson against the said Spaulding in the said action, the same being worth the sum of six thousand six hundred dollars, or thereabouts; that thereafter, and on or about the 1st day of August, 1875, the said defendant sold the said property, under the pretense that the same was perishable, and under a pretended authority from one of the justices of the court in which the said action was pending; that the said property was sold for a grossly inadequate price, to wit, for
48 the sum of thirteen hundred dollars, or thereabouts, whereas the said property was in fact worth the sum of six thousand six hundred dollars, or thereabouts, as aforesaid; that the said pretense under which the said property was sold was false; that the said property was

not in fact perishable; that the said property could have been sold by waiting till the proper season of the year, and selling the same in a proper manner, for the sum of at least six thousand six hundred dollars, as aforesaid; that the pretended authority from the said justice for the sale of the said property was null and void, and that said defendant well knew the same to be null and void, as appears by the following facts, to wit: that on the 23rd day of July, 1875, the petition for an adjudication of bankruptcy against the said Spaulding was filed as aforesaid; that the said warrant of attachment was issued, and the aforesaid property was levied upon under the said warrant within four months before the filing of the said petition; that by virtue of the subsequent adjudication against the said Spaulding and the subsequent
49 assignment to this plaintiff of the property of the said Spaulding as aforesaid, the said attachment was on the said 23rd day of July, 1875, dissolved by operation of law, and all proceedings of the said supreme court of the State of New York, thereafter made by virtue of or in furtherance or enforcement of the said attachment were null and void; that the said pretended authority obtained from the said justice of the said court for the sale of the said property was obtained after the filing of the said petition, as aforesaid; that the defendant had notice of the filing of the said petition; that thereafter, and after the filing of the said petition as aforesaid, and after the dissolution of the said attachment as aforesaid, and on or about the 15th day of September, 1875, the said Dickerson caused to be entered in the said action a premature and irregular judgment against the said Spaulding, and thereupon caused to be issued to the defendant as sheriff of the city and county of New York an execution upon the said judgment, and the defendant thereupon levied upon the proceeds of the said
50 attached property and delivered over part of the same to the said Dickerson, and retained the balance for his fees and expenses in the said action; that the said judgment and the said execution were wholly illegal and void, and the said defendant well knew them to be so; that thereafter and on or about the 25th day of September, 1875, the said judgment was set aside and vacated by an order of the said court, on the ground that the same was prematurely and irregularly entered.

And the plaintiff further shows that he has suffered damage by reason of the detention of the said property, in the sum of three hundred dollars.

Wherefore plaintiff demands judgment against the defendant for six thousand six hundred dollars, the value of the property wrongfully converted by the defendant as aforesaid, and three hundred dollars damages for the detention of the same, together with the costs of this action.

CARTER & EATON,
Pl'ff's Att'ys.

51 CITY AND COUNTY OF NEW YORK, *ss:*

William B. Hornblower, being duly sworn, says that he is a member of the law-firm of Carter & Eaton, and one of the attorneys for the plaintiff herein; that the foregoing complaint is true, to his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true; that the reason why this verification is sworn to by this deponent and not by the plaintiff is, that the material facts are within the personal knowledge of this deponent, and the plaintiff does not reside in the county in which

any one of his attorneys resides, and is not at present within the city, county, or State of New York.

W. B. HORNBLOWER.

Sworn to before me this 23rd day of February, 1876.

JOHN F. GULLIVER,
Notary Public, N. Y. Co.

52 (Endorsed:) Long vs. Connor. C. L. D., No. 4, p. 175. Filed Ap'l 3, 1876.

53 At a stated term of the circuit court of the United States for the southern district of New York, held at the court-rooms in the city of New York, on the 20th day of November, 1877.

Present, Hon. Nathaniel Shipman, justice.

WILLIAM H. LONG, AS ASSIGNEE OF BENJAMIN H. Spaulding,
against
WILLIAM C. CONNOR, SHERIFF OF THE CITY and county of New York.

The counsel for the defendant having applied for leave to interpose a supplemental answer to the complaint herein, it is ordered, on motion of Vanderpoel, Green & Cuming, that said application be granted, and that said defendant be, and he hereby is, allowed to file the supplemental answer which is hereto annexed, and to serve a copy thereof on the plaintiff's attorneys.

N. SHIPMAN, *Judge.*

54 *Supplemental answer.*

Circuit court of the United States, southern district of New York.

WILLIAM H. LONG, AS ASSIGNEE,
against
WILLIAM C. CONNOR, SHERIFF OF THE CITY and county of New York.

The defendant, for his supplemental answer to the complaint of the plaintiff, avers that on the 3rd day of November, 1877, the above-named plaintiff duly recovered judgment in this court in the action brought by him against Alfred J. Dickerson, the pendency of which action was alleged in the answer of said defendant, for the sum of seven thousand seven hundred and one dollars, damages and costs; that said judgment was recovered on the same cause of action as is alleged herein, and for the conversion of the same goods and chattels mentioned and described in the complaint herein; that thereafter, and on or about the day of , 1877, the said plaintiff issued to the marshal of the United States for the southern district of New York an execution
55 against the property of said Alfred J. Dickerson, based upon said judgment.

Wherefore defendant demands judgment for the dismissal of the complaint herein, and for his costs and disbursements of action.

VANDERPOEL, GREEN & CUMING,
Defendant's Solicitors.

CITY AND COUNTY OF NEW YORK, *ss:*

William C. Connor, late sheriff of the city and county of New York, the defendant herein, being duly sworn, says that the foregoing answer is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

WM. C. CONNOR,
Late Sheriff.

Sworn to before me this 21 day of November, 1877.

JOSEPH N. TOONE,
Notary Public, N. York.

56 (Endorsed:) N. Y. U. S. circuit court. William H. Long, as assignee, &c., against William C. Connor, sheriff, &c. Supplemental answer. Vanderpoel, Green & Cuming, attorneys for def't, Tribune Building, New York. U. S. circuit court. Filed Nov. 23, 1877. John I. Davenport, clerk.

57 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms in the city of New York, on Friday the twenty-third day of November, in the year of our Lord one thousand eight hundred and seventy-seven.

Present, the honorable Nathaniel Shipman, judge.

WILLIAM H. LONG, AS ASSIGNEE OF BENJAMIN H. Spaulding,
vs.
WILLIAM C. CONNOR, SHERIFF OF THE CITY and county of New York.

The counsel for the defendant having applied for leave to interpose a supplemental answer to the complaint herein, it is ordered, on motion of Vanderpoel, Green and Cuming, that said application be granted, and that said defendant be, and he is hereby, allowed to file the supplemental answer which is hereto annexed, and to serve a copy thereof on the plaintiff's attorneys.

N. SHIPMAN, *Judge.*

58 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms in the city of New York on Tuesday, the fourth day of December, in the year of our Lord one thousand eight hundred and seventy-seven.

Present, the honorable Nathaniel Shipman, judge.

WILLIAM H. LONG, ASSIGNEE, &C.,
vs.
WILLIAM C. CONNOR, SHERIFF, &C.

On motion of William B. Hornblower, esq., of counsel for the plaintiff, ordered trial.

Jurors sworn: Lemuel Bangs, George Hendershot, Robt. H. Hutchinson, James H. Davidson, William J. Davenport, Richard Irwin, jr., James B. Newton, David B. Keelor, Geo. E. Underhill, John Jackson, Robert Parkhill, Charles Curtis.

Mr. Hornblower opens the case on the part of the plaintiff.

Evidence for the plaintiff:

59 Plaintiff's Exhibits, marked A, B, C, and D.
Charles Miles, jr., sworn.
Benjamin H. Spaulding, "
Patrick H. Malloy, "
Samuel Godchard, "
Plaintiff's Exhibit E.
Charles Miles, jr., recalled.
Plaintiff's Exhibit F.
Mr. Hornblower rests the prima facie case on the part of the plaintiff.
Robert S. Green, esq., of counsel for the defendant, moves that the court direct the jury to find a verdict for the defendant, and is heard in support of said motion.
Daniel E. Chamberlain, esq., also, of counsel for the plaintiff, is heard in opposition to said motion.
The court denies said motion, and Mr. Green excepts to the ruling of the court in so doing.

Evidence for the defendant:

Simon Herman, sworn.
Defendants' Exhibit, Nos. 1, 2, 3.
D. G. Gale, "
Defendant's Exhibit, No. 4.
" " " 5.
Mr. Green rests the prima facie case on the part of the defendant.

Evidence for the plaintiff:

Benjamin H. Spaulding recalled.
Plaintiff rests. Defendant rests.

60 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms in the city of New York on Wednesday, the fifth day of December, in the year of our Lord one thousand eight hundred and seventy-seven.
Present, the honorable Nathaniel Shipman, judge.

WILLIAM H. LONG, ASSIGNEE, &c.,
vs.
WILLIAM C. CONNOR, SHERIFF, &c.

This cause being still on trial, the jurors sworn in it are called, and severally answer to their names.
Mr. Green renews his motion that the court direct the jury to find a verdict for the defendant, and is heard in support of said motion.
Mr. Chamberlain is heard in opposition to said motion.
The court denies said motion, and Mr. Green excepts to the ruling of the court in so doing.
Counsel for the respective parties are heard upon the question of damages relative to this cause.
Mr. Green sums up the cause on the part of the defendant.
Mr. Chamberlain sums up the cause on the part of the plaintiff.

61 Charge is thereupon given by the court to the jury, who retire under charge of an officer duly qualified to attend them, and on their return say that they find a verdict for the plaintiff for the sum

of six thousand and seventy-seven dollars as principal, and nine hundred and ninety-eight dollars and forty seven cents as interest, the total amount being seven thousand and seventy-five dollars and forty-seven cents ($7,075.47), and so say they all.

Mr. Green moves for a new trial.

The court denies said motion, and Mr. Green excepts to the ruling of the court in so doing.

On motion of Mr. Green, it is ordered that the defendant have a stay of thirty days in which to make and prepare a case, with leave to turn the same into a bill of exceptions.

Prior to the retiring of the jury Mr. Hornblower excepts to certain portions of the charge, which he states.

Also, prior to the retiring of the jury, Mr. Green presents certain requests to charge; the court declines to charge as requested, and Mr. Green excepts to the ruling of the court in so doing.

A copy:

JOHN I. DAVENPORT, *Clerk.*

H. H. M.

62 (Endorsed:) U. S. circuit court, S. D. of New York. William H. Long, assignee, &c., vs. William C. Connor, sheriff, &c. Certified transcript from minutes.

63 Therefore the issue above joined is ordered by said court to be tried at the circuit court appointed to be held at the United States court building in the city of New York on the third Monday of October, in the year one thousand eight hundred and seventy-seven.

And now, at this day, to wit, the twenty-third day of November, 1877, as yet of the October term, before the honorable Nathaniel Shipman, judge, came the parties by their respective attorneys, and the jurors of the jury summoned to try the said issue being called, also came, who to speak the truth of the matters within contained being chosen, tried, and sworn, say upon their oath that the plaintiff's complaint is true, and they assess the damages of the said plaintiff by reason of the premises, over and above his proper costs and charges in and about his suit expended, at seven thousand and seventy-five dollars and forty-seven cents ($7,075.47).

Therefore it is considered that the said plaintiff recover of said defendant the said damages by the jury above assessed, and also
64 the further sum of one hundred and eleven dollars and forty-three cents, his costs and charges, as taxed and allowed to said plaintiff, which said damages, costs, and charges amount in the aggregate to the sum of seven thousand one hundred eighty-six dollars and forty-three cents ($7,186.43.)

And the said defendant in mercy, &c.

Judgment signed this 12th day of January, A. D. 1878, 3 p. m.

J. M. DEUEL,
Dep. Clerk.

(Endorsed:) U. S. circuit court, S. D. of N. Y. Wm. H. Long ag'st Wm. C. Conner, sheriff, &c. Judgment roll. Carter & Eaton, pl'ff's att'y. U. S. circuit court. Filed January 12, 1878. John I. Davenport, clerk.

65 *Bill of exceptions.*

United States circuit court for the southern district of New York.

WILLIAM H. LONG, ASSIGNEE IN BANKRUPTCY of Benjamin H. Spaulding,
against
WILLIAM C. CONNOR, SHERIFF OF THE CITY and county of New York.

Be it remembered that the above cause came on to be tried on the fourth day of December, 1877, before the honorable Nathaniel Shipman and a jury upon the pleadings (pro ut the same); whereupon, to support the issues on his part, the plaintiff introduced in evidence the petition filed in the district court of the United States for the district of Massachusetts on the twenty-third day of July, 1875, and adjudication of Benjamin H. Spaulding as a bankrupt, made the fourth day of September, 1875, being the general record of the proceedings in the matter of Benjamin H. Spaulding, bankrupt, which were marked Exhibit A
66 (pro ut the same); also the deed of assignment executed by the register in bankruptcy to the plaintiff on the twenty-first day of September, 1875, marked Exhibit B (pro ut the same). It was admitted by the counsel for both parties that the defendant's list of goods seized was the correct list, and plaintiff's counsel then introduced said list in evidence, which was marked plaintiff's Exhibit C (pro ut the same). Plaintiff's counsel then introduced in evidence the stipulation made by defendant's counsel, which were marked Plaintiff's Exhibit D (pro ut the same).

The plaintiff then called as a witness Charles Miles, jr., who, being duly sworn, on his oath saith:

I am a commission merchant in the straw goods line. That was my business in July, 1875. I was at that time acting as factor for Benjamin H. Spaulding. I received goods from him consigned to me for sale. I have the original invoice-book here.

The plaintiff's counsel then asked the witness the following question:

Q. Look at the invoice corresponding to case number 7346;
67 what was the value of the goods in that case, in your judgment?

(The defendant, by his counsel, objected to the question on the ground that it was immaterial and irrelevant, and that, as it was admitted by the pleadings herein that the defendant acted in these proceedings as sheriff under an order from the supreme court of the State of New York, the plaintiff is concluded as to any recovery herein by the amount realized at the public sale of the goods ordered by the court. The court overruled the objection and received the evidence, to which ruling the defendant by his counsel excepted and prayed his bill of exceptions, which is signed and sealed accordingly.)

A. Thirteen $\frac{63}{100}$ dollars per dozen. I have made a computation of what I consider the value of these goods. I compute them to be worth $6,500. I have made a list with prices attached from the original invoice book, which corresponds to the numbers in Exhibit C.

68 The said list was introduced in evidence and marked Plaintiff's Exhibit F (pro ut the same).

The plaintiff then called Benjamin H. Spaulding, as a witness, who being duly sworn, testified:

In July, 1875, I was carrying on the business of manfacturing straw

of six thousand and seventy-seven dollars as principal, and nine hundred and ninety-eight dollars and forty seven cents as interest, the total amount being seven thousand and seventy-five dollars and forty-seven cents ($7,075.47), and so say they all.

Mr. Green moves for a new trial.

The court denies said motion, and Mr. Green excepts to the ruling of the court in so doing.

On motion of Mr. Green, it is ordered that the defendant have a stay of thirty days in which to make and prepare a case, with leave to turn the same into a bill of exceptions.

Prior to the retiring of the jury Mr. Hornblower excepts to certain portions of the charge, which he states.

Also, prior to the retiring of the jury, Mr. Green presents certain requests to charge; the court declines to charge as requested, and Mr. Green excepts to the ruling of the court in so doing.

A copy:

JOHN I. DAVENPORT, *Clerk.*

H. H. M.

62 (Endorsed:) U. S. circuit court, S. D. of New York. William H. Long, assignee, &c., vs. William C. Connor, sheriff, &c. Certified transcript from minutes.

63 Therefore the issue above joined is ordered by said court to be tried at the circuit court appointed to be held at the United States court building in the city of New York on the third Monday of October, in the year one thousand eight hundred and seventy-seven.

And now, at this day, to wit, the twenty-third day of November, 1877, as yet of the October term, before the honorable Nathaniel Shipman, judge, came the parties by their respective attorneys, and the jurors of the jury summoned to try the said issue being called, also came, who to speak the truth of the matters within contained being chosen, tried, and sworn, say upon their oath that the plaintiff's complaint is true, and they assess the damages of the said plaintiff by reason of the premises, over and above his proper costs and charges in and about his suit expended, at seven thousand and seventy-five dollars and forty-seven cents ($7,075.47).

Therefore it is considered that the said plaintiff recover of said defendant the said damages by the jury above assessed, and also
64 the further sum of one hundred and eleven dollars and forty-three cents, his costs and charges, as taxed and allowed to said plaintiff, which said damages, costs, and charges amount in the aggregate to the sum of seven thousand one hundred eighty-six dollars and forty-three cents ($7,186.43.)

And the said defendant in mercy, &c.

Judgment signed this 12th day of January, A. D. 1878, 3 p. m.

J. M. DEUEL,
Dep. Clerk.

(Endorsed:) U. S. circuit court, S. D. of N. Y. Wm. H. Long ag'st Wm. C. Conner, sheriff, &c. Judgment roll. Carter & Eaton, pl'ff's att'y. U. S. circuit court. Filed January 12, 1878. John I. Davenport, clerk.

65 *Bill of exceptions.*

United States circuit court for the southern district of New York.

WILLIAM H. LONG, ASSIGNEE IN BANKRUPTCY of Benjamin H. Spaulding,
against
WILLIAM C. CONNOR, SHERIFF OF THE CITY and county of New York.

Be it remembered that the above cause came on to be tried on the fourth day of December, 1877, before the honorable Nathaniel Shipman and a jury upon the pleadings (pro ut the same); whereupon, to support the issues on his part, the plaintiff introduced in evidence the petition filed in the district court of the United States for the district of Massachusetts on the twenty-third day of July, 1875, and adjudication of Benjamin H. Spaulding as a bankrupt, made the fourth day of September, 1875, being the general record of the proceedings in the matter of Benjamin H. Spaulding, bankrupt, which were marked Exhibit A
66 (pro ut the same); also the deed of assignment executed by the register in bankruptcy to the plaintiff on the twenty-first day of September, 1875, marked Exhibit B (pro ut the same). It was admitted by the counsel for both parties that the defendant's list of goods seized was the correct list, and plaintiff's counsel then introduced said list in evidence, which was marked plaintiff's Exhibit C (pro ut the same). Plaintiff's counsel then introduced in evidence the stipulation made by defendant's counsel, which were marked Plaintiff's Exhibit D (pro ut the same).

The plaintiff then called as a witness Charles Miles, jr., who, being duly sworn, on his oath saith:

I am a commission merchant in the straw goods line. That was my business in July, 1875. I was at that time acting as factor for Benjamin H. Spaulding. I received goods from him consigned to me for sale. I have the original invoice-book here.

The plaintiff's counsel then asked the witness the following question:

Q. Look at the invoice corresponding to case number 7346;
67 what was the value of the goods in that case, in your judgment?

(The defendant, by his counsel, objected to the question on the ground that it was immaterial and irrelevant, and that, as it was admitted by the pleadings herein that the defendant acted in these proceedings as sheriff under an order from the supreme court of the State of New York, the plaintiff is concluded as to any recovery herein by the amount realized at the public sale of the goods ordered by the court. The court overruled the objection and received the evidence, to which ruling the defendant by his counsel excepted and prayed his bill of exceptions, which is signed and sealed accordingly.)

A. Thirteen $\frac{63}{100}$ dollars per dozen. I have made a computation of what I consider the value of these goods. I compute them to be worth $6,500. I have made a list with prices attached from the original invoice book, which corresponds to the numbers in Exhibit C.

68 The said list was introduced in evidence and marked Plaintiff's Exhibit F (pro ut the same).

The plaintiff then called Benjamin H. Spaulding, as a witness, who being duly sworn, testified:

In July, 1875, I was carrying on the business of manfacturing straw

goods at Milford, Massachusetts. I had been in the business since 1849. The value of the goods, the invoices of which have been put in evidence in this case, was $6,600.

Cross-examination:

I arrived at this amount by figuring the cost of the goods; it is an estimate made from the goods. When I made the estimate I saw the goods in my factory. I made the estimate as we shipped the goods. I figured up some two years ago that the goods were worth $6,600, from a list made by Charles Miles, senior, with my assistance, two years ago last summer, drawn from the invoices made at my factory and contained in the invoice book of Chares Miles, jr., of the attachment pro-
69 ceedings, and before the bankruptcy proceedings were commenced. I do not know whether the goods mentioned in the list from which I made the estimate were the ones levied on by the sheriff. I was not there when the goods were taken.

The plaintiff then called Patrick H. Malloy as as witness, who, being duly sworn, testified:

I am a hat jobber; member of the firm of Boyden, Malloy & Co., number 520 Broadway. I have been in business about twenty-seven years. Between the first and sixth of August, 1875, I bought some straw goods of Godchard & Co., of New York. They were of the manufacture of Spaulding. We paid $5.50 per dozen for those goods. We stored them out to nearly the first of January, as we considered the sale of straw goods over at that time in a wholesale way.

Plaintiff's counsel then asked witness the following question:

Q. What were they sold for by you?

(The defendant by his counsel objected to the question on the ground that the highest amount to which the plaintiff could in any event
70 be entitled is the market value of the property with interest. The court overruled the objection and allowed the question to be answered; to which ruling the defendant by his counsel excepted and prayed his bill of exceptions, which is signed and sealed accordingly.)

A. We were jobbers; we sell in small quantities, half a dozen or a do en, or case. We commenced selling the goods in the following January and sold them till the trade was over again. We put them in stock and sold them to average $15 a dozen; some as high as $33, and some as low as $6.

Cross-examination:

We paid Mr. Godchard in hats; we took his goods and he took ours in exchange for them. Straw goods will bring more before the opening of the season than before the closing. The month of August is not a good season of the year to sell straw goods in large quantities. They are not worth as much in the market at that time as before the opening of the season.

71 Redirect:

The season for commission men selling direct from the manufacturers is earlier than the season for jobbers.

The plaintiff then called as a witness Samuel Godchard, who, being duly sworn, testified:

I was in the hat business in 1875, at No. 9 Bowery. About the first of August I made a purchase of straw goods from the sheriff's auctioneer at sheriff's sale. I sold those goods to Boyden, Malloy & Co. at $5.50 a dozen. This is the original invoice made by my firm—the one received by Boyden, Malloy & Co. at the time of the sale.

The said invoice was introduced in evidence and marked Plaintiff's Exhibit E (pro ut the same).

I bought about 500 dozen straw hats at that sale. I sold all these goods to Mr. Malloy.

Cross-examination:

This sale took place at Mr. Herman's, the sheriff's auctioneer. There was quite a number of persons there. There were several bids
72 on the goods. I consider that I bought the goods very reasonably. I sold them at a fair advance. The transaction between Mr. Malloy and me was an exchange of goods. I could not at the time have obtained that amount in cash which I got in trade. That was the best offer I had by a good deal.

Redirect:

I bought the goods at $2.25 per dozen.

Recross:

That was the highest price bid for the goods.

The plaintiff then rested.

It was then admitted by the respective counsel that the attachment in the suit of A. J. Dickerson v. B. H. Spaulding, which is set forth in the answer, was issued as therein set forth at the time therein stated, and was on the same day levied on the property in controversy in this action; that the proceedings necessary before the attachment was issued was regularly taken, that is, on a proper affidavit and undertaking, the ground being the non-residence of the defendant Spaulding.

73 Defendant's counsel introduced in evidence the order made by the supreme court in said action (attached to Exhibit C), directing the sheriff to sell the property levied upon by him and dated the twenty-seventh day of July, 1875, which was marked Defendant's Exhibit 1 (pro ut the same).

Defendant's counsel also introduced in evidence the judgment roll in said action, filed the fifteenth day of September, 1875, at 1.40 p. m., in the supreme court of the State of New York for the city and county of New York for the sum of $2,175.85, which was marked Defendant's Exhibit 2 (pro ut the same).

Defendant's counsel also introduced in evidence the execution based upon said judgment issued to the sheriff of the city and county of New York for the full amount of the judgment, $2,175.85. Also the return endorsed on said execution (showing that the sum of $873.91 had been paid to the plaintiff therein on account of said judgment),
74 which was marked Defendant's Exhibit 3 (pro ut the same).

Defendant's counsel then moved the court to direct a verdict in favor of the defendant on the ground that no cause of action had been established against the defendant, as his possession was originally lawful and no demand and refusal had been proven. The court denied the motion, to which ruling the defendant by his counsel excepted and prayed his bill of exceptions, which is signed and sealed accordingly.

The defendant then called as a witness Simon Herman, who, being duly sworn, testified:

My business in August, 1875, was sheriff's auctioneer. I conducted a sale of certain straw goods in the latter part of July or the first of August, 1875. It was under an order of the court.

Q. Did you have many persons present at that sale?

A. There were; probably from 25 to 30 were there. The bidding at

that sale was pretty lively. Samuel Godchard & Co. became the
75 purchasers; they were the highest bidders. The amount realized at that sale was $1,156.50.

Cross-examination:

The sale was advertised in the public press, I think, once, the day before the sale. The sale was on July 31st, 1875, or August 1st. It was advertised the day before the sale; that was all the advertising there was as far as I know. I sold them at No. 13 Bowery; that is my place.

(To a juror.) There were, according to my book, 514 dozens. They were sold by the dozen. They were all offered in one lot.

Redirect:

The goods were mixed and we thought the parties that wanted to buy them would give more for them by selling them in one lot. They were first offered in separate lots, and we did not realize anything on them, and dealers said they would not buy them without buying the whole lot.

The defendant then called as a witness Diedrick G. Gale, who, being duly sworn, testified:

76 In 1875 I was deputy sheriff of the city and county of New York. As such I had charge of the process in evidence here. I subsequently received the order of sale from Mr. Wines, the plaintiff's attorney. Under it I published the sale in the Herald, I think; one sheriff's notice was put in the old city hall, one in the new hall, and one at the auctioneer's place, No. 13 Bowery. These were the usual notices of sale.

Cross-examination:

I think the notice was published once in the Herald, one day. The day before the sale, I think, I sent a notice to Mr. Spaulding; I mailed it and put it in the post-office myself. I mailed a copy of this letter to Spaulding on the twenty-ninth of July, 1875, at 3.20 p. m.

The notice was introduced in evidence and marked Defendant's Exhibit No. 4 (pro ut the same.)

Defendant's counsel then introduced in evidence the judgment roll in the case of Long v. Dickerson, in the United States circuit court, which was marked Defendant's Exhibit No. 5 (pro ut the same.)

The defendant then rested.

77 Benjamin H. Spaulding, recalled, testified further:

The value of the goods described in Plaintiff's Exhibit F was $6,526.01. I received the notice of sale at nine o'clock the morning of the sale. I was at Milford then.

(It was admitted that the execution issued in the case of Long v. Dickerson is in the marshal's hands, unsatisfied, and no levy has been made thereon.)

The evidence having been closed, defendant's counsel moved that the court direct a verdict for the defendant on the following grounds:

First. That the sheriff, having levied on the property under a valid warrant of attachment, sold the same by order of a court of competent jurisdiction and in compliance with law having applied the same to the satisfaction of the judgment recovered in the attachment action prior to the assignment in bankruptcy and without any notice of the proceed-

ings therein, is not liable for a wrongful conversion of property, because—

78 (1.) All the sheriff did was done prior to the assignment and in pursuance of his duty.

(2.) The relation of the assignment back does not change lawful official acts into tortious conduct.

(3.) The process and proceedings in the State court were a protection to the officer as against any action for tort in respect of his acts done in obedience to such process and proceedings.

(The court refused to direct a verdict on the ground, to which ruling defendant excepted and prayed his bill of exceptions, which is signed and sealed accordingly.)

Second. That it appearing affirmatively by the evidence that the defendant acted in good faith in the regular discharge of the duties of his office and under the process and orders of the State court, whose jurisdiction and right to act is unquestioned, the defendant is not personally liable to the present plaintiff, but he must now seek his remedy against those who have received payments from the defendant in contravention of the bankrupt act.

79 (The court refused to direct a verdict on this ground, to which ruling defendant excepted and prayed his bill of exceptions, which is signed and sealed accordingly.)

Third. That the original taking by the defendant having been lawful and the sale having been made by order of a court of competent jurisdiction, and the proceeds of the sale having been applied toward the satisfaction of a judgment in pursuance of law, and no demand having been proved to have been made upon the defendant, either for the goods or for the proceeds thereof prior to the commencement of this action, it cannot be maintained, on the ground that the court in making the order of sale, having jurisdiction to make the order, and it being the sheriff's duty to obey it, and it having been made in pursuance thereof, such sale cannot be considered a wrongful conversion thereof, which is the basis of the action.

80 (The court refused to direct a verdict on this ground, to which ruling defendant excepted and prayed his bill of exceptions, which is signed and sealed accordingly.)

Fourth. That the property which was attached never vested in the assignee in bankruptcy, because the property was not held under attachment at the time the assignment was executed. §5044 of the Revised Statutes provides that the relation of the assignee affects property attached only in case it remains subject to the attachment at the time of the assignment.

(The court refused to direct a verdict on this ground, to which ruling defendant excepted and prayed his bill of exceptions, which is signed and sealed accordingly.)

Fifth. That the plaintiff, by bringing his action against Dickerson, to recover from him the proceeds of the sale, has elected to affirm the proceedings of the sheriff in making the same, and has thereby waived the tort which is the foundation of this action.

81 (The court refused to direct a verdict on this ground, to which ruling defendant excepted and prayed his bill of exceptions, which is signed and sealed accordingly.)

Sixth. That on the whole evidence the defendant is entitled to a verdict.

(The court refused to direct a verdict on this ground, to which ruling

defendant excepted and prayed his bill of exceptions, which is signed and sealed accordingly.)

The court then charged the jury as follows:

GENTLEMEN OF THE JURY: The discussions of the learned counsel during the progress of the trial and the interlocutory rulings of the court must have made you familiar with the views of the law which the court entertains applicable to this case, and therefore it will not be necessary for me to detain you at any considerable length with a discussion of those views. It appears from the uncontradicted evi-
82 dence in this case that on the twentieth day of July, 1875, the defendant, who was then sheriff of the city and county of New York, attached, by a valid attachment, the goods which are described in the complaint at the suit of one Mr. Dickerson, the goods at that time being the property of the defendant in that suit, one Mr. Spaulding. It further appears that on the twenty-third of July, 1875, three days after the attachment, a petition in bankruptcy, praying for the adjudication of Mr. Spaulding as a bankrupt, was filed in the district court of the United States for the district of Massachusetts, within which district Mr. Spaulding was then a resident and a citizen; and that early in September, 1875, Mr. Spaulding was duly adjudicated a bankrupt by a decree by the district court for the district of Massachusetts; that subsequently an assignee was appointed, Mr. Long, who is the plaintiff in this case, and that the proper officer executed, on the twenty-first of September, 1875, a deed to Mr. Long, the assignee, of all the estate and rights of property of the bankrupt in the usual form provided by the rules of the supreme court, and in pursuance of the
83 act of Congress for that purpose. It further appears that on or about the first day of August, 1875, in pursuance of an order of sale issued by a justice of the supreme court of the State of New York, directing the sale of this property as perishable property, the sheriff sold these goods at public auction for the sum of $1,156.50.

I am of opinion, gentlemen, that under and by virtue of the statutes of the United States the sheriff was guilty of a conversion of this property on the first day of August, 1875, when he sold it at public sale, and that he is liable to pay to the plaintiff the true market value of the property on that date, with interest thereon from that day to the present time; and, furthermore, that the fact that the plaintiff has obtained an unsatisfied judgment against the plaintiff in the original suit is not a bar to his action against the sheriff.

The only question then for you to determine, is what was the true market value of this quantity of straw hats on the first day of August, 1875; and for the purpose of ascertaining what was the market
84 value, you can take into consideration fair sales made at or about that time, or within a reasonable time subsequently. You can take into consideration the amount that was received at the sheriff's sale. That is not conclusive, but it furnishes you some evidence of the value; and upon the other hand you are to consider that this may have been a sudden sale, or, as it is called, a force sale, and that no great length of time or great amount of advertising of notice to the general public was given; that it was a forced sale, and therefore you are to determine whether that was a fair criterion of the actual market value of the property at the time of the conversion. I am of the opinion that you are not to regard the injury to the plaintiff arising from the detention, but that you are to look at the value of the property and ascertain that. The measure of damages is the market value of the property rather than any

injury over and above the actual market value which the plaintiff might have suffered. In other words, to sum it up briefly, you are to find the true real market value of this property on or about the first day
85 of August, 1875, and return the verdict for that sum, with interest from that date to the present time, and specify in your verdict how much is the principal sum and how much is the interest.

The defendant, by his counsel, submitted to the court the following requests to charge:

1. No bankruptcy proceedings having been commenced at the time the attachment in evidence was placed in defendant's hands, it was his duty to execute the same.

(The court refused to charge this request, except as already charged, to which ruling the defendant, by his counsel, excepted, and prayed his bill of exceptions, which is signed and sealed accordingly.)

2. It not appearing that the defendant had notice of the bankruptcy proceedings, it was his duty to obey the order of the State court and sell the property.

(The court refused to charge this request, except as already
86 charged, to which ruling the defendant, by his counsel, excepted, and prayed his bill of exceptions, which is signed and sealed accordingly.)

3. That in making such sale the sheriff was required by law to make the same at public auction, of which the only notice required by law was the posting in three public places in the town where the same was to be sold.

(The court refused to charge this request, except as already charged, to which ruling the defendant, by his counsel, excepted, and prayed his bill of exceptions, which is signed and sealed accordingly.)

4. That the law did not require the sheriff to publish such notice in any public newspaper or to send notice thereof to the defendant in the process.

(The court refused to charge this request, except as already charged, to which ruling the defendant, by his counsel, excepted, and
87 prayed his bill of exceptions, which is signed and sealed accordingly.)

5. That the only notice of such sale required by law was given of the sale of this property.

(The court refused to charge this request except as already charged, to which ruling the defendant by his counsel excepted, and prayed his bill of exceptions, which is signed and sealed accordingly.)

6. That in awarding damages to the plaintiff the jury are restricted to the amount realized at such sale.

(The court refused to charge this request, to which ruling the defendant by his counsel excepted, and prayed his bill of exceptions, which is signed and sealed accordingly.)

The defendant by his counsel excepted to that portion of the charge which held that the sheriff was guilty of conversion on the first of August, by the sale made by him, and prayed his bill of exceptions,
88 which is signed and sealed accordingly. And also to that portion of the charge which held that the defendant is liable to pay the true market value with interest, and prayed his bill of exceptions, which is signed and sealed accordingly. And also to the direction of the verdict for the plaintiff, for the amount which they may find to be the market value, and prayed his bill of exceptions, which is signed and sealed accordingly.

The jury thereupon retired, and thereafter rendered a verdict in favor of the plaintiff for—

Principal sum	$6,077.00
With interest	998.48
Total damages	$7,075.48

Defendant's counsel moved for a new trial, which motion was denied; to which ruling defendant by his counsel excepted and prayed his bill of exceptions, which is signed and sealed accordingly, on January 1, 1878, and during the October term, 1877, of said court, and as of the date of the verdict.

N. SHIPMAN, [L. S.]
Judge.

89 (Endorsed:) William H. Long, assignee, &c., against William C. Connor, sheriff, &c. Bill of exceptions. Vanderpoel, Green & Cuming, solicitors for pl'ff in error, Tribune building, New York. U. S. circuit court. Filed Jan. 10, 1878. John I. Davenport, clerk.

90 *Bond for damages and costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

WILLIAM H. LONG, AS ASSIGNEE IN BANKRUPTCY of Benjamin H. Spaulding,
vs.
WILLIAM C. CONNER, SHERIFF OF THE CITY and county of New York.

Know all men by these presents that we, William C. Conner, of the city of New York, Bernhard Ginsburg, of the city of New York, Charles M. Watkins, of the city of New York, Edward D. Gale, of the city of New York, are held and firmly bound unto the above-named William H. Long, in the sum of fifteen thousand dollars, to be paid to the said William H. Long, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally firmly, by these presents, sealed with our seals and dated the 16th day of January, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas the above-named William C. Conner has prosecuted a writ of error to the Supreme Court of the United States, to reverse
91 the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named William C. Conner shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

WM. C. CONNER. [L. S.]
BERNHARD GINSBURG. [L. S.]
CHAS. M. WATKINS. [L. S.]
EDWARD D. GALE. [L. S.]

Sealed and delivered, and taken and acknowledged, this 16 day of January, 1878, before me as to Bernhard Ginsburg.

JOHN A. SHIELDS,
U. S. Comm'r, S. D. of N. Y.

Sealed and delivered, and taken and acknowledged this 17 day of Jan'y, A. D. 1878, before me, as to Wm. C. Conner, Chas. M. Watkins, and Edward D. Gale.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Bernhard Ginsburg, of No. 299 Delancey street, in the city of New York, and Charles M. Watkins, of No. 121 Washington avenue,
92 of the city of Brooklyn, being severally duly sworn, each for himself, deposes and says, and each for himself saith that he is worth the sum of fifteen thousand dollars over and above all his just debts and liabilities.

BERNHARD GINSBURG.
CHAS. M. WATKINS.

Sworn to this 16th day of January, A. D. 1878, before me, as to Bernhard Ginsburg.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

Sworn to this 17th day of Jan'y, A. D. 1878, before me, as to Chas. M. Watkins.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

UNITED STATES OF AMERICA,
South. Dist. of New York, ss:

Edward D. Gale, of No. 25 Norfolk street, in the city of New York, being duly sworn, deposes and says that he is worth the sum of fifteen thousand dollars over and above all his just debts and libilities.

EDWARD D. GALE.

Sworn to this 17th day of Jan'y, A. D. 1878, before me, as to Edward D. Gale.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

93 (Endorsed:)

U. S. circuit court. William C. Conner, sheriff, &c., pl'ff in error, vs. William H. Long, assignee, def't in error. Bond for costs on——

The within bond is allowed as to form and amount and sufficiency of sureties.

SAM'L BLATCHFORD.

JAN. 17, 1878.

U. S. circuit court. Filed Jan. 18, 1878.

JOHN I. DAVENPORT,
Clerk.

94 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Bernhard Ginsburg, being duly sworn, says that he resides at No. 299 Delancey street, in the city of New York. I own the house and lot No. 299 Delancey street, in the city of New York; it is a five-story double house, brick; the lot is twenty-five feet by seventy-five feet, the house is twenty-five feet by about fifty-four feet; the property is worth $22,000. I have been offered $20,000, but refused it; the property cost me $20,000, with the improvements I have made on it. There is a mortgage of $12,000 on the property; no other encumbrance on the property; the taxes are all paid on the property to date. I own fourteen lots of land in Brooklyn, said property commencing at the cor. of North 11th street & Sixth street, also fronting on Union avenue; the property cost me $14,000. There is a mortgage of $3,750 on the property; no other encumbrance on the property. All the above property is recorded in my name. I am on a bond in the sheriff's office in an order of arrest for $500 and I am on a cigar manufacturer's bond for $500, but I am on no other bonds, except the above. There are no judgments against me that I know of. I consider myself worth over and above all my just
95 debts & liabilities the sum of thirty thousand dollars.

BERNHARD GINSBURG.

Subscribed & sworn to before me this 16 day of January, 1878.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

96 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Charles M. Watkins, being duly sworn, says that he resides at No. 120 Washington avenue, Brooklyn. I am in the collecting business; my office is 25 Chambers st., room 15. I own 88 lots of land at Linden Park, Staten Island, town of Southfield, county of Richmond; they are worth $300 a lot. There is a mortgage on the whole of this property to the amount of $3,600. 58 of these lots are on record in my name; the balance are not on record, but the deeds are in my name; there is no other encumbrance on the property except as stated above. I gave other property in exchange for the whole of these lots. I own twenty lots in the town of Oneida, Madison County, New York; they are worth $500 a lot; the lots are 30 feet by 140 feet each; there is no encumbrance on this property; the deeds are in my name but they are not on record; I took these lots in exchange for other property. There are no judgments against me. I am on a bond in the U. S. circuit court for the southern dist. of New York in the case of the U. S. v. Rosenblatt for $5,000, but on no other bonds.

97 CHAS. M. WATKINS.

Subscribed & sworn to before me this 17 day of January, 1878.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

98 UNITED STATES OF AMERICA, *ss:*

To William H. Long, assignee in bankruptcy of Benjamin H. Spaulding, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern

district of New York, wherein William C. Conner, sheriff of the city and county of New York, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 17th day of January, in the year of our Lord one thousand eight hundred and seventy-eight.

SAML. BLATCHFORD, *D. J.*

99 (Indorsed:) U. S. circuit court. William C. Conner, sheriff, &c., pl'ff in error, against William H. Long, assignee, &c., def't in error. Citation. Vanderpoel, Green & Cuming, proctors for pl'ff in error, Tribune Building, New York. Original.

Service of a copy of within citation is hereby admitted.

N. Y., Jan'y 22, 1878.

CHAMBERLAIN, CARTER & EATON,
Att'ys for Def't in Error.

U. S. circuit court. Filed Jan. 23, 1878.

JOHN I. DAVENPORT, *Clerk.*

(Indorsement on cover:) No. 322. William C. Conner, sheriff of the city and county of New York, plaintiff in error, vs. William H. Long, assignee in bankruptcy of Benjamin H. Spaulding. S. New York, C. C. U. S. Filed 28th October, 1878.

SUPREME COURT, U.S.
FILED
OCT 21 1881

SUPREME COURT of the UNITED STATES.

October Term, 1881.

No. 76.

EXECUTORS OF WILLIAM C. CONNER,
LATE SHERIFF OF THE CITY AND COUNTY OF
NEW YORK,
Plaintiffs in Error,

vs.

WILLIAM H. LONG, ASSIGNEE IN BANKRUPTCY
OF BENJAMIN H. SPAULDING,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for Plaintiffs in Error.

VANDERPOEL, GREEN & CUMING,
Attorneys for Plaintiffs in Error.

ROBERT S. GREEN,
AARON J. VANDERPOEL,
Of Counsel.

NEW YORK:
RUSSELL BROTHERS, PRINTERS, 17, 19, 21, 23 ROSE STREET.
(LAW TELEPHONE, NO. 388.)

1881.

FILED

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Of Counsel.

NEW YORK:
RUSSELL BROTHERS, PRINTERS, 17, 19, 21, 23 ROSE STREET.
(LAW TELEPHONE, No. 588.)

1881.

Supreme Court of the United States.

No. 76, OCTOBER TERM, 1881.

Executors of WILLIAM C. CONNER, late Sheriff of the City and County of New York, *Plaintiff in Error*, *vs.* WILLIAM H. LONG, Assignee in Bankruptcy of Benjamin H. Spaulding, *Defendant in Error.*	*Brief for Plaintiff in Error.*

In error to the Circuit Court of the United States for the Southern District of New York.

Trial before Hon. Nathaniel Shipman, Judge, and a jury, October Term, 1877 (fol. 58).

Verdict in favor of William H. Long, assignee and plaintiff, for $7,075.48 (fol. 61).

Judgment thereon (fol. 64).

Writ of error sued out by defendant (fol. 1).

STATEMENT.

The action was originally commenced in the Superior Court of the City of New York, and was removed into the Circuit Court of the United States for the Southern District of New York, on March 27, 1876, on motion of plaintiff's attorneys (fol. 6).

The action is against the defendant as sheriff of the City and County of New York (43).

The defendant's liability is claimed to arise on the follow-

ing state of facts, concerning which there can be no dispute.

On the 20th day of July, 1875, a warrant of attachment was duly and regularly issued in an action commenced on that day, by Alfred J. Dickerson, against Benjamin H. Spaulding, in the Supreme Court of the State of New York (36). The proceedings, necessary before the attachment was issued, were regularly taken, that is, on a proper affidavit and undertaking, the ground being the non-residence of the defendant Spaulding (72). It is conceded, that the warrant of attachment was issued to the defendant, Conner, as sheriff of New York (47), and that he on the same day levied it on the property in controversy in this action (72). Such proceedings were had in the cause, that on the 27th day of July, 1875, an order was made in it directing the sheriff to sell the property levied upon by him (73); under this order the property was regularly sold (76) by the sheriff's auctioneer, on or about the 1st of August, 1875 (74). The amount realized at the sale was $1,156.50 (75). Judgment was entered in the action on the 15th day of September, 1875, in favor of the plaintiff, for $2,175.85 (73). Execution (defendant's Ex. 3, fol. 74) was issued on this judgment. It is tested September 15, 1875, and is regular. By endorsements thereon it appears that it was received by the sheriff September 15, 1875, 1.55 p. m., and was returned September 20, 1875, and that the amount made (being amount of sale less expenses) had before its return been paid by the sheriff to the attorney of the plaintiff in execution.

Benjamin H. Spaulding, the defendant in the suit brought by Dickerson, was a resident of Massachusetts. On the 23d day of July, 1875, a petition in bankruptcy was filed against him in the District Court, for the District of Massachusetts, and an adjudication of him as a bankrupt was made in such proceedings on the 4th of September, 1875 (65). The deed of assignment was executed by the register in bankruptcy to William H. Long, assignee (the plaintiff herein), on the 21st day of September, 1875 (66), the day after the sheriff had returned the execution in Dickerson against Spaulding.

The plaintiff, Long, as assignee, commenced, January 19, 1876, an action against Alfred J. Dickerson (the plaintiff in attachment and execution against Spaulding, under which Conner, the sheriff, and defendant herein, acted), and on the 3d of November, 1877, recovered a judgment against Dickerson for $7,701 (Defendant's Ex., No. 5, fol. 76). This judgment was recovered for the same cause of action as alleged in this suit, and for the conversion of the same goods described in the complaint in this. No levy was made on the execution issued in the suit by Long *v.* Dickerson, and the same at the time of the trial remained in the marshal's hands unsatisfied (77).

On the 21st day of January, 1876, he commenced this suit against the sheriff (44), and recovered judgment November 23, 1877, for $7,186.43 (63, 64).

Assignment of Errors Relied Upon.

First.—That the Circuit Court allowed the question at fol. 67, viz.: "Q. Look at the invoice corresponding to case number 7,346. What was the value of the goods in that case, in your judgment?"—to be answered, and the answer thereto to be admitted in evidence over the objection of the defendant that the goods having been sold by the sheriff under an order of the Supreme Court of the State of New York, the plaintiff is concluded as to any recovery herein by the amount realized at each sale.

Second.—That the Circuit Court allowed the question at fol. 69, viz.: "Q. What were they sold for by you?"—to be answered, and admitted the answer thereto in evidence.

The goods in question had been purchased by the witness, and the evidence elicited was what he sold them for, months afterward.

Third.—That the Circuit Court refused to direct a verdict in favor of the defendant as requested at fol. 74, on the ground "that no cause of action had been established, as defendant's possession was originally lawful, and no demand and refusal had been proved."

Fourth.—That the Circuit Court refused to direct a verdict in favor of the defendant, as requested at fols. 77, 78, on the ground "that the sheriff, having levied on the property under a valid warrant of attachment, sold the same by order of a court of competent jurisdiction, and in compliance with law, having applied the same to the satisfaction of the judgment recovered in the attachment action, prior to the assignment in bankruptcy, and without any notice of the proceedings therein, is not liable for a wrongful conversion of property; because—

1. All the sheriff did was done prior to the assignment and in pursuance of his duty.
2. The relation of the assignment back does not change lawful official acts into tortious conduct.
3. The process and proceedings in the State court were a protection to the officer as against any action for tort in respect of his acts done in obedience to such process and proceedings."

Fifth.—That the Circuit Court refused to direct a verdict in favor of the defendant, as requested at fol. 78, on the ground "that it appearing affirmatively by the evidence that the defendant acted in good faith, in the regular discharge of the duties of his office, and under the process and orders of the State court, whose jurisdiction and right to act is unquestioned, the defendant is not personally liable to the present plaintiff, but he must now seek his remedy against those who have received payments from the defendant in contravention of the bankrupt act."

Sixth.—That the Circuit Court refused to direct a verdict in favor of the defendant as requested at fol. 79, on the ground "that the original taking by the defendant having been lawful, and the sale having been made by order of a court of competent jurisdiction, and the proceeds of the sale having been applied toward the satisfaction of a judgment in pursuance of law, and no demand having been proved to have been made upon the defendant, either for the goods or for the proceeds thereof prior to the commencement of this action, it cannot be maintained, on the ground "that the Court in making the order of sale, having jurisdiction to make the order, and it being the sheriff's duty to

obey it, and it having been made in pursuance thereof, such sale cannot be considered a wrongful conversion thereof, which is the basis of the action."

Seventh.—That the Circuit Court refused to direct a verdict in favor of the defendant, as requested at folio 80, on the ground "that the property which was attached never vested in the assignee in bankruptcy, because the property was not held under attachment at the time the assignment was executed. Section 5044 of the Revised Statutes provides that the relation of the assignee affects property attached only in case it remains subject to the attachment at the time of the assignment."

Eighth.—That the Circuit Court refused to direct a verdict in favor of the defendant, as requested at folio 80, on the ground "that the plaintiff, by bringing his action against Dickerson, to recover from him the proceeds of the sale, has elected to affirm the proceedings of the sheriff in making the same, and has thereby waived the tort, which is the foundation of this action."

Ninth.—That the Circuit Court refused to direct a verdict in favor of the defendant, as requested at folio 81, on the ground "that on the whole evidence the defendant is entitled to a verdict."

Tenth.—That the said Circuit Court refused to charge and instruct the jury, as requested at folio 85, that "no bankruptcy proceedings having been commenced at the time the attachment in evidence was placed in defendant's hands, it was his duty to execute the same."

Eleventh.—That the said Circuit Court refused to charge and instruct the jury, as requested at folio 85, that "it not appearing that the defendant had notice of the bankruptcy proceedings, it was his duty to obey the order of the State court and sell the property."

Twelfth.—That the said Circuit Court refused to charge and instruct the jury, as requested at folio 87, "that in awarding damages to the plaintiff the jury are restricted to the amount realized at such sale."

Thirteenth.—That the said Circuit Court did charge the jury as follows (at folio 83): "That under and by virtue of the statutes of the United States the sheriff was guilty of a

conversion of this property on the first day of August, 1875, when he sold it at public sale." (Exception at folio 87.)

Fourteenth.—That the said Circuit Court did charge the jury as follows (at folio 83): "And that he (the sheriff) is liable to pay to the plaintiff the true market value of the property on that date, with interest thereon from that day to the present time." (Exception at folio 88.)

Fifteenth.—That the said Circuit Court directed a verdict for the plaintiff for the amount which the jury might find to be the market value, as follows (folio 85). "In other words, to sum it up briefly, you are to find the true, real market value of this property on or about the first day of August, 1875, and return the verdict for that sum, with interest from that date to the present time."

Sixteenth.—That the said Circuit Court denied the defendant's motion for a new trial. (Folio 88.)

FIRST POINT.

The sheriff having proceeded under valid and regular process and orders of a court of competent jurisdiction, and not having erred in the exercise of discretion or judgment in executing the same, is protected thereby from liability for his acts in the proper discharge of his duty.

1. There is nothing in the case to impeach the action of the sheriff as being simply the strict and conscientious discharge of his duty as a public officer.

The attachment was regular. It was properly levied. The sale was authorized and commanded by order of a court having that power and jurisdiction. The execution was regular, and the appropriation of the money thereon, before the deed of assignment to the plaintiff herein, was required by law.

His good faith cannot be attacked, as it does not appear that he ever heard of the bankruptcy proceedings before

his attention was called to them long after all his connection with the property had ceased.

2. The defendant, on the 20th of July, 1875, had the attachment placed in his hands.

No proceedings in bankruptcy were then pending, and there was property of the defendant in his county. Clearly he could do nothing but levy on it.

If he had failed to take the property into his possession, he would have been liable to the plaintiff in the process.

New York Code of Procedure, sec. 232.
Ransom v. *Hallett*, 18 Barb., 56.
Smith v. *Orser*, 43 Barb., 187.
Carlisle v. *Saule*, 44 Vermt., 265.

He was therefore lawfully in possession of the property in New York on July 23, 1875, when the petition in bankruptcy was filed in Massachusetts.

When and how did his dealing with the property become wrongful?

The learned judge held and charged that the sale on August 1 was a conversion, for which he was liable.

This sale was by an order of the Supreme Court made in said action July 27, 1875 (folio 73), directing the property to be sold as perishable.

3. We submit that this process and order protect the sheriff.

Keeping in view the distinction between the two classes of process pointed out so clearly in "*Buck v. Colbath*, 3 Wall, 334," we submit that when the officer has properly exercised his judgment and discretion on the three points stated in that case at page 344, viz.: "*First*, in ascertaining that the property on which he proposes to levy, is the property of the person against whom the writ is directed; *secondly*, that it is property which, by law, is subject to be taken under the writ; and, *thirdly*, as to the quantity of such property necessary to be seized in the case in hand," the writ or order under which he acts should protect him to the extent and for the same reason that he is protected in

the execution of the other class of process, such as the writ of replevin. He is legally responsible to any person for the consequences of any error or mistake, in the exercise of his judgment upon these three points, to the prejudice of such person, but outside of those points the writ of attachment is as mandatory as that of replevin, and if there is no error or mistake by the officer on them, it should protect him. He has left "no discretion to use, no judgment to exercise, no duty to perform but to seize the property described;" and the rule of law should be applied "that if the court issuing the process had jurisdiction in the case before it to issue that process, and it was a valid process when placed in the officer's hands, and that, in the execution of such process, he kept himself strictly within the mandatory clause of the process, then such writ or process is a complete protection to him, not only in the court which issued it, but in all other courts."

The jurisdiction of the Supreme Court to issue the attachment and make the order is undoubted. It is admitted that the process was valid and properly executed. There can be no question here as to the quantity of the property attached, nor that it was subject to be taken under the attachment.

We have seen that at the time of levying the attachment, the proceedings in bankruptcy had not been commenced and that the property belonged to the defendant.

It was thereupon and thereafter in the possession of the court.

Johnson v. Bishop, 1 Woodworth, 324.
Bradley v. Frost, 3 Dillon, 458.

The commencement of bankruptcy proceedings did not divest the defendant in attachment of the property.

Hampton v. Rouse, 22 Wall, 263, 275: "Until an assignee is appointed and qualified, and the conveyance or assignment is made to him, the title to the property, whatever it be, remains in the bankrupt."

Herein the bankrupt act differed from the former one, by the 3d section of which the property was divested out of the bankrupt by the decree (*Ib.*)

Also differs from the English Act, 6 Geo. 4, c. 16.—Under the English law, all property at the time of the act of bankruptcy and up to obtaining the certificate, passed, but it was divested by the act of bankruptcy, not by the assignment.

The pendency of the bankruptcy proceedings in Massachusetts did not of themselves prevent the further action of the Supreme Court.

In *Eyster v. Gaff*, 91 *U. S.*, 521, 524, it is said: "It is a mistake to suppose that the bankrupt law avoids of its own force all judicial proceedings in the State or other courts, the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition."

"The court in the case before us had acquired jurisdiction of the parties and of the subject matter of the suit. It was competent to administer justice, and was proceeding, according to the law which governed such a suit, to do so. It could not take judicial notice of the proceedings in bankruptcy in another court, however seriously they might have affected the rights of parties to the suit already pending.

"It was the *duty* of that court to proceed to a decree as between the parties before it, until by some proper pleadings in the case it was informed of the changed relations of any of those parties to the subject matter of the suit. Having such jurisdiction, and performing its duty as the case stood in that court, we are at a loss to see how its decree can be treated as void."

Again in *Doe v. Childress*, 21 *Wall*, 642, 646. "Where the power of a State court to proceed in a suit is subject to be impeached, it cannot be done except upon an intervention by the assignee, who shall state the facts and make the proofs necessary to terminate such jurisdiction. This rule gains whether the four months' principle applies or whether it is not applicable."

Johnson v. Bishop, 1 *Woolworth*, 324. "No court is bound to take judical notice of the proceedings of another court. The State court can have no knowledge, or even notice of the proceedings in the federal court, by which its right to possess and adjudicate the property in question is

affected. It should be informed, in a proper way, of those proceedings, before its possession is interfered with or assailed."

The control of the State court over the property will not be interfered with by proceedings in another court because violative of judicial comity.

In *Johnson v. Bishop, supra*, it is said, "The property is held by the sheriff under writs rightfully issued, and his possession is the possession of the court by the command of whose writ he seizes it. And so long as the proceedings, in virtue of which it was taken, are pending, that possession will not be interfered with by any other court. This general principle has been acted upon in England in many cases in which two courts of concurrent jurisdiction were sought to be brought into collision (citing cases). By this salutary rule, harmony is maintained between the several superior courts of law and chancery, which have co-extensive and concurrent jurisdiction in a great variety of cases. The importance of the rule, and of scrupulously obeying it in this country, is greatly increased by the fact that the federal and State courts, although exercising their jurisdiction in the same territory, over the same subjects, and often the same classes of litigants, draw their existence from different sources, and are to one another foreign tribunals. In no other way can unseemly and mischievous collisions be avoided."

The following cases are cited:

Hagan v. Lucas, 10 Pet., 400.
Peck v. Jenness, 7 How., 612.
Pulliam v. Osborne, 17 How., 471.
Taylor v. Carryl, 20 How., 583.

The reason of the rule is stated in *Johnson v. Bishop*, as follows: "It would be a violation of judicial comity, and provoke unseemly conflicts."

Peck v. Jenness, 7 How., 625: "These rules have their foundation, not merely in comity, but in necessity."

Freeman v. Howe, 24 How., 459: "No government could maintain the administration or execution of its laws, civil

or criminal, if the jurisdiction of its judicial tribunals were subject to the determination of another."

This order to sell was as specific as any mandate of a writ of replevin—it was to sell *the* property then in the possession of the court. There was no room for discretion or for judgment—there was but one thing to do, viz., to sell.

The sheriff had, it is seen, properly levied on the property—he had taken it into possession—a possession which was that of the court, with which no other court would interfere. The court, in the exercise of undoubted power, directed its officer to sell it; he obeyed such order, and disposed of the property at public auction, as required by law. What else could he do? And yet the learned judge holds that in so doing he was guilty of a tort. And thereupon we have the other court laying its hand, which had been restrained by judicial comity from before interfering, upon the officer, and holding him a wrong doer in obeying the order of his court.

What is left of judicial comity and of non-interference with the action of another court? It will be asked, shall then, the bankrupt law be evaded? We answer, no! The remedy is complete. If the property is still in the possession of the court or officer, "the right of the assignee to appear in the State court, and there assert his claim to the possession of the property, is expressly recognized by the clause of section fourteen, which authorizes him to prosecute and defend all suits at law or in equity, pending at the time of the adjudication of bankruptcy, in which the bankrupt is a party, in his own name. And if the State courts fail to recognize his legal rights, a presumption not here to be indulged, he can, in the proper mode, bring the case from the highest court of the State to the highest court of the United States."

Johnson v. *Bishop*, *supra*.
Peck v. *Jenness*, 7 How., 612.
Eyster v. *Gaff*, 91 U. S., 525.

It will be said that in this case the property was sold, judgment obtained in the original suit, execution issued, and

the money raised on the sale paid over by the sheriff, before the assignee was appointed, and that such application would have been fruitless.

These acts were all in the regular orderly conduct of the suit.

The court was bound to proceed in the suit.

Eyster v. *Gaff*, 91 U. S., 525.

The sheriff was bound to sell and apply the proceeds of the sale toward the satisfaction of the judgment.

New York Code of Procedure, § 237.

They are as unimpeachable as the former proceedings, but the remedy still exists to prevent the object of the bankrupt law from being defeated. That object is to distribute the estate of the bankrupt equally among his creditors. If the officer has not kept himself strictly within the mandate of his process; if he has erred or made a mistake in matters resting in judgment or discretion, his process or orders are no protection, and he may be prosecuted. If, however, he has done only his duty, and made no error or mistake in exercising his judgment or discretion, the process and orders of his court are a protection, and the assignee must pursue the estate of the bankrupt. Sold, as the property was, in this case, at a judicial sale, it could not be recovered in specie, and the remedy of the assignee is against the party who had put in motion the machinery by which it was diverted, and who had benefited by that diversion.

The assignee's right of action against the plaintiff in attachment is complete; he was a volunteer; he had no duty to perform; it is true he was pursuing his legal remedies, but he took the risk of this liability, and must abide the consequences.

Shawhan v. *Wherrit*, 7 How., 645.

This was exactly what the assignee did—he sued Dickerson, the plaintiff, in attachment, and recovered judgment for the full value of the goods. This was the course indicated and pursued in *Bradley* v. *Frost*, 3 Dillon, 458, in which Judge Dillon refused to hold the sheriff liable under some-

what similar circumstances, and held the other party liable to respond to the assignee.

See, also,

Cragin v. *Thompson*, 2 Dill., 513.
King v. *Loudon*, 53 Geo., 64.
In re Holmes, 1 N. Y. Obs., 211, S. C.; 5 Law Rep., 360.

4. The orders of a court having jurisdiction cannot be collaterally assailed.

Thompson v. Tolmie, 2 Peters, 157.
Grignon's Lessees v. Astor, 2 How., 319.
United States v. Arredondo, 6 Peters, 691.
Voorhees v. Bank of the U. S., 10 Peters, 449, 473.

5. The learned trial judge properly considered it his duty to follow the case of *Miller* v. *O'Brien*, 9 Blatch., 270, in his own circuit, holding the sheriff liable. The decision of that case was based on the English cases of *Balme* v. *Hutton* and *Carlisle* v. *Garland*, which settled the doctrine that, under the then existing statute, 6 Geo. 4, ch. 16, a sheriff who seized and sold the goods of a bankrupt under a *fi. fa.* before commission issues, but after an act of bankruptcy committed within two months, was liable in trover to the assignee. In *Balme* v. *Hutton*, 2 *Cr. & J.* 19, the Court of Exchequer held the sheriff was not liable, but that the plaintiffs in execution were. This was reversed in Exchequer Chamber, 1 *Cr. & M.* 262. It was followed in Exchequer Chamber by the case of *Carlisle* v. *Garland*, 2 *Cr. & M.* 31, which was affirmed in the House of Lords in 1837, 4 *Cl. & F.*, 693. The decision in the House of Lords in 1837 was followed by the Act of 2d and 3d Vict., c. 29, July 19, 1839, which provided, "That . . . all executions and attachments against the lands and tenements or goods and chattels of such bankrupt, *bona fide* executed or levied before the date and issuing of the fiat, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed," with provisos as to cases where parties had notice, and of fraudulent performances.

Sec. 133, ch. 106, 12 and 13 Vict., Aug. 1, 1849, provided that "All executions and attachments against the goods and chattels of any bankrupt *bona fide* executed by seizure *and sale* before the date of the fiat or the filing of such petition, shall be valid, notwithstanding, etc." This was not repealed by act of Aug. 6, 1861. (See schedule G, ch. 134, 24 and 25 Vict., and is re-enacted 32 and 33 Vict., sec. 95, sub. 3, Aug. 9, 1869.) So that the hardship of the decisions of the courts were almost immediately remedied by Parliament, and all acts thereafter contain provisions to relieve, to a certain extent, the sheriff from the severity and injustice of the rule as settled by those decisions.

Slater v. Pinder, L. R., 6 Ex. 228.
Edwards v. Scarsbrook, 3 B. & S., 28.

The English decisions should not be held controlling here, because—

1. The provisions as to the vesting of the bankrupt's estate in the assignee differ materially in the two systems.

   Under the English law, the property from and by the Act of Bankruptcy was divested, and devoted to the use of the creditors, subject to certain exceptions. It was not dependent on the assignment; that instrument was but the evidence of the fact. 6 Geo. 4, c. 16.

   Under the U. S. law, the title remains in the bankrupt until the assignment; it is its execution and delivery that divests the title; *Hampton v. Rouse*, 22 Wall, 275; and if before that time its character has been altered by due process of law, the assignee takes his title subject to the changed condition of affairs.

2. Congress, by the act, treats the sheriff as not liable, except in a certain event.

   Section 5044 of the Revised Statutes provides, "As soon as an assignee is appointed and qualified, the judge, or, where there is no opposing interest, the register shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books

and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same *is then* attached on *mesne process* as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings." The expression, "Although the same *is then* attached on *mesne process* as the property of the debtor" must have some force and effect. According to the contention on behalf of the assignee, these words are superfluous and meaningless. The words are those of the present tense, "*is then* attached." The time referred to is the time of the assignment, not the time to which it relates back; if that were meant, words would have been used of the past tense, "*was* then attached." The object, it is submitted, was to use words holding the property, if in the hands of the sheriff under the attachment at the time of the assignment, so that the assignee could by proper application reach them, and treating the sheriff as not responsible if he had, in the discharge of his duty, parted with the possession, assimilating the provision to the later English statutes, relieving the sheriff where the goods had passed out of his possession by levy *and sale*, and thus avoiding such complications and injustice as the assignee claims have arisen in the case, and leaving him to follow the proceeds into the hands of the party who has received them, or recover from him the value of the property.

3. Such effect should not be given to the fictions of the doctrine of relation and the form of the action of trover on which the English decisions rest, as would do violence to the spirit of our complex system of government.

Federal courts are in this case asked to so construe federal legislation, as to hold that a State officer in the plain discharge of his duty in obedience to the

mandate of a State court of competent jurisdiction, and acting in strict compliance with law, has, by said act, become a wrong doer.

It is to be presumed that Congress never intended such legislation.

This court say, in a case where a strict construction of the currency statute would tend to interfere with the power of taxation reserved to a State: "If this be so, it is certainly a reasonable conclusion that Congress did not intend, by the general terms of the currency act, to restrain the exercise of the power of the State.

Lane County v. Oregon, 7 *Wall*, 77, 78.

Taylor v. *Carryl*, 20 How., 623: "The legislation of Congress, in organizing the judicial powers of the United States, exhibits much circumspection in avoiding occasions for placing the tribunals of the States and of the Union in any collision."

Again at page 621: "It forms a recognized portion of the duty of this court to give preference to such principles and methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may co-operate as harmonious members of a judicial system coextensive with the United States, and submitting to the paramount authority of the same constitution, laws and federal obligations."

Here is a duty far above and beyond that of avoiding actual interference and unseemly conflict over the possession of property. *That* duty devolves on all courts of concurrent jurisdiction. *This* is peculiar to our system of government. That is discharged by refraining from action until the other court has finished with the possession of the property. As is said in *Buck* v. *Colbath*, *supra*, p. 342: "Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it (the property) according to the rights of the parties before them, whether those rights required them to take possession of the property or not. The effect to be given in

such cases to the adjudications of the court first possessed of the property, depends upon principles familiar to the law;" of course, no effect if the court first in action has proceeded without or beyond the scope of jurisdiction, or by irregular and improper methods, or the officer in executing valid process has made errors in judgment or discretion; but we are told that even when the first court was confessedly competent to act—when it had undoubted jurisdiction of the person and subject matter—when its process and proceedings have been regular—when the officer has made no mistake or error in executing his process, or in obeying the orders of the court, and has simply done his duty in strict conformity with law—that the statutory application of the doctrine of relation renders the proceedings of the first court invalid, its process and and orders powerless to protect, and its officers amenable to punishment by the second tribunal: and undeniably the authorities cited support the contention. But just here, we submit, the English decisions cease to aid us, in consequence of the difference of the two systems. They have but one government, one legislature, one judicial system. Parliament is almost omnipotent, the courts of law, of equity, and of bankruptcy, are all the creatures of and subject to its enactments alone. Judges, public officers, and the officers of the courts are appointed under its laws, derive their powers and ascertain their duties from, and are amenable only to, the provisions of its statutes.

Their system is an unit, ours is complex.

State courts derive their life, jurisdiction and powers from the sovereignty of the State. State officers are the creatures of State legislation, subject to its statutes as to their office, its tenure, duties and liabilities. Federal courts and their officers derive their powers from the laws of Congress, passed by authority of the constitution, a source of power which, though derivative, is nevertheless within its sphere supreme.

Though the system is complex, its workings may be harmonious; the elements are not discordant if each is

properly directed and controlled. But to this end the power of each to act unquestioned within its appropriate limits must be maintained. The independence of the governmental, legislative and judicial departments is necessary to the proper existence of the States. Those departments, with their various officers, must be left free to act, and when they do act within their proper jurisdictions, they must not be held amenable to federal supervision. That independence is destroyed and all harmonious action marred if the State court is to act with the liability of its judgments, orders and decrees, clearly within its jurisdiction, being rendered not only ineffective, but invalid, and if its officer is to be placed in the dilemma of, on the one hand, being subject to proceedings for contempt if he does not act, and on the other, the future and certain punishment by the federal court, in case he does so act.

Much that is said as to the exercise of concurrent powers by the federal and State governments, in *Lane County* v. *Oregon*, 7 *Wall*, 71, 76, 77, applies with great force to the question under consideration, and calls for the construction of this statute, so as to preserve the harmonious workings of the two and independent systems.

SECOND POINT.

It is respectfully submitted that Congress has not, under the constitution, the power to transform, by statutory relation, the legal acts of a State public officer, done in good faith, in the strict performance of his duty, in the execution of regular process and orders of a State court of competent jurisdiction, into wrongs, rendering such officer liable in an action of tort therefor.

1. "It is a principle of elementary history that the States of the Union became entitled on the 4th of July, 1776, to all the rights and powers of sovereign States."

McIlvaine v. *Coxe*, 4 Cranch, 209.

"It is a further principle in the same history that the States have retained all such rights intact and unimpaired, except so far as they have voluntarily abridged them by the adoption of the federal constitution and its amendments."

U. S. Cons., Amendment 10.

Among the reserved rights are "the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for the legitimate purposes of State government."

Veazie Bank v. *Fenno*, 8 Wall, 533.

2. When powers are concurrent, each must be exercised, if possible, so that the one will not trench on the other, always admitting, if there is a *necessary* interference, that of the State must give way to the federal.

Congress may not adopt any means for the execution of an express power that Congress may see fit to adopt.

Legal Tender Cases, 12 Wall, 457, 571.

Though this is a sentence from the dissenting opinion, there can be no question as to its soundness, or that in the execution of an express power Congress should not adopt means which infringe upon the functions of government of the State, except so far as may be necessary for the execution of the power.

"It is not indispensable to the existence of any power claimed for the federal government that it can be found specified in the words of the constitution, or clearly and distinctly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred."

Legal Tender Cases, 12 Wall, 534.

If the existence of a power not specified is to be inferred from the spirit of the instrument, certainly the exercise of an express power ought to be restrained within limits which do not tend to destroy the system of the government.

3. Congress has the power to authorize the issue of United States notes, and to make them lawful money and legal tender in payment of debts, public and private, within the United States.

Lane Co. v. *Oregon*, 7 Wall, 71.
Legal Tender Cases, 12 Wall, 457.

a. But it cannot so execute this power as to interfere with or abolish the power of the State to require payment of State taxes in coin.

Lane County v. *Oregon*, 7 Wall, at page 76: "The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. But in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved. . . . . Now, to the existence of the States, themselves necessary to the existence of the United States, the power of taxation is indispensable. It is an essential function of government. It (the constitution) gave the power to tax, both directly and indirectly, to the national government, and, subject to the one prohibition of any tax upon exports and to the conditions of uniformity in respect to indirect, and of proportion in respect to direct taxes, the power was given without any express reservation. On the other hand, no power to tax exports or imports, except for a single purpose and to an insignificant extent, or to lay any duty on tonnage, was permitted to the States. In respect, however, to property, business, and persons within their respective limits, their power of taxation remained and remains entire. It is, indeed, a concurrent power, and in the case of a tax on the same subject by both governments, the claim of the United States, as the supreme authority, must be preferred; but

with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the States commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the State Constitutions or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the national government. There is nothing in the constitution which contemplates or authorizes any direct abridgment of this power by national legislation. To the extent just indicated, it is as complete in the States as the like power, within the limits of the constitution, is complete in Congress."

b. The power of taxation in Congress is express, subject to the provision mentioned in the above opinion, yet "the reserved right of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress."

Veazie Bank v. *Fenno*, 8 Wall, 533.

c. The power of Congress in raising revenue by the stamp provisions of the internal revenue act, is not to be seriously questioned; yet Congress has no power to impose a stamp tax upon official bonds given to a State by its officers.

State v. *Garton*, 32 Ind., 1.

d. Nor to require a stamp upon the process, etc., of a State court.

Lewis v. *Randall*, 1 Abb., Pr. Rep., N. S., 139.

e. Nor authority to impose a stamp duty on certificates of sale of lands for State taxes.

Barden v. Super. of Coe Co., 13 Wis, 445.

f. The clause in the United States Internal Revenue Act, providing that certain instruments not stamped as therein required shall not be recorded, does not affect the recording of them by State officers.

Moore v. Quick, 105 Mass., 49.

g. The provisions of same law, that certain unstamped instruments shall not be received in evidence, does not apply to State courts.

Carpenter v. Snelling, 97 Mass., 452.
Green v. Holway, 101 Mass., 243.
Citing *Griffin v. Ranney*, 35 Conn., 239.
Craig v. Dimmock, 47 Ill., 308.
Bunker v. Green, 48 Ills., 243.
Express Co. v. Haines, 48 Ills., 248.
Summons v. Halloway, 21 Mich., 162.
Duffy v. Hobson, 40 Cal,, 240.
Atkins v. Plympton, 44 Vt., 21.
People v. Gates, 43 N. Y., 40.

4. It is not in the constitutional power of Congress to prescribe for the States a rule for the transfer of property within them.

Moore v. Moore, 47 N. Y., 467.
Summons v. Halloway, 21 Mich., 162.

The power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States, is expressly given by Article 1, sec. 8, sub. 4, subject only to the expressed restriction that they be uniform throughout the United States; but we submit on the principle of the cases cited, that the power must be exercised without unnecessarily impairing the efficiency of any of the reserved rights of the States, one of which is the administration of justice through the courts; that in carrying out that power it cannot make the acts of public State officers and the officers of the State courts which were right when done, to be wrongs by the application of the doctrine of relation to some subsequent action under the federal law.

It would be an improper exercise of such power, not only on the above grounds, but it is unnecessary and not within the object of the provision. Bankruptcy is essentially a matter relating to property; proceedings in bankruptcy are in the nature of proceedings *in rem*. Their object is to secure the estate of the bankrupt for distribution

among his creditors. It reaches that property and its proceeds everywhere. If in the possession of State courts, the assignee will be permitted to intervene to secure it; if it has been disposed of, the proceeds may be followed, or those who have set independent authority to work on it may be held liable. It may do away with the effect of the judgment of State courts as to the property, but it cannot reach the officer of that court who has in discharge of his duty executed the orders of the court or the process of the law, because just there steps in the protection of a separate independent government, whose rights in that regard have been reserved.

The questions presented in the first and second points are raised by the 4th, 5th, 6th, 7th, 9th, 10th, 11th, 13th, 15th and 16th assignment of errors.

THIRD POINT.

The original taking having been lawful, and the defendant having afterwards dealt with the goods only by order of the court having possession thereof, this action could not be maintained without proof of some fact, as demand and refusal, to render defendant liable for a tort.

[3d assignment of errors.]

The rule is a familiar one, that where property comes lawfully into the hands of a person, this action cannot be maintained without some action, as a demand and refusal, to render the possession wrongful, the reason being that the action being for a tort the defendant must be put in the wrong. This is, of course, unnecessary where the defendant has *wrongfully* sold the property, but a lawful sale of the property is not within the exception.

FOURTH POINT.

The learned judge erred in reference to the measure of damages.

[12th, 14th and 15th assignment of errors.]

The evidence was that the sheriff sold the goods at public auction as required by law. There is no evidence tending to show that the sale was not fair. The amount realized at the sale was $1,156.50 (fol. 75).

The learned judge charged that the sheriff was liable to pay the true market value of the property, on the day of sale, with interest (fol. 83), and refused to charge, as requested, that in awarding damages to the plaintiff the jury are restricted to the amount realized at such sale (fol. 87).

The jury found for $7,075.47 (fol. 61).

The Act of 1874, sec. 4, Laws of 1874, page 178, provided that, unless otherwise ordered by the court, the assignee shall sell the property of the bankrupt, whether real or personal, at public auction, etc.

Whitmore v. *Black*, 13 *M. and W.* 507, was an action of trover brought by an assignee in bankruptcy against a sheriff who had sold goods on an execution to recover the difference between what they had brought, which had been paid to him, and the market value at the time of sale. The Lord Chief Baron, in summing up, told the jury, that, if they thought the sale was fair and *bona fide*, as the assignees were bound to sell, the amount produced by the sale might be taken as the value of the goods, and the jury found so. A rule was refused the plaintiff, Baron Parke saying: "It must always be borne in mind that the assignees were bound to sell the goods: and, although their value at the time of the conversion may afford some measure of the damages, we must, nevertheless, apply the qualification that the assignees themselves were compelled to sell."

Clarion Bank v. *Jones*, 21 *Wall*, 325, was an action under the first clause of Sec. 35 of the Bankrupt Act (Revision, sec. 5128) brought by the assignee against the bank as liable under that section.

The act is specific. It says: "the assignee may recover

the property, or *the value* of it from the person so receiving it, or so to be benefited"—and as the property had been sold at a judicial sale, and could not be recovered in specie, the remedy was for the market value (p. 339).

FIFTH POINT.

There was error in admitting evidence as to the value of the goods, in the opinion of the witness Miles (fol. 67).

[1st assignment of error.]

For the reasons stated in the fourth point, the measure of damages was, as claimed in the objection to the question (fol. 67), and in the error first assigned, the amount produced at the public sale by order of the court.

SIXTH POINT.

There was error in admitting evidence as to what the goods were sold for by Malloy (fols. 69, 70.)

[2d assignment of error.]

1. The sale by the sheriff was in August, 1875.—Malloy subsequently became the owner of some of them and sold them in January following.

What they brought in January had no bearing on the market value in August, when the sheriff sold them—that was shown not to be a good time to sell (fol. 70), and January was the time they would bring most in market.

2. For reasons stated in third point.

SEVENTH POINT.

The learned judge erred in not giving effect to the fact that the assignee had brought suit and recovered judgment against Dickerson, the plaintiff in attachment. Exception (fol. 81.)

[8th assignment of error.]

EIGHTH POINT.

The judgment should be reversed with costs.

VANDERPOEL, GREEN & CUMING,
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ROBERT S. GREEN,
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Of Counsel.

SUPREME COURT U. S.
FILED
OCT 27 1881
JAMES H. MCKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1881.

No. 76.

WILLIAM C. CONNER, SHERIFF,

Plaintiff in Error,

vs.

WILLIAM H. LONG, ASSIGNEE, &C.,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

D. H. CHAMBERLAIN,
W. B. HORNBLOWER,
OF CHAMBERLAIN, CARTER & HORNBLOWER,
Counsel for Defendant in Error.

BURGOYNE, Law Case Printer (Law Telephone 587), 29 Rose Street, N. Y.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1881.

No. 76.

WILLIAM C. CONNER, Sheriff, &c.,
Plaintiff in Error,

AGAINST

WILLIAM H. LONG, Assignee in Bankruptcy of BENJAMIN H. SPAULDING,
Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of New York.

BRIEF FOR THE DEFENDANT IN ERROR.

Statement.

This cause comes to this Court upon a writ of error to the Circuit Court of the United States for the Southern District of New York to review a judgment for $7,186.43, in favor of William H. Long, as Assignee in bankruptcy of Benjamin H. Spaulding against William C. Conner, entered on January 12th, 1878, upon a verdict, after a trial before the Hon. Nathaniel Shipman and a jury.

This action was commenced in the Superior Court of the City of New York, but after issue had been joined by the service of an answer, it was removed on the application of the plaintiff to the United States Circuit Court for trial, the plaintiff, Long, being a citizen of Massachusetts, and the defendant Conner, being a citizen of New York.

This is a suit in the nature of *trover* to recover damages for the conversion by defendant Conner of certain straw goods.

The facts are substantially undisputed, except as to the value of the goods in question.

On July 20, 1875, one Alfred J. Dickerson commenced an action in the Supreme Court of New York against Benjamin H. Spaulding, to recover the sum of $2,086$\frac{17}{100}$ and interest, and a warrant of attachment was on that day issued to the plaintiff in error, Conner, as Sheriff of the City and County of New York, against the property of said Spaulding, and the Sheriff levied on the property in question, which was at that time in the possession of Charles Miles, Jr., of the City of New York, as factor for Spaulding (see Record, p. 19).

On July 23, 1875, a petition was filed by certain creditors of Spaulding in the District Court of the United States for the District of Massachusetts, in which district Spaulding resided and carried on business, praying for an adjudication of bankruptcy against said Spaulding, and on the 4th of September, 1875, he was adjudged a bankrupt by said Court; and on the 21st day of September, 1875, the defendant in error, Long, duly qualified as assignee in bankruptcy of Spaulding in said proceedings, and received from the Register in Bankruptcy the formal instrument of assignment under the seal of the Court, assigning and conveying to him as such assignee, all the estate and effects belonging to the said Spaulding, or to which the said Spaulding was entitled on the 23d day of July, 1875 (see p. 13).

In the meantime, and after the filing of the petition in bankruptcy, an order was made by one of the Justices of the Supreme Court of New York, in the attachment suit of Dickerson vs. Spaulding, directing the Sheriff to sell the property levied upon by him. This order was made July 27, 1875 (see Record, p. 21).

The Sheriff sold the property at auction on the 31st of July, 1875, for $1,043.18 (see answer, Record, p. 11).

Judgment in the attachment suit was entered on the 15th of September, 1875, for $2,175.85. Execution was issued to the Sheriff, and he paid over to Dickerson $873.91 out of the proceeds of the property, retaining the balance on account of his fees (Record, p. 21).

This action was brought by the Assignee in Bankruptcy of Spaulding against the Sheriff to recover damages for the wrongful sale of this property.

POINTS.

I.

The Court did not err in charging the jury that *the Sheriff was guilty of conversion* in selling the property on the 1st of August, 1875.

1.

The *attachment* was *dissolved by the adjudication and assignment in baukruptcy;* the dissolution of the attachment *took effect by relation at the date of the filing of the petition* in bankruptcy, and *made void all proceedings in the attachment suit* intermediate between the filing of the petition and the date of the assignment.

The language of the Bankrupt Act on this point is as follows:

U.S. Rev. Statutes, § 5044, provides: "As soon as an assignee is appointed and qualified, the Judge, or where there is no opposing interest, the Register shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books and papers relating thereto, and *such assignment shall relate back to the commencement of the proceedings in bankruptcy* and by *operation of law* shall *vest the title* to all such property and estate, both real and personal, *in the assignee, although the same is then attached on mesne process* as the property of the debtor, *and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings.*"

The attachment in this case was issued on the 20th of July, 1875. The bankruptcy proceedings were commenced only three days afterwards, July 23d, 1875.

The assignment in bankruptcy related back to the 23d of July, dissolved the attachment as of that date, and made all subsequent proceediugs thereunder unlawful and void.

The section above quoted from the Revised Statutes of the United States is a reenactment of Section 14 of the Bankrupt Act of 1867.

In the earlier history of the English bankrupt laws, their pro-

visions as to relation of the assignee's title by operation of law, were similar to our own, except that the relation was carried back beyond the commencement of the proceedings in bankruptcy to the commisson of an act of bankruptcy by the debtor. More recently the severity of some of the consequences of this rule has led to legislation modifying the law in favor of third parties dealing in good faith with the bankrupt and his property.

Doubtless, when a new bankrupt law is framed and enacted by Congress they will make such provisions as may seem to them wise and just to protect third parties from the harsher results of this relation by operaion of law. But whatever Congress may do or may not do in the future, the Court is now called upon simply to ascertain what it has done in the past and to enforce the law as they find it, and not as they would like to find it.

Congress enacted the bankrupt law of 1867 with the legislation and the judicial decisions of England before them; and when they adopted the language of the English statutes, they must be presumed to have adopted also the construction put upon those statutes by the English Courts. At any rate, they cannot be supposed to have been ignorant of the decisions of the English Courts, and if those decisions had been at variance with the intention of Congress, it would have been very easy and most natural to have guarded against the application of those decisions by express language.

The original English Bankrupt Act, 34 and 35 Hen. VIII., c. 4, does not define the time at which the title of the bankrupt to his property shall be divested.

The Act of 13 Eliz., c. 7, provides in Section 2, that the Lord Chancellor or Lord Keeper of the great seal upon complaint in writing against a person "being bankrupt as is before defined," might appoint commissioners who should have power to take "order and direction" with the bankrupt's property, and that "every direction, order, bargain, sale, and other things done" by the commissioners "shall be good and effectual in the law. to all intents, constructions and purposes" against the bankrupt, his wife, heirs, children, "and *against all other person or persons claiming by, from or under such offender* or offenders, debtor or debtors, *by any act or acts, had, made or done after any such person shall become bankrupt* as is aforesaid."

The Act of 1 James I., c. 15, does not vary the law on this point.

The Act of 21 James I., c. 19, however, provides, by Section 11, that: "If at any time hereafter any person or persons shall become bankrupt, and at *such time as they shall become bankrupt*," shall, by consent and permission of the true owner, have in their possession any goods or chattels whereof they are the reputed owners, and take upon them the sale, alteration or disposition as owners, the Commissioners "shall have power to sell and dispose the same, to and for the benefit of the creditors which shall seek relief by the said commission, as fully as any other part of the estate of the bankrupt; and for the better payment of debts and discouraging men to become bankrupt."

And by Section 9 of this Act it is provided that creditors having security "by judgment, statute, recognizance, specialty with penalty or without penalty, or other security, or having no security, or *having made attachments* in London, or any other place, by virtue of any custom there used, of the goods and chattels of any such bankrupt, *whereof there is no execution* or extent served and executed upon any of the lands, tenements, hereditaments, goods, chattels, and other estate of such bankrupts, *before such time as he or she shall or do become bankrupt*, shall not be relieved upon any such judgment, statute, recognizance, specialty, attachments, or other security, for any more than *a ratable part of their just and true debts with the other creditors* of the said bankrupt, *without respect to any such* penalty or greater sum contained in any such judgment, statute, recognizance, specialty with penalty, *attachment*, or other security."

The Act of 5 Geo. II., c. 30, a temporary Act, but which was in force by various extending Acts when the case we are about to cite was decided (see Section 8 of 24 Geo. II., c. 57) did not alter the law on this point, although the Act 29 Geo. II., c. 32, had modified it so as to provide that a creditor of the bankrupt who received payment after the commission of an act of bankruptcy, but before notice thereof, and before the commencement of proceedings in bankruptcy, should not be obliged to refund to the assignees in bankruptcy.

In this state of the law, the case of *Cooper et al., assignees, vs. Chitty*, 1 Burrows, 20, was decided.

This was an action of *trover* brought by the assignees of one Johns, a bankrupt, against the Sheriffs of London, who had taken and sold the goods of Johns in execution under a *fieri fa-*

cias. The case was twice argued. It appeared Johns committed an act of bankruptcy December 4th, 1753. On December 5th, one Godfrey obtained judgment and issued execution, and the goods of Johns were seized on execution. On December 8th, a commission of bankruptcy was taken out against Johns, and on the same day the Commissioners of Bankruptcy executed an assignment to the plaintiffs. On December 28th, the Sheriffs sold the goods.

Lord Mansfield delivered the judgment of the Court and said they were *all* agreed (p. 31). The Court held that "the *property* was in the *plaintiffs* as on and from the fourth of December (which was before the seizure) *by relation.*" The statutes vest in the assignees all the property that the bankrupt had at the time he committed the act of bankruptcy, and make the sale by the Commissioners good against all persons who claim by, from, or under the bankrupt, *after* the act of bankruptcy, and against all executions not served and executed *before* the act of bankruptcy. "Before the Act of 19 Geo. II., c. 32, if the bankrupt had *bona fide* bought goods, or negotiated a bill of exchange, and thereupon or otherwise, in the course of trade, paid money to a fair creditor, after he himself had committed a *secret* act of bankruptcy, such *bona fide* creditor was liable to refund the money to the assignees, after a commission and assignment; and the payment, though really and *bona fide* made to the creditor, was *avoided and defeated* by the secret act of bankruptcy." That was remedied by that Act, in case no notice was had by the creditor. "The only question then is, whether the defendants are guilty of a wrongful conversion. That the *conversion itself was wrongful* is manifest. The *Sheriffs had no authority to sell the goods of these plaintiffs* but of William Johns only."

The Court intimate that the Sheriffs were not liable for trespass for the original taking, but hold that they were clearly liable in *trover* for selling; that the Sheriff always *acted at his peril* and was liable for a mistake although innocently made; that the *proceedings in bankruptcy* were *public*, and that the Sheriff was *bound to take notice of them.*

In *Cooper vs. Chitty*, it will be noticed that the goods were *seized* by the Sheriff *after* the act of bankruptcy and were *sold after* the assignment.

But in the next leading English case, *Balme vs. Hutton*, 1 Crompton and M., 262, the plaintiff, as assignee in bankruptcy, brought action in *trover* to recover value of goods sold by the defendant as Sheriff *after* the act of bankruptcy but before the assignment and before the commencement of proceedings in bankruptcy.

The sale was made under a writ of *fieri facias* and "neither the Sheriff, nor the Chief Bailiff, nor his deputy, who made the sale, knew or had notice of any act of bankruptcy before the return of the writ of *fi. fa.*"

The case was decided in the Exchequer Chamber, on error from the Court of Exchequer. The whole subject was most elaborately and exhaustively discussed, seven Judges delivering separate opinions, six holding the Sheriff liable, and one *contra*.

PATTESON, J., thus states the case (p. 265):

"The principal question, then, is this: Is a Sheriff liable to an action of trover at the suit of the assignees of a bankrupt, where, upon a *fieri facias* against a trader who had committed a secret act of bankruptcy, of which the Sheriff is wholly ignorant, he seizes and sells? I am of opinion that he is liable. It has been so considered for a great length of time; and though I admit that the case of *Cooper vs. Chitty*, reported in 1 Burr., 20, and much more intelligibly, as I think, in Lord Kenyon's notes, 395, does not necessarily decide the point, because in that case the Sheriff sold the goods after a commission had issued; yet the general understanding of the profession has long treated that case and the subsequent practice as decisive of this question."

"The action of *trover*, which is the form of the present action, is founded on property, and as the assignees have the property by relation, it follows that they can maintain this action against any person who has converted the goods in the interval between the act of bankruptcy and the action" (p. 270).

The Judge then takes up the question whether the character of the Sheriff furnishes a defense to the action, and thus disposes of that question.

He says: "The Bankrupt Acts contain no clause protecting the Sheriff. It is said to be hard on the Sheriff, but if the law be clear, any hardship is immaterial, and it is not found practically hard, for the offices of Under Sheriff and of bound-bailiff are coveted, notwithstanding the action which has pre-

vailed many years. It is said that the Sheriff is invincibly ignorant of the facts; so is the execution creditor, yet he is not excused if he join in the execution; *ignorance, therefore, alone will not do.* Again, the Sheriff is often as invincibly ignorant in cases of bills of sale, whether they be fraudulent or not; yet he is obliged to run the risk" (p. 271).

Taunton, J. says (p. 275): "This relation takes effect, not from the common law, but by statute, and the necessary result is, that though, at the time of the execution executed, goods seized under an execution may ostensibly have been the goods of the bankrupt, and in truth would have been and have continued to be so, notwithstanding a prior act of bankruptcy committed, if no commission was sued out thereon; yet if a good commission be taken out and an assignment executed, whoever possesses himself thereof at any interval of time between the act of bankruptcy and the assignment is considered as possessing himself of the property of the assignees. He, therefore, whether judgment creditor, or Sheriff, or bailiff, or any other person who, in such a case, takes the goods apparently of A., the bankrupt, has in legal effect taken possession of the goods of B., the person who afterwards becomes assignee, and is liable to an action at the suit of B., the subsequent assignee, for so doing, unless he be protected by some peculiar privilege."

And see the opinions of Bosanquet, J. (p. 282); Littledale, J. (p. 295); Park, J. (p. 303), and Tindal, C. J. (p. 313).

Indeed, as early as 1798, in Sir Henry Gwillim's edition of Bacon's Abridgment, Tit. Bankrupt, we find this language:

"It seemeth to have been formerly very much doubted, whether the assignees could maintain any action against an officer who had the goods of a bankrupt in execution, after an act of bankruptcy, and before the issuing of the commission, *but it is now settled* that the *assignees may in such case bring trover against him*, though the relation shall not operate to make him a trespasser."

And the case of *Balme vs. Hutton*, above cited, was itself simply an affirmance of the cases of

Potter vs. Starkie, cited 4 Maule & S., 260.
Lazarus vs. Waithman, 5 B. Moore, 313;
Price vs. Helyar, 1 Moore & Payne, 541; 4 Bing., 597.

And Park, J., says (1 Crompt. & M., 308): "The oldest man now living remembers no other rule upon this point."

The case of *Balme vs. Hutton* was followed by the House of Lords in

Garland vs. Carlisle, 4 Scott, 587, affirming 10 Bing., 452.

The leading case in this country is *Miller, assignee, vs. O'Brien, Sheriff*, 9 Blatch., 270.

In that case the property was attached by the Sheriff a few days before proceedings in bankruptcy were begun, but was sold under execution *after* proceedings were begun.

Judge Woodruff states the question thus: "Whether a Sheriff who, after the proceedings are commenced in bankruptcy, wherein an assignee is appointed, levies an execution upon and sells property which was of the bankrupt, is liable to the assignee, *notwithstanding he pays the proceeds of sale to the creditors before he receives actual notice of the bankruptcy?*"

He notices the fact that the property was attached a few days before the proceedings in bankruptcy, and that the property was sold as perishable under the rules of the State Court—facts which mark the present case also, and holds that "as between the assignee and Sheriff these circumstances are not material."

The learned Judge cites the English cases of *Balme vs. Hutton* and *Garland vs. Carlisle* and holds them to have been correctly decided.

To same effect are,

In re Preston, 6 B. R. 545.

Duffield vs. Horton, 73 N. Y., 218.

And this Court says in *Bank vs. Sherman* (101 U. S., 406):

"The statute is clear and imperative. Its constitutional validity is not questioned. It contains no qualification. We cannot interpolate what is claimed. Such a function is beyond the sphere of our power and duty. It is our business to execute the law as we find it, and not to make or modify it. In the disposition of property among creditors, equality is equity. It was the genius and purpose of the statute to secure this result as far as possible from the moment its aid was invoked, whether by debtor or creditor. * * * *The filing of the petition* was a *caveat to all the world.* It was in effect an attachment and in-

junction. Thereafter all the property rights of the debtor were *ipso facto* in abeyance until the final adjudication. * * * The bankrupt became, as it were, for many purposes, *civiliter mortuus. Those who dealt with his property in the interval* between the filing of the petition and the final adjudication, did so *at their peril.*"

2.

The liability of the Sheriff is entirely independent of any question of *notice* or *good faith.* He was *bound to know* of the filing of the petition in bankruptcy.

This was expressly held in all the cases above cited. Indeed, the English cases hold the Sheriff liable for selling property before proceedings are, in fact, commenced and while it is *impossible* for him to know whether they ever will be commenced.

See especially—

Balme vs. Hutton, 1 Compt. & M., 308.
Miller vs. O'Brien, 9 Blatch., 270.
And the other cases already cited.

It has also been held as to other transfers by or transactions with the debtor or dealings with his property intermediate between the filing of the petition in bankruptcy and the appointment of the assignee.

The commencement of proceedings in bankruptcy is notice to all the world. It is, as this Court expressed it in *Bank vs. Sherman*, 101 U. S., 406, a "*caveat to all the world.*"

Thus in *Mays vs. Manufacturers' Nat. Bank*, 4 B. R., 446, a suit was brought by the assignee in bankruptcy to recover a debt paid by the defendant to the bankrupt in good faith and without knowledge of any proceedings in bankruptcy and before adjudication. It was held by Judge Sharswood that the assignee could recover.

To same effect is

Howard vs. Crompton, 14 Blatchf., 328.

In *Duffield v. Horton et al.*, 10 Hun, 140,—affirmed 73 N. Y., 218, the defendants owed the bankrupt a debt. He was sued by a creditor who attached the debt due from the defendants. Judgment was obtained by the creditor and afterwards the de-

fendants paid the money to the Sheriff, who held an execution on said judgment. Before the payment was made proceedings in bankruptcy were begun in which an assignee was appointed, but the defendants had no knowledge of these proceedings until *after* their payment to the sheriff. *Held*, that the assignee was entitled to recover the amount owing by defendants to the bankrupt, notwithstanding their good faith and want of knowledge of bankruptcy proceedings.

3.

The Sheriff is not protected by the order of the State Court directing a sale of the property as perishable.

(*a*) This *order could have no greater force or validity than the attachment itself.*

It was made after the filing of the petition in bankruptcy. By operation of law, the *attachment had already been dissolved.* The Sheriff cannot justify for selling the assignee's property under an order made by virtue of an attachment which had been dissolved by operation of law before the order was made.

This precise question was considered in

Miller vs. O'Brien, 9 Blatchf., 270, and
In re Preston, 6 B. R., 545.

If this sale had been made before the petition in bankruptcy was filed it might, perhaps, have been so far good that the subsequent dissolution of the attachment would not have invalidated it, and that the assignee would have been entitled only to the proceeds of the property; but the sale having been made *after the petition in bankruptcy was filed* and *after the attachment had been dissolved by operation of law*, the sale was an *absolutely nullity* as against the assignee.

In the case of *In re Preston*, 6 Bank Reg., 545, it appeared that an attachment was levied Feb. 28th. On March 4th, an order was made directing the sale of the property by the Sheriff as perishable. On March 18th, a petition in bankruptcy was filed by the debtor, and on March 20th the property was sold by the Sheriff under the order, he having at the time no notice of the filing of the petition in bankruptcy.

The Court held the sale *invalid*, as being made without the consent of the true owner, the assignee in bankruptcy.

The effect of the dissolution of the attachment in absolutely annulling all prior proceedings under it is well illustrated in *Duffield vs. Horton*, 73 N. Y., 218, where the dissolution of the attachment was held to invalidate a payment made to the Sheriff by garnishees. A debt was levied upon under an attachment. Within four months a petition in bankruptcy was filed against the attachment debtor. Prior to the assignment judgment was recovered in the attachment suit, execution issued and the garnishees, without knowledge of the bankruptcy proceedings, paid the amount of their debt to the Sheriff. In a suit by the assignees to recover the debt, *held* that the assignment transferred the property as of the day of the filing of the petition; that the attachment was dissolved *and the lien thereof discharged as of that date;* and that the payment to the Sheriff was unlawful and did not discharge the defendants, and they were held liable.

In *Miller vs. Bowles*, 58 N. Y., 253, it was held that the appointment by the State Court of a Receiver and a transfer to him of the attached property *prior to the commencement of the bankruptcy proceedings*, did not alter the effect of the dissolution of the attachment. The Receiver's title was extinguished by the dissolution.

And in *West Philadelphia Bank vs. Dickson*, 95 U. S., 180, this Court held that money collected by a creditor under an attachment issued within four months prior to the bankruptcy might be recovered back by the assignee. The attachment "*is avoided and made of no effect*, and the proceedings under it are *held for naught*."

And see *Morris vs. First National Bank*, 68 N. Y., 362.

(*b*) But not only had the attachment been dissolved at the date of the order, but *the property had ceased to be the property of the attachment debtor* and had become the *property of the assignee*.

The Sheriff cannot justify for selling the assignee's property by showing an order of Court directing the sale of *Spaulding's property*.

As was said by Judge Woodruff in *Miller vs. O'Brien*, "By operation of law the property held by the Sheriff was the property of the present plaintiff, whether the Sheriff knew it or not."

The Sheriff on the 20th of July, had lawfully seized the property, but on the 23d of July he was no longer the lawful custodian of the property, except it be as a simple bailee to the use of the assignee. The original taking by the Sheriff being lawful, he could not be sued in *trespass*, but in every other respect he was in the same position as if under an attachment directing him to seize the property of A. B., he had in fact seized the property of C. D.

Suppose the Sheriff, having a warrant of attachment against the property of A. B., had seized the property of C. D. in the *first* instance. No one will contend that he would be protected from liability to C. D., by an order directing him to sell the property attached.

But in legal effect the present case is exactly the one supposed.

On the 23d July, the Sheriff had, in legal contemplation, seized the property of a person not named in his warrant. Whatever he thereafter did with this property other than to restore it to its owner, *he did at his risk and peril.*

(c) This order was not in the nature of process *in rem.* It was simply an order *authorizing the Sheriff to anticipate a sale under execution.* It can have no greater force and effect than an execution sale, and no one will pretend that an execution sale is process *in rem.* The order simply directed the sale of the property held by the Sheriff under the attachment. If the Sheriff *wrongfully held* the property under the attachment, he *could not rightfully sell it* under the order.

The distinction between process *in rem* and other process is clearly pointed out in *Buck vs. Colbath.*, 3 Wall, 343, and the liabilities of the officer in executing both kinds of process are summarized. Wherever the process *describes the property to be seized* and *commands the officer to take posssession of certain specific property*, the officer is absolutely protected; but where the officer is directed to levy upon the property *of a party*, there

the Sheriff is bound to *act at his peril*, and must see to it that he does not interfere with the property of any one else.

A writ of attachment directing the Sheriff to seize and hold the property of the defendant is not process *in rem*. And it is absurd to say that an order for the sale of the property levied on changes the character of the Sheriff's holding, so as to cut off the rights of third persons.

Besides, even if this were process *in rem* it would not avail the Sheriff, for the *Court* had already *lost jurisdiction* over the *res*. The original process under which the property was held by the Sheriff had been dissolved by operation of law.

(*d*) Nor does the argument that the Sheriff was *bound to execute the order* affect the question. So is he bound to sell under an execution, and yet all the cases from *Cooper vs. Chitty* down, hold that the Sheriff is not excused from liability on that account, even where he sells after a secret act of bankruptcy, but before the filing of the petition in bankruptcy, and while he cannot yet know with certainty whether a petition will ever be filed.

This point was pressed upon the Court with great earnestness by the counsel for the Sheriff, in the case of *Balme* v. *Hutton* (1 Cromp. and M., 261), and it was urged that to hold the Sheriff liable for executing process which he was bound to execute, was a great hardship. The Court admitted that the Sheriff *could not refuse to sell on execution* before the commencement of the bankruptcy proceedings, even though he knew of a prior act of bankruptcy, by reason of which the sale might be made unlawful by relation. But the Court held, as have all the subsequent decisions, that this is *no excuse for the Sheriff*. He must *act at his peril* in this as in all other cases of *doubtful title*, and must protect himself by bonds of indemnity if he thinks it needful.

See especially the language of Bosanquet, J., 1 Cromp. and M., 284, and the opinions of the Lords Justices in *Garland vs. Carlisle*, 4 Scott, 587.

But we by no means concede that the Sheriff was bound to execute this order. On the contrary, we claim that the *order* was itself a *nullity*, made by a Court which had *lost jurisdiction* over the subject matter.

4.

The cases cited by the learned counsel for plaintiff in error on their brief, in nowise conflict with the principles we contend for.

Hampton vs. Rouse, 22 Wall., 263, was not a case where an assignee in bankruptcy sought to disaffirm a transfer by the bankrupt, or to set aside a sale of his property; but on the contrary, it was a case where the assignee did not appear as a party, and where he had doubtless affirmed the act of the bankrupt as done for his benefit. It was an ejectment suit brought by a purchaser of land at a tax sale. It appeared that the defendant, the owner of the land, had made a legal offer to redeem; but it was objected that his offer was of no avail because he had at the time been adjudged a bankrupt on his own petition, although no assignee had as yet been appointed. The trial Judge so charged the jury. This Court very properly *held* the charge to be error, and reversed the judgment, holding that until the assignment, the bankrupt was the owner of the property, holding the legal title, although by the subsequent assignment the title of the bankrupt might be divested by relation. All that this case holds is that the bankrupt can do such acts as are necessary or proper for the preservation of the property intermediate between the filing of the petition and the assignment. Indeed, as was suggested by counsel in the argument of that case, the bankrupt might well have been considered the agent of the assignee for the purpose of redeeming.

Eyster vs. Gaff, 91 U. S. 521, merely *held* that a State Court might proceed with a foreclosure suit *commenced before the bankruptcy proceedings*; and that an assignee in bankruptcy of the mortgagor stood in the same position as any other purchaser whose title was subsequent to the filing of the bill for foreclosure. If the bill had been filed intermediate between the petition in bankruptcy and the assignment, this case would have some pertinency. As it is, it has no pertinency. The remarks in the opinion to the effect that the State Court will not take judicial notice of the bankruptcy proceedings must be taken in connection with the question then before the Court. It was merely a question of practise and pleading—not of ultimate rights.

The same is true of *Doe vs. Childress*, 21 Wall., 642—which

was a case where an attachment had been levied *more* than four months before bonkruptcy proceedings and hence was not dissolved by operation of law. This Court held that the assignee in bankruptcy could not object to the regularity of the proceedings in the attachment suit. If he had any objection to make, he ought to have appeared in the State Court to make it. This is manifestly a different question from that raised in our case, which goes to the *jurisdiction* of the State Court and which relies on the express provisions of the statute.

The same remarks apply to the other cases cited by counsel for plaintiff in error.

The case of *Bradley v. Frost*, 3 Dill. 458, is the only one which is apparently in conflict with the authorities we have cited, and in that case, the Judge merely says "it is doubtful" whether an assignee in bankruptcy can maintain such an action as this, and he expressly reserved the point for further consideration. So that that case is no authority either way.

The overwhelming weight of authority in our favor and the explicit language of the statute are not to be overborne by *dicta* such as those quoted by counsel for plaintiff in error.

5.

The verbal criticism by counsel for plaintiff in error, as to the meaning of the word "then," is fallacious.

The statute says that "the assignment shall relate back to the commencement of the proceedings in bankruptcy, and shall vest the title to all such property and estate, both real and personal, in the assignee, although the same *is then* attached on *mesne process* as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings."

It is manifest that the word "then" refers to the words immediately preceding, namely, "commencement of proceedings," and not to the words further back as to the making of the assignment. The use of the word "is," instead of "was," is immaterial. Nothing is more common than the use of the present tense in speaking of a past time.

To construe the word "then," as counsel for plaintiff in error construes it, would be in direct opposition to the spirit of the

bankrupt law. It would allow and encourage a race of diligence between the attaching creditor and the general creditors. If the attaching creditor should reach the goal of execution before the general creditors reach the goal of an assignment, the attaching creditor obtains a preference over the general body of the creditors. The Court will not so construe the Act unless the language imperatively demands such a construction.

As this Court has well said, in *Bank vs. Sherman* (101 U. S., 406), already cited: "In the disposition of property among creditors, equality is equity. It was the genius and purpose of the statute to secure this result as far as possible, from the moment its aid was invoked, whether by debtor or creditor."

6.

The question is raised by counsel for plaintiff in error, in his brief, as to the constitutional right of Congress to legislate so as to interfere with the officers of a State Court in the execution of process.

This question is answered at once by recalling the single proposition that Acts of Congress, within the sphere allowed by the Constitution, are as much laws of the State as are Acts of the State Legislature. The Acts of Congress become incorporated into the law of the State, and are binding upon its Courts as well as upon its citizens. No one will pretend that the State Legislature of New York could not by an insolvent law, in the absence of Federal legislation, enact the provisions contained in the sections of the United States Revised Statutes now under consideration, or that the State Courts would not be bound by such an Act.

Congress, having jurisdiction over the subject matter of bankruptcy, can pass any laws on that subject which the State Legislature could pass, and the State Courts will be bound thereby.

Mr. Justice Bradley, in *Claflin vs. Houseman*, 93 U. S., 136, thus forcibly states the true relations of the Federal and State governments: "The *laws of the United States* are *laws in the several States*, and just as much binding on the citizens and courts thereof as the State laws are. The United States is *not a foreign sovereignty* as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty.

Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State, concurrent as to place and persons, though distinct as to subject matter."

And see

Ex parte Siebold, 100 U. S., 371.
Tennessee vs. Davis, 100 U. S., 257.

II.

The Court did not err in its rulings as to the *measure of damages.*

The Court admitted evidence as to the actual market value of the goods at the time of the sale, and the Court charged the jury that the Sheriff was "liable to pay to the plaintiff *the true market value* of the property on that date with interest" (Record, p. 24).

Counsel for the Sheriff contended that the plaintiff was limited to the amount realized at the Sheriff's sale.

This position is manifestly untenable. The sale was *wrongful;* the Sheriff was guilty of *conversion* in making the sale; and is liable in *damages* by reason of the conversion. Those damages are the *market value of the property* at the time of conversion, with interest.

The rule on this subject is explicitly laid down by this Court in *Clarion Bank vs. Jones* (21 Wall., 325), where it was held that an assignee in bankruptcy can recover the market value of property wrongfully sold on execution and is not limited to the proceeds of the sale.

And see Crocker on Sheriffs, § 881.

As to measure of damages in actions for conversion, see

2 Sedgwick on Damages (7th Ed.), 368 [474].
Stevens vs. Low, 2 Hill, 132.
Andrews vs. Durant, 18 N. Y., 496.
Wehle vs. Haviland, 69 N. Y., 448.
Prince vs. Conner, Sheriff, 69 N. Y., 608.
Dows vs. National Exchange Bank, 91 U. S., 618.

III.

The Court did not err in refusing to direct a verdict for the defendant, because no *demand* was proved.

Demand and refusal are only *evidence* of conversion. No demand is necessary to be proved where the defendant has *wrongfully sold* the property. This is *conclusive evidence of conversion.*

2 Greenl. on Evidence, § 644.
Edwards vs. Hooper, 11 M. & W., 363.
Lovell vs. Martin, 4 Taunt., 799.
Featherstonhaugh vs. Johnston, 8 Taunt., 237.
Earle vs. VanBuren, 2 Halst., 344.
Pease vs. Smith, 61 N. Y., 477, 481.
Hall vs. Chapman, 35 Ala., 553.

IV.

The Court did not err in refusing to direct a verdict for the Sheriff, on the ground that the plaintiff had obtained *judgment against Dickerson*, the attaching creditor.

Counsel for the defendant requested the Court to direct a verdict on the ground "that the plaintiff, by bringing his action against Dickerson to recover from him the proceeds of the sale, has elected to affirm the proceedings of the Sheriff in making the same, and has, thereby, waived the tort which is the foundation of this action" (Record, p. 23).

The judgment roll in the suit of *Long vs. Dickerson*, which was offered in evidence (see Record, p. 22), is not set forth in the Record. This Court, cannot, therefore, know what that suit was; or whether it was, as alleged in this request to direct a verdict, an action to recover the proceeds of the sale.

As a matter of fact, it was *not such an action at all.* It was an action for *conversion.* And this is expressly alleged in the defendant's supplemental answer. (Record, p. 15):—"That said judgment was recovered on the *same cause of action as is alleged herein* and for the *conversion of the same goods and chattels* mentioned and described in the complaint herein."

As the defendant's request to direct a verdict was based upon an erroneous statement of fact, it must be disregarded.

That *judgment against one* of two joint wrongdoers in an action of trover, *without satisfaction*, is no bar to an action against the other, is well settled law.

Lovejoy vs. Murray, 3 Wall., 1.
Elliott vs. Hayden, 104 Mass., 180.
Knight vs. Nelson, 117 Mass., 458.
Osterhout vs. Roberts, 8 Cowen, 43.
Sanderson vs. Caldwell, 2 Aiken (Vt.), 195.
Elliott vs. Porter, 5 Dana (Ky.), 299.
Sharp vs. Gray, 5 B. Monr., 4.
Livingston vs. Bishop, 1 Johns., 290.
Sheldon vs. Kibbe, 3 Conn., 214.
Blann vs. Cochern, 20 Ala., 320.
Knott vs. Cunningham, 2 Sneed, 204.
Page vs. Freeman, 19 Mo., 421.
Freeman on Judgments (3d Ed.), §§ 236, 237.

There is no pretense in the case at bar that the judgment against Dickerson has been satisfied

V.

The Court did not err in its rulings on evidence.

There are but two exceptions as to evidence in the record.

1. One Miles was called as a witness for the plaintiffs. He testified that he was a commission merchant in the straw goods line. In July, 1875, he was acting as factor for the bankrupt. Having identified the invoices of the goods taken by the Sheriff, he was asked as to the value of the goods. The defendant objected to this question on the ground that as the defendant acted as Sheriff under an order of Court, "the plaintiff is *concluded* as to any recovery herein by *the amount realized* at the public sale of the goods ordered by the Court" (Record, p. 19).

This objection was properly overruled under the principles above set forth.

No objection was made to the competency of the witness to testify as to value, or to the method of proving value.

2. One Malloy was called as a witness for the plaintiffs, who testified that he was a hat jobbor, of the firm of Boyden, Malloy & Co., of New York; that he bought the identical goods in question from the firm of Godchaud & Co., who had bought them at the Sheriff's sale (see testimony of Godchaud at foot of p. 20 of Record). Malloy was then asked : "What were they sold for by you ?" This was objected to by defendant, on the ground that the "highest amount to which the plaintiff could in any event be entitled, is the *market value* of the property with interest" (Record, p. 20). The question was not objected to on the ground that the sale by witness was too remote in point of time; but simply on the ground that it was no evidence of market value.

This objection is untenable. A *sale in the regular course of business of the identical goods* in controversy, is the best evidence possible of their market value. *It is their market value.*

The charge of the learned Judge put the question of value before the jury in such a shape that there could not possibly have been any misunderstanding as to the true rule. He instructed them that they must determine the "true market value" of the goods on the 1st of August, and for the purpose of ascertaining that value, they could take into consideration "fair sales made at or about that time, or within a reasonable time subsequently." He also told them they could take into consideration the amount received at the Sheriff's sale, though that amount was not conclusive.

Certainly no fault can be found with this.

As to the admissibility of the evidence, see

Crounse vs. Fitch, 1 Abb. Ct. of App. Decisions (N. Y.), 475.

Fennerstein's Champagne, 3 Wall., 145.

VI.

The Court did not err in its rulings on defendant's requests to charge.

All of the questions involved in these requests have been already fully considered.

VII.

The judgment should be affirmed with costs.

D. H. Chamberlain,
Wm. B. Hornblower,
Of Counsel for Defendant in Error.

14-245

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~950.~~ 104

HENRY N. WALKER AND JOSEPH P. WHITTEMORE, APPELLANTS,

vs.

DANIEL W. POWERS AND OSCAR CRAIG, EXECUTORS OF JOHN CRAIG, DECEASED; DANIEL W. POWERS, PERSONALLY, AND HELEN MARIA POWERS, SOLE DEVISEE, &c., OF JOHN CRAIG, IMPLEADED WITH HENRY TEN EYCK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 20, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 350.

HENRY N. WALKER AND JOSEPH P. WHITTEMORE, APPELLANTS,

vs.

DANIEL W. POWERS AND OSCAR CRAIG, EXECUTORS OF JOHN CRAIG, DECEASED; DANIEL W. POWERS, PERSONALLY, AND HELEN MARIA POWERS, SOLE DEVISEE, &c., OF JOHN CRAIG, IMPLEADED WITH HENRY TEN EYCK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

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1 United States circuit court, northern district of New York. In equity.

HENRY N. WALKER AND JOSEPH P. WHITTEMORE
vs.
OSCAR CRAIG AND DANIEL W. POWERS, executors of the last will and testament of John Craig, deceased, and Helen M. Powers and Daniel W. Powers, and Henry Ten Eyck.

The complainants in this cause filed their bill of complaint on the 20th day of September, A. D. 1876. A subpœna to appear and answer was thereupon issued and was served personally, previous to the return day thereof, on the defendants Oscar Craig and D. W. Powers. Said bill of complaint is hereto annexed.

On the 10th day of February, A. D. 1877, all the defendants except Henry Ten Eyck appeared in said cause by Danforth and Shepard, their solicitors, and filed their demurrer to said bill of complaint, which is hereunto annexed.

2 On the 17th day of February, A. D. 1877, an order was duly entered setting down the demurrer for argument, a copy of which is hereto annexed.

Afterwards, at the June term of the said court, held at Canandaigua, commencing on the third Tuesday of June, A. D. 1878, before the honorable Samuel Blatchford, circuit judge, the said cause came on to be heard on the bill and demurrer therein, and was duly argued by counsel and submitted to the court for decision.

On the 23rd day of August, A. D. 1878, the court filed its decision, and an order was duly entered for a decree allowing the said demurrer and dismissing the bill of complaint.

On the 9th day of October, A. D. 1878, a decree was filed and entered allowing the said demurrer and dismissing the bill of complaint with costs, which is hereto annexed.

3, 4 UNITED STATES OF AMERICA.

In the circuit court of the United States for the second circuit and northern district of New York. Sitting in equity.

To the judges of the circuit court of the United States for the northern district of New York:

Henry N. Walker and Joseph P. Whittemore, of the city of Detroit and State of Michigan, and who are citizens of the State of Michigan, bring this their bill of complaint in their own behalf and in behalf of all the creditors of Nelson P. Stewart, late of the said city of Detroit, in the State of Michigan, deceased, against Oscar Craig and Daniel W. Powers, executors of the last will and testament of John Craig, late of the city of Rochester, in the State of New York, deceased, and Helen Maria Powers, sole heiress and devisee of said John Craig, deceased; and against Daniel W. Powers personally and Henry Ten Eyck, residing in Cazenovia, New York, who are all citizens of the State of New York.

And thereupon your orators complain and say that on the eleventh day of May, A. D. 1863, Nelson P. Stewart, who had long been and

then was a resident of Detroit aforesaid, in the State of Michigan aforesaid, deceased on the day and year aforesaid, at the place last aforesaid, testate but insolvent.

That by the will of said Stewart, which was executed before his insolvency aforesaid. to wit, in the year 1857, the property therein devised and bequeathed was left to his wife and heirs of his body, subject to the payment of his debts, and in consequence of his insolvent condition at his decease was never probated or acted upon; but that on
5 motion and petition of a creditor of said Stewart's estate, in accordance with the provisions of the statutes of the State of Michigan, letters of administration upon said Stewart's estate were, on the 20th day of April, A. D. 1874, granted by the judge of probate of the county of Wayne, in the State of Michigan, and letters of administration duly issued to one George K. Johnson, a citizen of said State of Michigan. who was a creditor of said estate of said Stewart to the amount of eighty thousand dollars and upwards.

That commissioners were duly appointed in accordance with the laws of the said State of Michigan, by the said probate court, with full power to hear and determine and adjudge upon the validity of all claims against the estate of said Stewart, deceased, as aforesaid, before which commission aforesaid the claims of said Johnson and the several claims of your orator Joseph P. Whittemore were in due course of proceeding under the laws of Michigan presented, audited, and allowed in the sums hereinafter set forth.

And the claim of the said Henry N. Walker was, after the close of the said commission, presented to and audited and allowed by the judge of probate, in accordance with the statutes of Michigan in such case made and provided.

That the said estate of said Nelson P. Stewart is justly indebted to the said Henry N. Walker in the sum of ten thousand dollars and upwards, for moneys loaned to and paid for the said Stewart in his lifetime and prior to the 1st of January, A. D. 1860, by the said Henry N. Walker, which were audited and allowed and adjudged to him as aforesaid by the said court of probate in Michigan as aforesaid. And the said Stewart died indebted on demands and debts contracted prior to the 1st of January, A. D. 1860, to divers citizens of the States of New York and Michigan, in other large sums of money, for whose benefit respectively also this suit is brought, and who shall prove their claims before the receiver to be appointed by this court in due course of practice.

6 That your orator Joseph P. Whittemore, by the consideration and judgment of the supreme court of the State of New York, duly recovered a judgment in an action upon promises of said Stewart against the said Nelson P. Stewart, on the 20th day of August, A. D. 1862, for the sum of twelve thousand four hundred and sixteen dollars damages, and one hundred dollars cost of suit, as by the judgment roll of said judgment, filed with the clerk of said court in the clerk's office in the city of Utica and county of Oneida, will appear, and to which for greater certainty and particularity your orators pray leave to refer. That the indebtedness for which said judgment was recovered accrued to your orator (Whittemore) prior to the 1st day of January, 1859.

And that on the 28th day of August, A. D. 1862, a transcript of said judgment was in due form of law filed with the clerk of said court in his office in Rochester, in the county of Monroe, and duly docketed on the day of the filing thereof by said clerk, in accordance with the provisions of the statutes of the State of New York, to make the said judgment a

lien upon the real estate of the said Stewart, in the said county of Monroe. And that said judgment still remains in full force and effect, unpaid and uncancelled, except as hereinafter set forth.

That on the 7th day of June, A. D. 1862, Elisha W. Chester, who resides in the city of New York, recovered against the said Nelson P. Stewart, a like judgment as last aforesaid, for the sum of twelve thousand six hundred and thirty-three dollars, damages and costs, by the consideration and judgment of the supreme court of the State of New York, the judgment roll whereof was filed in the office of the clerk of said court in the city of New York, to which roll reference is hereby prayed for greater certainty and particularity. And a transcript of said last named judgment was duly filed and docketed early in the year 1862,
in the office of the clerk of said court at Rochester, in the county
7 of Monroe aforesaid, as required by the statutes of New York, to bind the real estate of the defendant in said judgment.

That the debt upon which said last named judgment was recovered accrued in the year 1858, and the suit in which said judgment was recovered was commenced by attachment in pursuance with the provisions of the statute laws of New York, and a notice of lis pendens in said attachment suit was duly filed and entered with the said clerk of the county of Monroe, on the 3d day of November, A. D. 1860. And that the said judgment last aforesaid was, on the 7th day of March, A. D. 1872, for a valuable consideration sold and transferred by the plaintiff therein, by writing under his hand and seal, to your orator Joseph P. Whittemore, to which assignment for greater certainty and particularity your orators pray leave to refer. And that said judgment last aforesaid is now owned by your orator (Whittemore), and the same is of full force and effect, neither paid, discharged or cancelled.

Your orators further say upon information and belief, that no proceedings have ever been had or taken in the States of Michigan or New York for proving the said will of said Stewart, nor have any proceedings except those hereinbefore mentioned been had in either of said States of New York or Michigan for administration upon the estate of said Stewart, and that the said Stewart left no property in the State of New York at his decease except that hereinafter mentioned.

Your orators further say that the widow and heirs and devisees, and the executors named in the last will and testament of the said Nelson P. Stewart are each and all citizens of the same State with your orators, and hence cannot be made parties defendant to this bill without ousting the jurisdiction of this court of this your orators' bill. And for reasons which appear herein, and will hereinafter appear, they cannot join as plaintiffs in the relief hereby sought.

Your orators further show that Frederick S. Stewart, Helen W.
8 McConnell and Adeline M. Johnson were at the time of said Stewart's decease his only heirs, and the devisees in the said unprobated will. And that your orator Whittemore on the sixth day of July, A. D. 1872, recovered a judgment in the nature of a judgment scire facias, under the provisions of the New York Code of practice, upon the first named judgment against said Stewart herein set forth, in the supreme court of the State of New York, in Monroe County aforesaid, against the above named Frederick S. Stewart, Adeline M. Johnson and Helen W. McConnell in an action in the nature of scire facias, to revive the aforesaid judgment of said Whittemore, and to have execution thereon against the property hereinafter specified, to which said action the said parties defendant personally appeared, and consented to the recovery therein prayed, to wit, that the said judgment be revived

and that execution in favor of said Whittemore issue against the property hereinafter described, which said judgment was duly filed, entered, and docketed in the office of the clerk of said supreme court, in Rochester, in the county (of Monroe) aforesaid, on the said sixth day of July, 1872, aforesaid, wherein and whereby it was adjudged that the aforesaid judgment of said Whittemore against said Stewart be revived, and that execution issue thereon for the sum of twenty-one thousand one hundred and sixty-eight $\frac{11}{100}$ dollars ($21,168.11) against the property described in the complaint upon which said judgment was recovered, viz:

"All that tract or parcel of land situate in the city of Rochester, in the county (of Monroe), described as follows: Beginning at the intersection of the west line of Mill street with the south line of Railroad avenue, and running thence westerly on the south line of said avenue one hundred feet; thence southerly on a line parallel with the west line of Mill street, one hundred eet; thence easterly on a line parallel with the south line of Railroad avenue to Mill street; thence northerl. on the west line of Mill street to the place of beginning."

9 Your orators further show that after the rendition of the judgment last aforesaid, an execution in favor of said Whittemore was duly issued and delivered to the sheriff of said county of Monroe, in pursuance with said last named judgment, directing the sheriff of said county of Monroe to make the moneys in said judgments and execution specified, of the lands hereinbefore last set forth and described, or out of such interest therein as the said Nelson P. Stewart had on the 23rd day of August, A. D. 1862, or at any time afterwards. Whereupon the said sheriff did levy upon the said above described lands, and having given due notice as required by law, did, on the 24th day of August, A. D. 1872, sell said lands at public vendue to your orator Whittemore for the sum of $21,636.97, bid therefor by him, and he being the highest bidder therefor, and the said sheriff did thereupon issue and deliver to said Whittemore a certificate of said sale. And thereafter, to wit, on the 26th day of November, A. D. 1873, the said sheriff, in pursuance of the statute in such case made and provided, executed a deed of said premises and delivered the same to said Whittemore, the same not having been redeemed from said sale last aforesaid; to which deed, and the judgment roll in said scire facias proceedings, and the execution aforesaid, and sheriff's certificate aforesaid, your orators pray leave to refer for greater certainty and particularity as a part of this bill of complaint.

Your orators further show that in respect of the frauds of said Stewart, and that of his co-conspirators in such frauds which are hereinafter set forth, your orator Walker had no knowledge thereof, or of any facts leading to such knowledge, till within six, or at most nine months prior to the filing this bill of complaint. And that no other of the creditors in whose behalf this bill is filed, nor did the said Chester, the assignor of the aforesaid judgment to said Whittemore, ever know anything of the frauds hereinafter set forth. And that the said Whittemore had no knowledge or notice of any of the circumstances
10 hereinafter set forth tending to prove the frauds hereinafter charged, or of any of said frauds within ten years preceding the filing of this bill, and that he has only lately, and since June 30, 1871, discovered the facts constituting and evincing the frauds and conspiracy hereinafter set forth, and the evidences thereof hereinafter set forth.

Your orators further show that the said Nelson P. Stewart in his lifetime, and prior to his last sickness hereinafter mentioned, was an extensive and daring speculator in real estate and other property, and a large

operator in railroad schemes and in building railroads and operating in the stocks, bonds and securities in the railroads which he undertook to manage and construct. That among his purchases of real estate were included the real estate hereinbefore described in the city of Rochester, known and hereinafter referred to as "Congress Hall," which was the name of the hotel which was built upon said premises so described as aforesaid.

That he also purchased forty-eight feet adjoining and in the rear of said hotel, being forty-eight feet front on said Mill street, by one hundred feet deep, familiarly known and hereinafter mentioned as the Congress Hall barn property or livery stable. He also purchased of one Cornelius B. Cornwall a farm of 122 acres in Irondequoit in said county of Monroe, by deed of May 5, 1856, recorded June 20, 1856, in the clerk's office of Monroe County, in book 132 of deeds, page 346, hereinafter mentioned as the Cornwall farm. He also purchased of one Freeman Clarke property on Washington street in the city of Rochester aforesaid, by deed of October 25, 1856, recorded December 10, 1856, in book 134, page 156, of deeds, in said last named clerk's office. He also a short time prior to the last named purchase purchased and took a conveyance from one John Farley of a large farm in Irondequoit aforesaid, and took the conveyance thereof in the name of his wife, Mary A. Stewart. He also purchased 77 acres adjoining or near said last named land, and took a
11 deed thereof from said Farley, hereinafter described and mentioned as the "Irondequoit property." And he also purchased several other parcels of land in and near Monroe County aforesaid, not necessary to be herein mentioned. He was engaged in Michigan in the construction of a railroad extending across said State from Detroit to Grand Haven, known as the Detroit and Milwaukee Railroad, of which enterprise he was the prime mover. And in 1855 he started the enterprise of building a railroad from Port Huron, in said State of Michigan, to Owosso in said State, and at that point connecting with said Detroit and Milwaukee Railroad; of which said last mentioned railroad said Stewart was prime mover and manager, and contractor for building the same under an agreement to build the same and take his pay in the stock and bonds of the road.

That said Stewart, about the year 1857, procured the bonds of said last named road to be placed to a large amount in the city of London, England, and was proceeding prosperously with the enterprise till the financial crisis of 1857 put a stop to the enterprise, and to the placing any more of the bonds of said railroad, and at the same time put a stop to the prosperity of said Stewart, and from that time forth until the latter part of the year 1859 said Stewart, although greatly embarrassed in his circumstances, tried to maintain his financial credit and go through—but then finding himself insolvent and hard pressed by his creditors, he formed the design of hindering, delaying and defrauding his creditors and secreting and saving his property to himself, and forthwith proceeded with the aid, advice and assistance of Oliver M. Benedict, an attorney at law residing at Rochester, New York, and who was his agent, confidential adviser and friend in all his business affairs in the State of New York, and with the aid and assistance of the aforesaid John Craig, now deceased, and of the said Daniel W. Powers, the defendant hereinbefore named, he carried out and executed that design as to the property hereinafter specified, through a joint conspiracy to secrete in
12 the hands of said Benedict, Craig and Powers all of said Stewart's interest in the property in Rochester and Irondequoit aforesaid, with intent to hinder, delay and defraud the creditors of said Stewart under the circumstances and in manner following, to wit:

In the fall of the year 1859, one Theodore Dehon, of the city of New York, having theretofore sued said Stewart in said city of New York, docketed a judgment in his favor against said Stewart in the clerk's office in Monroe County aforesaid, of $10,000 and upwards. Said Stewart was then indebted to said John Craig in something over $3,000, which was secured by mortgage on lands other than that hereinbefore mentioned. He was also indebted to said Daniel W. Powers upon a promissory note of some thirteen hundred dollars and upwards, and upon bond secured by a mortgage on said Congress Hall barn property of about $1,500, being a second mortgage on said barn property, and subject to a prior mortgage to one of the Rochester Savings Bank of $1,500. On being advised of the entry and docketing of the said Dehon judgment as aforesaid, said Powers and Craig were stirred up to activity in respect of their said debts, and notified said Benedict, who notified said Stewart. At the time said Stewart was thus notified he was also very much embarrassed by his pressing indebtedness in Michigan, and he had then lost credit so that no one would advance him any money without ample collaterals. And among other creditors of said Stewart was the Michigan Insurance Company's Bank, of which Henry K. Sanger, a personal friend of said Stewart, was cashier, and John Owen was president, to which bank said Stewart was indebted in December, 1859, on paper past due, about $25,000, which sum was then amply secured by endorsers and collaterals held by said bank. At about the same time said Stewart had made arrangements with his attorneys in New York City to appeal from the judgment of said Dehon in New York City aforesaid, docketed in Rochester as aforesaid. And early in January, 1860, said
13 Powers commenced suit by attachment on his said promissory note against said Stewart, and filed a notice of lis pendens in the Monroe County clerk's office on his said attachment proceedings, and early in January, 1860, entered up judgment in said suit upon said promissory note, and at about the same time commenced a foreclosure on his said mortgage of Congress Hall barn property, upon which he took a decree on the second day of March, A. D. 1860, and said Craig commenced foreclosure on his mortgage against said Stewart. Whereupon, and about the first day of April, A. D. 1860, said Stewart hastened to Rochester and called on said Benedict to attend to the matter so as aforesaid impending, and, on consultation with the said Benedict, enlisted him in said Stewart's design aforesaid to provide for the then pressing emergencies, and to carry out said Stewart's plans and design aforesaid to hinder, delay, and defraud his creditors; whereupon it was arranged between said Benedict and Powers that the judgment which said Powers had recovered in January previous should be paid to Powers, and that said Powers' decree of foreclosure might rest so long as the interest was kept up on that decree and on the prior mortgage to the Savings Bank; and thereupon said Stewart furnished to said Benedict the money wherewith to pay to said Powers his judgment so rendered as aforesaid, which said Benedict accordingly paid to said Powers on the 10th April, 1860, and instead of cancelling said judgment, said Benedict, at request of said Stewart, took an assignment of the same to said Benedict on the day last aforesaid, and thus continued it as an ostensible lien upon the property aforesaid of said Stewart in Monroe County as a shield against other creditors of said Stewart, which said transaction between said Stewart and Benedict, and the payment of the money by Stewart to Benedict to pay to said Powers, and the intent aforesaid with which said judgment was left uncancelled of record, were well known to said Powers at the time last aforesaid, and to said

14 John Craig. That as soon as said Powers' pressing claims were disposed of as aforesaid, said Stewart and said Benedict took up the matter of the Dehon judgment and the appeal thereof, and at the request of said Stewart said Benedict applied to the said John Craig, who was a client and an intimate friend and confidant of said Benedict, and who was a man of great wealth, to become the surety of said Stewart on the contemplated appeal from the said judgment of Dehon, and upon such request of said Benedict said Craig consented to become such surety on an appeal to the supreme court in banc, and thereafter to the court of appeals, which consent was in writing, signed by said Craig, on being amply secured against such contemplated liability; and thereupon it was proposed by said Benedict and Stewart to secure said Craig by mortgage on the aforesaid Congress Hall property, on which said Craig then held mortgages to the amount of $18,000, and which was then worth $30,000, and was then under rental to one Robert D. Cook for a term of five years' from the first day of May, 1860, at a rental of $3,600 per annum, payable monthly, in advance. Also, to assign to said Craig the five years lease aforesaid of said Robert D. Cook, with authority to said Craig to collect the said rents and accumulate a fund with which to meet the liability on said proposed appeal bond, providing in said instrument of assignment that in case of default in payment of the rents, or of any contingency which should entitle said Stewart to possession against his said tenant, that said Craig should be entitled to possession and to relet said property till the said rents should have fully indemnified said Craig against his said proposed liability on said appeal bond, a copy of which said instrument of assignment is hereto annexed and marked Exhibit 1.

Also, to assign to said Craig a chattel mortgage on the furniture in said Congress Hall, on which was due $1,200. Also, to mortgage to said Craig the aforesaid seventy-seven acres of land in Irondequoit, which was of the value of $5,000, and unincumbered except by
15 the Madison County Bank judgment, hereinafter mentioned. Also, to mortgage to said Craig a farm of said Stewart in Erie County, New York, worth some five or six thousand dollars, and to pay to said Craig out of said securities the sum of $1,000 for his trouble in becoming security as thus proposed.

Which said proposition of said Benedict and Stewart was accepted by said Craig, and on the 23d day of April, A. D. 1860, the said mortgages as proposed were duly executed and delivered to said Craig; and the chattel mortgage aforesaid was then, or soon thereafter, assigned as proposed; and on the 24th day of April, 1860, the said lease to Robert D. Cook was assigned to said Craig, with provisions as aforesaid for possession and collection of the rents; and the said Craig thereupon afterwards signed the appeal bond to Dehon, as had been thus agreed, and the papers and documents for perfecting the said arrangement as aforesaid were drawn by the said Benedict, acting for both parties in said transaction.

Your orators further show that after the said Craig had become surety on the said appeal bond to Dehon as aforesaid, and before justification on the said undertaking, he ascertained that the trustees of the Madison County Bank, a moneyed corporation then lately doing business in Cazenovia, New York State, had, on the 25th October, 1859, recovered and docketed a judgment in Monroe County clerk's office aforesaid for the sum of $2,675.24 against said Stewart, which was a lien on the property so as aforesaid mortgaged to said Craig by said Stewart anterior to said Craig's said indemnity mortgage and to the docketing in said Mon-

roe County of the judgment of said Dehon. And thereupon said Craig refused to justify, of which refusal said Benedict and Stewart were notified. And thereupon, to wit, June 1st, 1860, said Stewart procured one Elisha C. Litchfield, of Cazenovia, New York State, and George K. Johnson, of Michigan, to join said Stewart in a bond of indemnity,
16 of the date last aforesaid, to said Craig, in the penal sum of $5,000, against the lien of the said judgment of the trustees of said Madison County Bank (copy of said bond is hereto annexed, and marked Schedule A), and delivered said bond to said Craig; and the same being satisfactory to said Craig, he there upon justified, and thereby perfected said Stewart's appeal of the judgment of Dehon aforesaid to the supreme court in banc.

Your orators further show that the aforesaid appeal from the said judgment of Dehon was taken without any expectation of reversing the judgment of said Dehon, but with the sole object on the part of said Benedict and Stewart of getting time by means of the appeal to the supreme court and to the court of appeals, so that the rents thus assigned to said Craig would accumulate in his hands to meet the said liability of Stewart to Dehon; which object was well understood between said Benedict and Stewart as the only object attainable by said appeal.

Your orators further show that on the 27th day of April, 1860, the said Stewart, in pursuance with the intent to defraud his creditors herein alleged, under the advice and with the knowledge of said Benedict, executed and delivered a warranty deed of said Congress Hall property, sealed, signed, and acknowledged by himself and wife, to Henry K. Sanger, of Michigan, the cashier of said Michigan Insurance Bank; that the said deed was delivered to said Sanger without any consideration in fact being paid therefor by said Sanger, but purporting to be for the nominal consideration of $22,000, including $18,000 of incumbrances to Craig aforesaid; and that Sanger never made any claim of any right or of possession under said deed, but after Stewart's sickness, hereinafter mentioned, and after said Stewart's affairs and himself had become a hopeless wreck, physically and financially, said Sanger delivered the said deed of Congress Hall to the lawyer of said Michigan Insurance Bank to be foreclosed as a mortgage, and stated to said lawyer and to said bank that said deed had been given by said Stewart as se-
17 curity for the debt of said bank against the said Stewart, theretofore contracted by said Stewart, which debt your orators allege had been before the delivery of said deed fully secured to said bank by endorsements of other parties on the paper of said Stewart, and by other absolute deeds of other property of said Stewart which had been deeded to said Sanger by said Stewart with intent on the part of said Stewart to hide from his creditors the property thus conveyed, under the cover of the actual indebtedness of said Stewart to said bank, and of the form of absoluteness in the conveyances, of which intent of said Stewart said Sanger was at the time of the delivery thereof respectively fully cognizant. And the aforesaid deed of Congress Hall, as well as the other deeds last mentioned, were accepted by said Sanger with notice of the last aforesaid intent of said Stewart; and the ostensible titles were thus held by said Sanger with such intent as last aforesaid until the death of said Sanger in 1864, testate, leaving by his last will and testament all his real and personal estate to his widow, Caroline Sanger; and the said Caroline, after the death of her said husband, by writing under her hand and seal, duly acknowledged and recorded in the clerk's office of the county of Monroe, and delivered to Elisha C. Litchfield, late of Caze-

novia, N. Y., declare the said deed to have been given as security for a debt of said Stewart to the said Michigan Insurance Bank, and in consideration of the premises released the dower interest of the wife of said Stewart in said Congress Hall property; and afterwards, in January, 1867, the said Caroline, by deed, duly executed, quitted claim to said Congress Hall property to one Henry Ten Eyck, of Cazenovia, for the consideration of two hundred dollars, paid by said Elisha C. Litchfield to said Michigan Insurance Bank for said deed, which said deed said Henry Ten Eyck received in trust for said Litchfield, and with full notice and knowledge that the title of said Sanger was at most a mortgage security to said bank. And your orators pray that said Ten Eyck
18 may be made a party defendant to this bill, in order that he may gainsay, if he chooses, the allegations of this bill as to his ostensible title to the Congress Hall property aforesaid.

Your orators further show that the said Stewart, on the 9th day of May, 1860, with the same intent on his part to cover up and secrete his property from his creditors, voluntarily executed to the said John Owen a chattel mortgage of all his household goods and personal property in Detroit, of the value of $20,000 and upwards, to secure a bona fide debt which was in judgment against said Stewart of about $3,300, and a fictitious debt to his wife's sister of $3,000, and as cumulative security to the said Insurance Bank. And soon thereafter, or about the same time as last aforesaid, said Stewart executed to John Farley, of Rochter, aforesaid, an absolute deed of about 500 acres of land owned by said Stewart, in the State of Iowa, to secure to said Farley the sum of about $800, with defeasance back to the said Oliver M. Benedict.

That on the 22d of May, 1860, the said Cornwall farm was sold on foreclosure of a mortgage given by said Stewart thereon for the purchase money; and the same was bid in by said Benedict in the name of himself and Martindale, his partner, and paid for by their own money and their bond & mortgage, and they held the title thereof till the next spring for said Stewart, when they sold the same to one Mason Cole, and after reimbursing themselves for their outlay in said purchase, paid over to said Stewart or held for his benefit the surplus, being between two and three thousand dollars.

That on the 5th day of September, A. D. 1860, at the said city of Rochester, the said Stewart, with fraudulent intent, as aforesaid, transferred and delivered to said Benedict and John H. Martindale, the law partner of said Benedict, bonds of said Port Huron and Milwaukee Railway Company to the nominal amount of $250,000—without any consideration to said Stewart therefor—and on the 6th day of the same September, 1860, said Benedict prepared a deed of the
19 aforesaid Congress Hall barn property for execution by said Stewart and wife to said Benedict, for the nominal consideration of one dollar, and mailed the same to said Stewart, to be executed and returned, which said deed dated on the 6th day of September, 1860, was received by said Stewart and executed and acknowledged by himself and wife on the 15th day of said September, 1860, and was returned to said Benedict, and by him caused to be recorded in the office of the clerk of Monroe County aforesaid, on the 24th day of September, 1860, in the proper registry of deeds of said county; and your orators show that said deed was drawn, executed, acknowledged, delivered, accepted and recorded with fraudulent intent as aforesaid, and that the property purporting to have been conveyed with the last named deed was valued by said Stewart at $10,000, and by said Benedict at $7,000, and that the said Benedict paid to said Stewart no consideration for said deed, and

that soon after the recording said deed, as last aforesaid, said Benedict, in pursuance of the aforesaid fraudulent design of said Stewart, procured said Powers to advertise the said property described in said deed from Stewart to Benedict last aforesaid, for sale on the said foreclosure decree of said Powers, that had been entered on the 2nd day of the previous March as aforesaid, and on the 12th day of January, A. D. 1861, the said barn property so as aforesaid deeded by Stewart to Benedict was by collusion between said Powers and Benedict, and in furtherance of the said fraudulent design of said Stewart, bid off by said Powers at the sum of $70. And said Powers was collusively as aforesaid allowed to take a deed of said barn property on said bid of $70, and to take a judgment for deficiency on his said foreclosure suit against said Stewart on said 12th January, A. D. 1861, for $1,438.25, which said judgment was on the same day duly entered and docketed in said Monroe County clerk's office, and became a lien on said Stewart's real estate in said county, and thereafter said Powers held said title and deficiency
20 judgment by a secret understanding between him and Benedict subject to the control of said Benedict, until they were disposed of after Stewart's sickness before mentioned under the direction of said Benedict as hereinafter stated.

Your orators further show that at about the same time of the last named deed, to wit, the 18th day of October, A. D. 1860, the said Stewart also deeded to said Benedict, in pursuance of the same fraudulent design as aforesaid, and without any consideration therefore, the said property of the said Stewart, on Washington Street, in Rochester aforesaid, which said last named deed was received and accepted by said Benedict, but was not recorded, though said Benedict held the same and afterwards procured the title of said Washington street property in the manner hereinafter stated, to be perfected in his own and said John Craig's name.

Your orators further show that in the month of October, A. D. 1860, or about that time, the said Nelson P. Stewart, being the holder of three several promissory notes of the aforesaid The Port Huron and Milwaukee Railway Company for the sum of $25,000 each, endorsed the same to the said Benedict and his partner, Martindale, without any consideration therefor, and in pursuance of the aforesaid fraudulent design of said Stewart; and thereupon said Benedict and Martindale sued the said railway company by declaration filed the 8th day of December, A. D. 1860, in the circuit court for the county of Sheawassee, in said State of Michigan; and thereafter, in course of due proceedings as required by law and the practice of said court, judgment was rendered in said court in favor of said Benedict & Martindale upon the said promissory notes, on the 8th day of May, A. D. 1861, for $78,835.40 damages, besides costs of suit; and execution was thereafter duly issued upon said judgment and returned unsatisfied.

Your orators further show that in August, of the year 1861, the said Stewart shipped from Michigan wheat belonging to said Stewart,
21 which was received by said Benedict & Martindale, and sold; and the avails thereof, amounting to $500, were held by them for the use of said Stewart.

Your orators further show that on the 13th day of September, A. D. 1861, at Detroit aforesaid, the said Nelson P. Stewart was struck down with paralysis or apoplexy, from the effects of which attack he never fully recovered, but until the 11th of May, 1863, dragged out a miserable existence, and then died; but immediately after said attack of paralysis the wife of said Stewart advised said Benedict of his condition, and wrote and telegraphed to said Benedict, requesting said Ben-

edict's attendance at Detroit to aid and advise in said Stewart's affairs; and upon receipt of such messages said Benedict consulted with said John Craig, and at the suggestion of the latter delayed his journey to Detroit for some days in hope that said Stewart might recuperate, so far as to be able to converse and give instructions about his business; and after such delay and consultations with said Craig, to wit, about the 4th of November, 1861, said Benedict proceeded to Detroit, and to visit at the house of said Stewart; and while on that visit, having ascertained that said Stewart was in a deplorable condition, and unable then to converse at all, said Benedict enlisted the wife of said Stewart in the fraudulent design of said Stewart and Benedict hereinbefore alleged, and directed the wife of said Stewart to forward to him at Rochester any property of said Stewart that could be conveniently sent, with intent to put the same beyond the reach of said Stewart's creditors; and advised her generally and particularly, as far as practicable, how to save the property of said Stewart from his creditors, and then returned to Rochester aforesaid; and on his return gave his attention first to the securing, in a safe place for Stewart, the said Congress Hall barn property, by procuring said Craig to advance from moneys of said Stewart, collected by said Craig from the rents of Congress Hall, under the assignment of the Cook lease aforesaid, sufficient to pay to
22 said Powers the amount of his said foreclosure decree, and the amount of the prior mortgage of the said Savings Bank upon said property, and to take a deed from Powers in the name of said Craig, to be held by said Craig, as Powers was then holding for said Benedict; and Powers consenting to the said arrangement, the same was effected by the payment from Craig to Powers of $3,216.57, and deed from said Powers and wife to Craig was accordingly duly executed and delivered on the 15th day of November, A. D. 1861, and the said property was held by said Craig under deed, and he collected the rents thereof, at the rate, at least, of $500 per annum, up to the time of his death, and by his will devised said property, with his other property, to Helen Maria Powers, the wife of said Daniel W. Powers, defendant herein.

Your orators further show that immediately after the said last above transfer of the barn property was effected, said Benedict wrote to the wife of said Stewart the letter of date of 18th of November, A. D. 1861, copy of which is hereto annexed and marked B; and on the 19th day of said November filed the said deed of said barn property for record in the registry of deeds of Monroe County, and the same was recorded therein on the 19th day of said November.

Your orators further show that, on the 17th day of December, 1860, the sheriff of Monroe County, having duly advertised the different parcels of property of said Stewart hereinbefore mentioned for sale, upon an execution theretofore issued on the said judgment of the said Madison County Bank, sold the several parcels of property, as follows: The Washington street lot to one Wendell, for $1,700; the Irondequoit 77 acres to Wendell, in different parcels, for $1,615; the Congress Hall property aforesaid to said John Craig, for $5; and the Congress Hall barn property aforesaid to said O. M. Benedict, for $5; and certificates of such sales were respectively issued and delivered to the respective parties aforesaid by said sheriff.

23 And your orators believe and charge that the last above-named pieces of property were advertised and sold as aforesaid at the suggestion of said Benedict, and the bid of said Craig for Congress Hall, and that of Benedict for the said barn property, were made in pursu-

ance and furtherance of the general plan of Benedict and Stewart in fraud of the creditors of the latter hereinbefore mentioned; and that, at the expiration of the time for redemption from the said bids of said Benedict and Craig, to wit, the 17th day of December, A. D. 1861, said Benedict, in collusion with said Craig in the general fraudulent purpose aforesaid, suffered and permitted the time to pass for Stewart, and those claiming under him, to redeem, without making redemption from said bid and certificate of sale of said Craig.

And your orators aver that both said Benedict and Craig were in funds from said Stewart, and that it was the duty of each and both to have made redemption, and not to have allowed the apparent default in redeeming them to occur; and your orators say that immediately after its occurrence the said Benedict wrote and sent the letter, copy of which is hereto attached, marked C, to the wife of said Stewart, at Detroit, under date of December 23, 1861; and that the chattel mortgage mentioned in said letter, and in the letter of November 18th, hereinbefore set forth, is the same mortgage to John Owen hereinbefore mentioned.

Your orators further show that during the fall of 1861 and the winter of 1862, the suggestions of said Benedict to the wife of said Stewart were acted on and carried out, and accordingly horses and other personal property of said Stewart were forwarded to said Benedict with the fraudulent object aforesaid, insomuch that on the 17th day of March, 1862, a fund, arising out of the avails of such secreted property, received and sold by Benedict, had accumulated in said Benedict's hands, and there remained subject to the order of said Stewart and wife,
24 concerning which fund and other matters in furtherance of the fraudulent design aforesaid, the letters of said Benedict, of March 27th, 1862, of April 5th, 1862, and of April 22d, 1862, hereto annexed, and marked respectively schedules D, E, and F, were written by said Benedict and received by Mrs. Stewart at Detroit.

Your orators further show that on the said 17th of March, 1862, the time was to expire for redeeming by judgment creditors the aforesaid property of said Stewart, which had been sold as aforesaid on the said Madison County Bank judgment; and on that day the said Oliver M. Benedict, the said John Craig, and the said Daniel W. Powers, met in consultation about the redemption then to be made; and it was then and there arranged and agreed between them, in pursuance with and furtherance of the afore-mentioned fraudulent design of Benedict and Stewart, that the said Benedict should reassign to said Powers the said judgment against Stewart, which, as hereinbefore stated, had been paid with Stewart's money and assigned to Benedict; and that the said Powers should proceed to redeem, in his name, under the said judgment so to be reassigned, all of the property which had been sold as aforesaid, on said Madison County Bank judgment, and thereby ostensibly to cut off the lien of said Craig's said indemnity mortgage upon the Congress Hall property aforesaid, and ostensibly to cut off the term of said lease to Robert D. Cook, so assigned as aforesaid to Craig by said Stewart; and ostensibly to cut off the said indemnity mortgage of said Craig on the Irondequoit property aforesaid; and thus apparently to absorb and cut off the title of Stewart, and thereby give to said Craig a remedy over against said Litchfield on the indemnity bond of the latter, hereinbefore set forth, and upon the mortgage of said Craig upon the Erie County farm of said Stewart aforesaid; and that the last named plan being agreed on as last aforesaid, by the parties aforesaid, the said Benedict did then and there, at the date last aforesaid,

25 gratuitously reassign to said Powers the said paid up judgment against said Stewart, without any consideration whatever from said Powers; and the said Powers, under the advice and direction of said Benedict (who acted for him in drawing the necessary papers for such redemption), proceeded in due form of law to redeem the said property so sold as aforesaid on the said Madison County Bank judgment, to wit, the Irondequoit property, the Congress Hall property, and the Washington street property aforesaid (omitting redemption of the barn property aforesaid); and on the 21st day of March aforesaid, the said sheriff of Monroe County deeded the said property to said Powers in due form of law.

Your orators further say that at the time of the said redemption last above set forth, the said Powers was, and for many years previous had been the son-in-law of said Craig, having married the only daughter and child of said Craig; and that said Craig and Powers has always since said marriage lived together as members of the same household and family; and said Powers had also for many years been the banker of said Craig; that said Benedict had then long been the lawyer and confidential adviser of both said Craig and Powers, and much of the time said Craig had occupied, with his desk and private business, the same law office with the said Benedict. That said Benedict had prior to the time last aforesaid, and for several years theretofore, been the attorney and trusted agent of said Stewart as to all his affairs in Monroe County, aforesaid, and had often prior thereto incurred personal responsibility of said Stewart, both as endorser, guarantor and otherwise, both to said Powers and others, as occasion seemed to require in protecting and guarding said Stewart's interests aforesaid; and had often made advances of his own funds, as in case of the bidding off the Cornwall farm as aforesaid, as occasion required in guarding and protecting said Stewart's interests—which relation of attorney and
26 confidential agent for Stewart, of said Benedict, was well known to said Powers and Craig during all the years aforesaid of its existence.

Your orators further say that immediately after the said last named redemption, to wit: On the 24th day of March, 1862, the said Powers and wife, for the ostensible consideration of $1,800, executed and delivered a quit claim deed of said Washington street property to said John Craig and Oliver M. Benedict, which deed was duly recorded in said Monroe County clerk's office on the 3d day of May, 1862; and that within a few days (not exceeding twenty days) after said last named redemption said Craig commenced suit in New York supreme court against said Litchfield, on said bond of indemnity hereinbefore set forth, as given by Litchfield to Craig.

Your orators further show that soon after the said last named redemption by said Powers, to wit: On or about the 27th of June, A. D. 1862, the said Benedict, having prepared a deed of the aforesaid Irondequoit property, which had been redeemed as aforesaid by said Powers, for execution by said Stewart and wife to said Daniel W. Powers, he proceeded to Detroit aforesaid, and to the house where said Stewart and wife resided, and reported progress to said Stewart in the plan of fraud aforesaid, and obtained the signature of said Stewart to the said deed, so prepared as last aforesaid; but that the wife of said Stewart, on taking advice of local counsel in the city of Detroit refused to execute the said deed, or to allow the same to be delivered—which said deed, so signed by said Stewart, is now in possession of your orators and ready to be produced—and a copy thereof is hereto annexed

and marked Schedule G. That upon the refusal of said Mrs. Stewart to execute the said deed to Powers, at the request of Benedict as aforesaid, said Benedict and Stewart were very angry, and said Benedict complained that Mrs. Stewart had lost the confidence formerly reposed in him.

Your orators further say that the said Litchfield, having on the
27 26th of May, 1862, put in an answer to said Craig's complaint on said indemnity bond aforesaid, insisting that the appeal upon which said Craig's undertaking had been given, was still pending and undetermined, the said Benedict, on the 13th of June, wrote and sent to said Stewart at Detroit the letter, and enclosed request, copies of which are hereto annexed, marked Schedule H, and afterward procured said Stewart's consent to abandon said appeal, so as to facilitate said Craig's recovery against Litchfield, and to make available the said liability of said Craig to Dehon, as surety for Stewart, in carrying out the fraudulent design aforesaid of said Stewart and Benedict.

Your orators further say that just previous to the redemption aforesaid, to wit: The 13th day of March, 1862, the said Benedict wrote and sent to the said Mrs. Stewart the letter of that date, copy of which is hereto annexed, marked Schedule I, and in addition to the letters hereinbefore mentioned, he sent to her at Detroit the letter of date April 24, 1862, and that of July 2d, 1862, copies of which, respectively, are hereto annexed and marked J and K.

Your orators further say that on the 1st day of May, A. D. 1860, the said John Craig commenced receiving the rents of Congress Hall aforesaid, under the said assignment of the term of the said five years lease to the said Robert D. Cook, and thence till the day of the redemption last aforesaid, he regularly received the said rents payable under said lease monthly in advance, and credited the same to said Stewart in account; and after the said redemption by Powers as aforesaid, said John Craig continued to receive the rents of said Congress Hall, under and by virtue of said assignment of said term as aforesaid, and he receipted the said rents in his own name, monthly, to the tenant in possession, except that occasionally in the absence of said Craig the said monthly rents were received of said tenant by said Daniel W. Powers, and receipted to said tenant in the name of said Craig by said Daniel W.
28 Powers, his agent, and the rents so receipted by said Powers were invariably placed to the credit of said John Craig in his bank account in said Powers' bank in Rochester aforesaid, and the rents so received by said Craig after said redemption by Powers, were placed by said Craig in his own accounts to the credit of Congress Hall—and such rents were thus received and credited by said Craig regularly till after the retransfer of the ostensible title of Congress Hall from said Powers to said John Craig as hereinafter mentioned.

Your orators further say that the said suit of said John Craig on his said indemnity bond of Litchfield was not tried till after the death of said Stewart (which occurred in May, 1863, as aforesaid), nor till sixth day of November, A. D. 1863, when the same came on by due course of practice to be tried before the Hon. Addison Gardiner, referee. And upon said trial the said John Craig, Daniel Powers, and Oliver M. Benedict were sworn as witnesses, and minutes of the evidence of said witnesses were duly taken by Oscar Craig, who was attorney for said John Craig, the plaintiff in said suit, and who is defendant herein in his capacity of executor of said John Craig; and minutes of the evidence aforesaid were also kept by the Hon. Addison Gardiner, referee as aforesaid. And on such trial the assignment and reassignment of the said

Powers' judgment hereinbefore stated were given in evidence, and said Daniel W. Powers testified of and concerning the matters in this bill before set forth, as appears by the minutes of said Oscar Craig and of said referee, as follows, viz: "That Congress Hall property is worth between $30,000 and $40,000." "I held a judgment against N. P. Stewart." "I redeemed under the sale in favor of Madison County Bank against N. P. Stewart. I think it was in March, 1862." "Mr. Benedict paid me the amount due on my judgment when he bought it of me. I did not pay anything when I took the reassignment from Mr. Benedict."

Ques. (By def't's counsel.) "What interest or inducement had you to redeem?"

29 Answer. "I had another judgment beside that. I should have redeemed on the other, if I had not on this—the other one was docketed in January, 1861—at the time I redeemed, I presume. I knew Mr. *Mr.* Craig had a mortgage on the property. I think it was on my application Mr. Benedict reassigned the judgment to me." * * * "I don't know that Mr. Craig understood that I was to redeem. I think I asked Mr. Benedict if the matter was all right and straight before redeeming."

And your orators further say that Oliver M. Benedict was called a witness by defendant in said suit, and on his direct examination testified on said last-named trial as and concerning the assignment and reassignment of said Powers' judgment and the matters hereinbefore set forth, as appears by the minutes kept by said Oscar Craig & said referee, amongst other things, as follows, viz:

"I believe I advanced money at one time to save (for Stewart) a farm in Irondequoit—not a part of this property." "Think I never advanced to buy up judgments against him." The "consideration of assignment of Powers' judgment to me was money." "I received the consideration money from Mr. N. P. Stewart, either before or immediately after assignment of the judgment—don't recollect the amount—about the amount of the judgment." "Received a good many amounts from Mr. Stewart at different times." "The consideration at the time of assigning back the judgment to Mr. Powers, nothing. I prepared papers for redemption. Don't think I went to sheriff's office when redemption was made. Powers went in person, as far as I know. Craig knew there was conversation about redeeming this property." * * "Mr. Craig was present at a conversation between Mr. Powers and me about the redemption." * * "I took the assignment of the judgment in favor of Mr. Powers, because Mr. Stewart owed me more than that amount, and requested

30 me to do so. Mr. Stewart said he wished I would consider the money paid upon his account with me, and take an assignment of the judgment as my security. This was when he paid me the money. Mr. Stewart said so, and it was more than an understanding; the suggestion came from him. Mr. Stewart's indebtedness to me at that time, I think, was considerably more than $1,800. During the years 1860 and 1861 I presume I did more or less business for Mr. Craig and Mr. Powers."

"The amount I testified Stewart owed me at the time of assignment of judgment to me was for professional services and moneys—mostly for professional services, at that time—but I think there was no time that I was not on his paper as accommodation endorser, &c. I think I have been reimbursed nearly all the money I have advanced. At the time I bought this judgment I had no securities for Stewart's indebtedness to me. Between the time of assignment of judgment to me and reassignment to Powers I undoubtedly received some money from Stewart.

I don't recollect any securities I took during that time. I think Stewart owed me about $1,800 at the time I reassigned judgment to Powers. Mr. Stewart has transferred property to me since". * * * Question by defendant's counsel. "Have you received any property to apply on the said additional indebtedness, except what you have named?" Answer. "I have received title to property since, I think, but not directly from Stewart. I took title to property in February, 1862. It was conveyed to me by Joseph Farley and wife—some land in Iowa. Stewart had ow'ed the land; had conveyed it to Joseph Farley. There was an agreement between Farley and Stewart that if Stewart would pay him a certain sum of money Farley would convey it to me. The agreement was in May, 1861." * * * "Mr. Stewart made default, and the Iowa lands were advertised for sale. The $800 which Benedict and Martindale endorsed went to protest. A man by the name of Thurber brought
31 some wheat for sale, and we were authorized to take out $500 of same and apply on note. Stewart thought we ought to pay the balance of $300. The farm was afterwards sold, and we got enough money out of it to reimburse us for the $300. I still have title to the Iowa lands. I think there are about 500 acres. I think I have paid about $250 for back taxes on them."

"I took a deed of 33 feet on Washington street in this city. Mr. Stewart said there might possibly be something realized out of it, and if so he wanted I should have it." * * * "The date of the deed is October 18th, 1860." * * * "On the sixth September, 1860, Stewart conveyed to me his title to the Congress Hall livery barn, with the same understanding as the Washington street property." * * * "In respect to the conveyances of Washington street and Mill street" (property) "attachments were being issued against him, and Mr. Stewart said he wanted me to take the property so as to protect me instead of other creditors." * * * "Mr. Stewart said he think it was worth while to prosecute the appeal to the court of appeals. Mr. Stewart was paralyzed. I first wrote to him. He understood what was said to him." * * * "The appeal to the court of appeals was made for the purpose of getting a more favorable settlement."

Your orators further say that the said John Craig was present on the said trial before the said referee, and heard the foregoing testimony of said Benedict and Powers, and on being sworn for the defendant in said cause was questioned in relation to the facts thus given in evidence by said Powers and Benedict, and testified in relation thereto, amongst other things, as follows, as appears by the said minutes of said referee, and of said Oscar Craig, taken on the said trial, viz:

"At the time I took the indemnity mortgage I don't think I knew Mr. Powers had a judgment against the mortgaged property. I
32 don't think I had a search. I relied on Stewart's statements. Mr. Benedict drew the papers. I don't recollect when I learned Mr. Powers had a judgment against the mortgaged property. I don't recollect that I knew of the assignment of the Powers judgment to Benedict. I don't know that I had any conversation with Mr. Powers or Mr. Benedict relative to the redemption. I don't know that it was talked over by us in Benedict's office. I don't recollect whether I knew that Powers had a second judgment about the time of redemption. I don't know whether I heard of the assignment from Powers to Benedict, or assignment to Mr. Powers by Benedict before the redemption or after it."

Question by plaintiff's counsel on cross-examination. "What did Mr. Stewart state to you at the time of taking the indemnity mortgage?" Answer. "He said the Irondequoit property was clear, and also Congress

Hall, except some mortgages which I knew of. Before justification I discovered the Madison County Bank judgment, and refused to justify unless it was removed. I communicated that refusal. Mr. Stewart, then, instead of removing it sent the bond in suit to me. After receiving this bond I justified. Judgment has been recovered against me on general term undertaking, and I have paid it." On being reexamined by pl'ff's counsel he testified: "This judgment against me has been assigned to Mr. Powers, as I suppose I paid to him as the holder of it." * * * "At the time the property was advertised under execution on judgment for trustees of Madison County Bank, I think I knew of the intended sale. I was present at the sale. I think Mr. Benedict was there. I think Mr. Powers was not there. At the time of the redemption by Mr. Powers I think I understood the judgment of Powers had been assigned to Benedict. I was never reque ted to justify after exception on the undertaking given on the undertaking to the court of appeals."

Your orators further say that after the said evidence was given
33 as aforesaid with other evidence in said cause, the case was submitted to said referee, and on the 3d day of December, A. D. 1863, the said referee made a report in said cause, finding for the plaintiff against the defendant for the sum of $5,000, the penalty of said bond and costs, copy of which said report is hereto annexed and marked Exhibit 2, upon which finding judgment was afterwards, to wit, on the 5th day of said December, 1863, duly entered thereon.

Your orators further say that prior to the trial before the said referee last above mentioned, the said Litchfield had filed a complaint in said New York supreme court, and commenced a suit therein against the said Craig and said Powers, in the nature of a cross bill to said Craig's action aforesaid on said bond, and had duly filed and served said complaint, a copy of which is hereto annexed, and marked Exhibit 3. And after said trial, the said Oscar Craig and said Benedict drew answers to said complaint of said Litchfield, and said Oscar Craig appeared in said cross-suit as attorney for said John Craig, and the said Oliver M. Benedict appeared in said cross-suit as attorney for said Daniel W. Powers, and an answer for said Craig to said last named complaint having been prepared by said Oscar Craig and Benedict, of which Exhibit 4, hereto annexed, is a copy; the same was signed and sworn to by the said John Craig, as shown by the copy hereto annexed, and the same was afterwards served by delivering the same through the mails to Messrs. Tracy, Wait and Olmstead, the attorneys of said Litchfield in said suit, by due course of practice. And an answer of said Daniel W. Powers to said last named complaint of said Litchfield was prepared by said Oliver M. Benedict, a copy of which is hereto annexed and marked Exhibit 5, and the same was duly signed and sworn to, as shown by the copy hereto annexed by said Powers, and a copy thereof duly served on said attorneys of said Litchfield as the answer of said Powers to said cross-bill of said Litchfield.

Your orators further say that soon after the coming in of said
34 answers last mentioned of said Powers and Craig, to wit, about the first day of March, A. D. 1864, the said Litchfield gave up litigating in respect to his liability on said bond, and then and there paid to said Craig the judgment rendered as aforesaid on said report of said referee as aforesaid, for $5,000, and costs.

Your orators further say that on the 10th day of March, A. D. 1864, the said Benedict and Craig sold and conveyed the said Washington

street property to D. W. Eaton and E. C. Marsh, bona fide purchasers thereof, for $2,100.

And that on the seventh day of May, A. D. 1864, the said Daniel W. Powers and wife conveyed to said John Craig by quit-claim deed, the said Congress Hall property for the nominal consideration of $1,753.25. And that said Powers and Craig pretended then, and said Powers now pretends, that the conveyance last aforesaid was made between them for the consideration of the payment by said Craig to said Powers of his said deficiency judgment against said Stewart; and that said payment of said deficiency judgment was the sole consideration paid to said Powers for the said conveyance of said Congress Hall property by said Powers to said Craig. And although the said redemption title had then ostensibly been held by said Powers for more than two years prior to said last named conveyance to said Craig, nothing was paid or pretended to have been paid by said Craig to said Powers for the judgment under which said Powers redeemed, or for the rents that had been collected by said Craig since the aforesaid redemption thereof by said Powers. And you orators aver that said Congress Hall property was worth at the time of the last named conveyance by said Powers to said Craig, at least $40,000, and that at the time said Stewart gave to said Craig his indemnity mortgage on said Congress Hall, the said Stewart valued the same at $40,000.

Your orators further say that neither said John Craig or his representatives have ever been in actual possession of said Congress Hall property, but that from the said first day of May, 1860, to the
35 time of the decease of said John Craig, the rents of said Congress Hall were regularly and monthly paid in advance to said John Craig by the tenants in possession thereof, at the rate of $3,600 per annum up to the first day of May, A. D. 1870, and since that time up to the time of filing this bill of complaint, the rental has been at the rate of $4,800 per annum, or $400 each month in advance, and the said rents were paid to the said John Craig during his lifetime, and since his decease to the said Daniel W. Powers and Oscar Craig, his executors, or to the said Helen Maria Powers, the defendants hereinbefore named. And that the said John Craig received the rents of the said Congress Hall barn property from the said Benedict, from the date of the said foreclosure sale thereof by Powers, to the date of the pretended purchase thereof from said Powers, on the 15th day of November, A. D., 1861. And since that time to the decease of said Craig, he received the rents of said barn property. And since his decease the rents thereof have been received by said executors or the said Helen Maria Powers.

Your orators further say that the said Oliver M. Benedict, while engaged in the said conspiracy with said Stewart hereinbefore alleged, and in the testimony hereinbefore set forth, as given by said Benedict in said Litchfield suit, gave out and pretended that the said Stewart was largely indebted to him, said Benedict, and that the various transfers from said Stewart to said Benedict, of property hereinbefore set forth, as well as the assignment of the said judgment, which said Benedict paid as aforesaid to Powers with the money of said Stewart, were made and assigned to said Benedict for the purpose of securing to said Benedict the aforementioned indebtedness of said Stewart to said Benedict. Which said pretenses of said Benedict your orators allege to have been mala fide, and that in fact said indebtedness of said Stewart to said Benedict amounted, at the time said judgment was assigned
36 by Powers to Benedict as hereinbefore stated, to only $1,800, which then stood in open account for professional services, which

account was subsequently, to wit, on the 3d day of May, A. D. 1861, settled between said Stewart and Benedict, and a receipt and statement of settlement, of which the following is a copy, was given in full settlement of said account, to wit:

Received Rochester, May 3d, 1861, of N. P. Stewart, his notes:

Due 15 June, 1861	$550 00
Due 15 July, 1861	500 00
Due 20 Aug., 1861	861 50
	$1,911 50

Which, when paid, will be in full for legal services up to November 3d, 1860.

BENEDICT & MARTINDALE.

And that on the 30th day of October, A. D. 1860, and the 3d day of November, 1860, the said Benedict wrote and sent to said Stewart at Detroit, the letter respecting said account, copies of which are hereto annexed and marked respectively, Schedules L and M. And your orators aver that when said Benedict reassigned to said Powers the said judgment, which the former had paid to the latter with Stewart's money aforesaid, no provision was made or pretended to be made by means of which the said judgment or the property intended to be redeemed thereunder should be used, applied or held for security for said Benedict for any amount whatever; nor at any time since the said redemption under said judgment up to the present time, has said Powers paid or pretended to pay, nor said Benedict received or pretended to receive, anything on account of or as consideration for said reassignment of said judgment by said Benedict to said Powers.

Your orators further say that the lands of said Stewart, in the State of Iowa, hereinbefore mentioned, and also mentioned in the testimony of said Benedict hereinbefore set forth, were worth at the time
37 they were turned out to said Farley, at least five thousand dollars, or $10 per acre, and that the debt of said Farley upon which said lands were turned out to him as security, was interest on a mortgage debt resting on the farm in Irondequoit, hereinbefore mentioned as purchased by said Stewart and deeded to the wife of said Stewart, and that said Benedict and Martindale endorsed to said Farley the note of Stewart to Farley, which was secured by deed of said Iowa lands to Farley, and that said note was paid to said Benedict, as stated in letter of said Benedict hereinbefore set forth, to Mrs. Stewart, under date of July 2d, 1862, with the avails of the sale of said Irondequoit farm and of Stewart's wheat as stated in said letter, leaving the title of said Iowa lands in said Benedict—or Benedict and Martindale—unincumbered except by the sum of $250, stated in Benedict's testimony aforesaid as paid by him for taxes on said property, which were paid by said Benedict on request of Mrs. Stewart in answer to letter of said Benedict in respect thereof of March 27th, 1862, hereinbefore set forth, or by said Benedict on his own motion in the exercise of his discretion and in pursuance of the fraudulent plan, design, and understanding with Stewart aforesaid.

Your orators further show that the said Daniel W. Powers, by two several deeds in which his wife joined, dated respectively on the 24th day of April, A. D. 1863, and recorded in the registry of deeds for Monroe County aforesaid, in book of deeds No. 177, pp. 407 and 413, the said Powers conveyed, with warranty, to Mortimer F. Reynolds, of said

Monroe County, for the consideration of four thousand seven hundred and twenty-five dollars, then paid by said Reynolds to said Powers therefor, the aforesaid Irondequoit property of said Stewart, which said Powers had redeemed as aforesaid under the said judgment so reassigned to him, said Powers as aforesaid, and that said Reynolds was a bona fide purchaser of said property from said Powers for value as aforesaid, without notice of the matters hereinbefore set forth.

38 Your orators further say that the said John Craig kept secret the aforesaid deed of Congress Hall property aforesaid, so executed as aforesaid by said Powers to said Craig on May 7th, 1864, until the 9th day of February, A. D. 1867, at which last-named date the said Craig caused the same to be put on record in said registry of deeds in Monroe County aforesaid.

Your orators further say that after the recording of the said deed as last aforesaid by said Craig, to wit, on the 13th July, A. D. 1867, the said Elisha C. Litchfield procured the said Henry Ten Eyck to commence suit in the New York supreme court against the said John Craig, which suit was brought to issue some time in December, A. D. 1867, on the complaint and answer, copies of which respectively are hereto annexed and marked Exhibits 6 and 7; which said issue was brought on to be tried before Hon. James C. Smith, circuit judge, on the 14th day of July, A. D. 1871, at the city of Rochester, in said county of Monroe. And upon the trial of the issue last aforesaid the said John Craig, Daniel W. Powers, and Oliver M. Benedict were respectively sworn as witnesses, and Edward C. Purcell, who was then at the time of said trial in possession of said Congress Hall property, was also sworn as a witness, and the said witnesses on such trial respectively testified and gave the evidence in such suit which appears in Schedule 8 hereto annexed, which is a copy of the stenographer's minutes of said trial, and contains a correct statement of the oral evidence of said witnesses respectively as the same was given upon said trial, as well as statement of the documentary evidence that was offered, and among the latter was included copies of the complaint of Litchfield and the answers of said Powers and Craig respectively to the cross bill of said Litchfield, in his former suit hereinbefore set forth, and copies of which said pleadings are annexed to this bill, and the same were produced in evidence on the said trial before Judge Smith, under a stipulation signed by the counsel of the respective parties, of which the following is a copy, viz:

39 Supreme court.

HENRY TEN EYCK
vs.
JOHN CRAIG AND ELISHA C. LITCHFIELD.

It is admitted (stipulated) by the counsel for the respective parties in this action that the within copy of the amended complaint and two answers may be offered in evidence as the original, subject to such objections only as could be made to the original; and if admitted in evidence may be read with the same effect as the original.

Sept. 8, 1868.

H. R. SELDEN,
Attorney for Plaintiff.
G. F. DANFORTH,
Attorney for Craig.

That said John Craig was present at the trial aforesaid, and so was the said Daniel W. Powers, and the attention of the latter was called to said copy of his said answer, while giving his testimony, and he read a portion of said answer and testified concerning the same as shown by the stenographer's minutes aforesaid.

Your orators further say that said evidence having been given before said circuit judge as aforesaid, the said cause was submitted and afterwards, to wit, on or about the 13th September, A. D. 1873, the said circuit judge filed in said supreme court his decision finding on said issues in writing, and signed by him, in the words and figures of Exhibit 9, hereto annexed, and afterwards in due course of practice in said cause judgment was entered accordingly; and afterwards the said John Craig having duly appealed from said judgment to the supreme court in banc, in the fourth department, the said judgment was reversed and a new trial ordered. Whereupon afterwards an appeal to the court of appeals of the State of New York was taken in behalf of said Ten Eyck
40 under stipulation for judgment absolute, according to the statute practice in such cases; and the said cause coming on to be heard before said court of appeals, the same was argued and decided in favor of the respondents in said appeal, in which said last-named judgment it was held and decided:

1st. That the redemption of said Powers under the judgment so reassigned, as hereinbefore stated by said Benedict to said Powers, was null and void; and that the transaction between said Benedict and Stewart, wherein the said judgment was paid with Stewart's money, and assigned by Powers at Stewart's suggestion, to said Benedict, leaving the same uncancelled of record, was fraudulent, and intended to defraud said Stewart's creditors.

2nd. That as against Ten Eyck, the plaintiff in said suit below, the bid of said Craig of $5, and the sheriff's certificate to Craig thereon, constituted an equitable title which said Ten Eyck, claiming on said record as grantee of said Stewart, and thereby standing in his shoes as a party to the fraud in the first-named finding set forth, could not be heard to question, on the ground of any frauds to which his said grantor was a party. And upon said finding and judgment of said court of appeals, judgment was finally rendered under the stipulation in the supreme court, in Monroe County aforesaid, in the year 1876.

Your orators further say that your orator Whittemore acted as counsel in said last named suit of Ten Eyck vs. Craig, under an arrangement with said Litchfield, by which it was understood between said Litchfield and Whittemore that their respective debts against said Stewart should be paid out of the avails of recovery in the name of Ten Eyck under his ostensible title aforesaid, said Litchfield having assured said Whittemore that said Ten Eyck had executed and delivered to said Litchfield a quit-claim deed of said property, and that the latter held the said deed in trust for the purposes of the arrangement aforesaid. But that said Litchfield died in November, 1873, and said Ten Eyck has
41 since informed said Whittemore that though he did execute such deed as stated by said Litchfield in the life-time of the latter, yet that the said deed was never delivered to said Litchfield, but retained among the papers of said Ten Eyck till after said Litchfield's death. As to how the fact is in respect thereto, your orators are ignorant, and pray an answer of said Ten Eyck as to how the fact may be.

Your orators further say that some time in the year 1872 the said John Craig, deceased, testate, in the city of Rochester aforesaid, which was the place of his residence at that time, leaving and devising by his

last will and testament all his real estate to the said Helen Maria Powers, hereinbefore named, and appointing the said Oscar Craig and Daniel W. Powers, hereinbefore named, executors of his said last will and testament, with power to manage and convey his real estate, who have both duly accepted the trusts under said will.

Your orators further say that the said Oliver M. Benedict deceased at the said city of Rochester, the place of his residence, some time in the year 1874.

Your orators further say that on the 11th day of April, A. D. 1876, and after the final decision of the said Ten Eyck suit in the court of appeals, your orator, Joseph P. Whittemore, commenced a suit in ejectment on the law side of this honorable court to recover the possession of the said Congress Hall property, under and by virtue of the sheriff's deed of said property, so as aforesaid executed and delivered to said Whittemore by the sheriff of Monroe County, by service of process and declaration upon James Terry, the tenant in possession of said Congress Hall property, in which said suit issue has been joined by filing and service of plea of the general issue by the said George F. Danforth, the defendant's attorney in said suit. That said issue is now pending and stands for trial; and the deposition of said Mrs. Stewart has been taken in said ejectment suit de bene esse. And that the said tenant claims to justify and hold his possession under the said Helen Maria Powers,
42 devisee of John Craig, as aforesaid. And the said Helen Maria Powers proposes to and is defending said ejectment in the name of said tenant, and she claims to hold said property and the possession thereof under the said redemption title, so procured as aforesaid by said Daniel W. Powers, and conveyed to the said Daniel W. Powers to the said John Craig, as hereinbefore set forth. And as your orators are informed and believe, the said Helen Maria Powers intends to insist on the said redemption title last aforesaid, as authorizing her to hold said property in her own right against said Whittemore's right to recovery in said ejectment, and also upon the ostensible title conveyed by the said deed to Henry K. Sanger, and the will of said Nelson P. Stewart, hereinbefore mentioned, as also a voluntary general assignment executed by said Stewart in Michigan, on the 20th of June, A. D. 1862, of all his real and personal property, as cutting off the lien of your orator Whittemore's judgment and execution aforesaid, upon the Congress Hall property. And that she intends to insist on said will of said Stewart, as transferring the legal title of said Congress Hall property to the widow and heirs of said Stewart, anterior to the scire facias proceedings upon the judgment of said Whittemore hereinbefore set forth, claiming thus to invalidate the revival of said Whittemore's said judgment, and the execution issued in pursuance thereof, for want of service upon the devisees under said will.

Whereas your orators insist that the said defendants, claiming to hold under said fraudulent redemption title so obtained as aforesaid, are estopped from so far questioning the redemption title so fraudulently obtained as aforesaid, as to be enabled to assert or set up against your orators any act or deed of said Stewart subsequent to the 17th day of December, A. D. 1860 (the date of the sale under which defendants claim), as affecting or transferring the title of said Stewart against your orators or either of them. And your orators allege as to all or any of such subsequent acts or deeds of said Stewart (except the will afore-
43 said), that they and each of them, as well as the said deed to Henry K. Sanger, were performed or made with the same fraudulent intent of said Stewart, and were but acts and deeds with the

same fraudulent design on his part as those hereinbefore alleged and set forth.

Your orators charge that the said defendant, Helen Maria Powers, devisee as aforesaid, insists against your orator Whittemore's right of recovery in said ejectment suit, that she has been invested by the will aforesaid of said John Craig, deceased, with the rights of mortgagee in possession under the mortgages of said Craig, hereinbefore mentioned, and that as such she cannot be divested of such right by an action of law, but only in an equitable action for an accounting and redemption in equity; and as to the latter action, that it is barred by the statute of limitations of the State of New York. As to which said several pretenses your orators aver that, although the said Helen Maria Powers has been invested by the will of said John Craig with all the rights of said deceased, both under his said indemnity mortgages and the prior mortgages of said Craig, and under the said so-called assignment of the Robert D. Cook lease, yet that said Craig declared in his lifetime that he never held as mortgagee in possession. And your orators aver also that the said John Craig in his lifetime collected rents under the said Cook lease assignment, and from other securities in his hands against said Stewart sufficient to pay, and which did pay all of said mortgages and interest, and the full amount of his liabilities in behalf of said Stewart on the said appeal bond signed for said Stewart to Dehon. And although it may be doubtful whether in law such facts may be shown to sustain the said ejectment suit of your orator Whittemore, your orators insist that such doubt furnishes good grounds for the interference of this court in aid of said ejectment suit, as hereinafter prayed, and your orators aver that the statutes of limitations of the State of New York do *no* not apply to or run against the case of your orators in this bill set forth, nor to any cases in which fraud is involved, except to cases
44 of frauds fully known for ten years prior to action brought seeking relief against transactions infected therewith.

Your orators further say that the said defendants give out and pretend and claim that the said John Craig, by virtue of his said sheriff's certificate of sale of the said Congress Hall property, obtained an equitable title to said Congress Hall property, which is good in this court of equity against your orators' claims, or the claims of either of them; in avoidance of which said claims and pretenses your orators insist as creditors of said Stewart upon the frauds and collusion hereinbefore set forth, through which the said apparent equitable title was obtained, and by which the same became perfected by apparent default at the expiration of twelve months after the execution sale. Also your orators insist upon the fraud and collusion hereinbefore set forth, through and by means of which the said apparent equitable title was surrendered by said Craig to said Powers, in furtherance of the fraudulent redemption proceedings and scheme hereinbefore set forth, wherein and whereby said Craig received back from said Powers the money he had bid, and, so far as he was concerned, merged his equity in Powers' fraudulent redemption, and extinguished his own equity (if he ever had any), which rested solely upon the money he had bid. And your orators also insist against such a claim of an equity resting upon the money he had bid as aforesaid, the recovery hereinbefore set forth, by said Craig, of said Litchfield, the surety of said Stewart, upon the said indemnity bond of said Litchfield, whereby said Craig recovered of and was repaid by said Litchfield the money he had bid as aforesaid, and thereby leaving said bid as a debt against said Stewart in favor of said

Litchfield, instead of the said bid being left to rest as satisfied by the sale of said Stewart's property.

And your orators further show that the statutes of Michigan, in limitation of all actions against the estates of deceased persons, do not begin to operate till after letters testamentary or of administration are issued on such estates.

45 Wherefore, in consideration of the premises, your orators pray that the said defendants, respectively, may answer this bill under oath according to their and each of their best knowledge, remembrance, hearsay, information, or belief. And that the estate of the said deceased Stewart in the State of New York may be settled under the decree and direction of this honorable court, and that the property of the said Stewart, deceased, or the avails thereof which have come to the hands of the defendants, or either of them, as hereinbefore alleged in their representative character or characters, or otherwise, may be applied in payment of his debts under the decree and order of this court according to the rules of law and equity in such cases, having due regard to the legal preferences fairly obtained by diligence and legal proceedings, giving such preferences among the various creditors of said Stewart as to the court shall seem meet, and as they are hereinbefore shown, or shall hereafter appear to be entitled. And that the redemption title of the said Congress Hall property hereinbefore described, and which was obtained by said John Craig, as in this bill stated, and the said deed to Henry K. Sanger, be declared collusive and fraudulent and void against your orators and the other creditors of said Nelson P. Stewart, and that the apparent equitable title which the said John Craig claimed in his lifetime, or his heirs, executors, or devicees claim under since his death, arising out of or under his said bid at the execution sale on said judgment of the said trustees of the Madison County Bank, and the sheriff's certificate given to said Craig on such sale, be declared fraudulent and void against your orators, and each of them. And that the said Helen Maria Powers and said executors be decreed to convey the said Congress Hall property to the complainant Whittemore in satisfaction of his said judgment and execution sale hereinbefore set forth, or to the receiver to be appointed in this cause, as hereinafter prayed, accordingly as this court shall find and decree as to the validity of the legal pro-

46 ceedings of said Whittemore, hereinbefore set forth, as being effectual at law to divest the said Stewart's title and invest the said Whittemore with the legal title thereof, in view of the objections hereinbefore stated, as urged by the defendants in the said ejectment suit of said Whittemore; and in case said objections to said Whittemore's said alleged legal title shall be held to be invalid, then that the said judgment of said Whittemore, upon which his said bid and sale were made, be allowed as a debt and lien on said Congress Hall and other property of said Stewart as aforesaid, and to be paid accordingly, and according to priority of lien with respect to other judgment creditors of said Stewart who shall come in and prove their claims before the receiver herein to be appointed. And in case said Whittemore's title to said Congress Hall property shall be held by this court to be valid, that then the said Helen Maria Powers and the said executors of said John Craig, deceased, be decreed to account to said Whittemore for the rents of said Congress Hall property since the date of said Whittemore's sheriff's deed thereof, and pay the net avails of said rents to him. And that the said executors of said John Craig, deceased, be decreed to account to the receiver hereinafter prayed to be appointed, for all the rents of the said Congress Hall property received by the said John

Craig in his lifetime, from the first day of May, A. D. 1860, and up to the date of said Whittemore's sheriff's deed aforesaid; and if this court shall find and decree that said Whittemore's legal title is invalid, that in that case the defendant's heir and executors aforesaid be decreed to account to said receiver for all the rents of said Congress Hall property received by the said John Craig in his lifetime, or the defendants, or either of them, since his death.

And your orators pray that the said deed of the Congress Hall barn property hereinbefore described, which was first deeded by Stewart to Benedict, and afterwards obtained by said Powers on foreclosure, as in this bill set forth, and which was afterwards deeded to
47 said Craig as hereinbefore stated, be declared and decreed to have been obtained by said Powers, and conveyed by Powers to Craig, in collusion with said Benedict and Stewart, in fraud of your orators and other creditors of said Stewart; and that the said estate of said John Craig be declared and decreed to hold said barn property in trust for your orators and the creditors aforesaid. And that the defendants, Helen Maria Powers and said executors, be decreed and ordered to convey by quit-claim deed the said barn property to the receiver hereinafter prayed to be appointed. And that she and the defendants may be decreed to account for the net rents of said property since the 15th day of November, A. D. 1861, to such receiver.

Also, that the redemption by defendant Powers of the said Irondequoit property in this bill mentioned, be declared by the decree of this court to have been collusive and fraudulent against your orators and the other creditors of said Stewart; and that the said Powers be decreed to account to the receiver to be appointed in this cause for the avails of the sale of said Irondequoit property, since he sold the same to said Mortimer F. Reynolds as in this bill stated, with interest on such avails to the time of accounting.

Your orators further pray that a receiver may be appointed of the property and effects of said Stewart, deceased, with the usual powers and duties in such cases, and to receive the conveyances hereinbefore prayed, with power also to credit and allow claims of creditors, as they may be established and proved before him under the direction of this court, against the estate of said Stewart, deceased, and to pay the same as directed by the court. And that an injunction be issued in this cause, staying the trial of the ejectment suit of said Whittemore hereinbefore mentioned, till *till* the further order of this court, and at least till an answer to this bill shall be put in.

And that process of subpœna of this court be issued and directed to the said Helen Maria Powers, sole heir and devisee of said John
48 Craig, deceased, and to the said Daniel W. Powers personally, and to said Daniel W. Powers and Oscar Craig, executors of the last will and testament of said John Craig, deceased, and to the said Henry Ten Eyck, requiring them and each of them to appear and answer this bill, and to abide by and perform the decree of this court in the premises, or for such other or further relief in the premises as this court shall see fit to grant. And your orators will ever pray, &c.

HENRY N. WALKER.
JOSEPH P. WHITTEMORE.

THEODORE BACON,
Complainant's Solicitor.
H. R. SELDEN,
Of Counsel.

UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

On this 13th day of September, A. D. 1876, personally appeared before me the within named Henry N. Walker and Joseph P. Whittemore, the parties complainant within named, who signed the foregoing bill of complaint; and they, being severally by me sworn, did each for himself depose that they each had read the foregoing bill of complaint, and that they know the contents thereof, and that to the best of their knowledge and belief, respectively, the same is true.

Witness my hand and official seal, at Detroit, the day and year aforesaid.

[L. S.] ADDISON MANDELL,
Commissioner of Circuit Court of the United States for the Eastern Dist. of Michigan.

49 SCHEDULE A.

Know all men by these presents, that we, Nelson P. Stewart, of Detroit, Michigan; George K. Johnson, of Grand Rapids, Michigan, and Elisha C. Litchfield, of Cazenovia, Madison County, New York, are held and firmly bound to John Craig, of Rochester, New York, in the penal sum of five thousand dollars, for which sum well and truly to be paid to the said John Craig, his executors, administrators, or as-
50 signs, we bind ourselves, jointly and severally, and our respective heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated at Detroit, on the first day of June, A. D., one thousand eight hundred and sixty.

The condition of this obligation is as follows: Whereas, Theodore Dehon, of New York, did heretofore recover against said Nelson P. Stewart, a judgment in the supreme court of New York, for the first judicial circuit, for the sum of ten thousand dollars and upwards (as by reference to the record whereof will more fully appear, that being the only judgment in said court of said Dehon against said Stewart).

And whereas said Stewart did appeal from said judgment to the general term of said supreme court, which appeal is still pending and undecided, and did give an undertaking on said appeal to stay execution on said judgment.

And whereas the above named John Craig did, on said Stewart's request, become security on said undertaking, together with Joseph Farley. And whereas for the indemnification of said John Craig, said Stewart did heretofore mortgage to said John Craig certain real estate situated in Erie County and Monroe County, New York. And whereas, on a portion of said premises so mortgaged to said Craig by said Stewart, the Madison County Bank, of New York, or the trustees thereof, have caused a levy to be made by virtue of an execution issued upon a judgment against said Stewart in favor of said bank or said trustees, in the supreme court of New York, for the sum of two thousand five hundred dollars and interest and costs. Now, if said Stewart and said Johnson, and said Litchfield, or either of them, shall before the sale, by virtue of any process issued upon or through said judgment of said Madison County Bank or its trustees, of any portion of the premises so mortgaged by said Stewart to said Craig, discharge said premises
51 from such process, and from the lien of said judgment and render and keep said property so mortgaged, free therefrom, and shall in all respects fully and entirely free and relieve said property so mortgaged to said Craig from the lien of said judgment, and fully preserve

and keep unimpaired the security of said mortgage to said Craig, from and against the lien and operation of said judgment, so that said security shall not thereby be lessened or impaired, then this obligation to be void; otherwise to remain in full force and effect.

NELSON P. STEWART. [L. S.]
GEORGE K. JOHNSON. [L. S.]
ELISHA C. LITCHFIELD. [L. S.]

Signed and sealed in the presence of—
FRED'K S. STEWART.

SCHEDULE B.

ROCHESTER, *Nov.* 18, 1861.

Mrs. N. P. STEWART, Detroit:

DEAR MADAM: I have been expecting daily to hear from Detroit as to how Mr. Stewart was getting along, and as to what was being done. I have heard nothing yet either from Mr. Thurber or Mr. Owen. Suppose you speak to Mr. Owen or Sanger to write me, giving the statement of matters which I asked Mr. Owen to send me, and which I understood him to assent to. Have you been able to sell the carriage (which came from Pontiac)? If you can sell it for $200, do so, and send me the money to apply upon matters here; if you can it will help so much.

Don't let Mr. Stewart make an assignment at present. I do not understand why Mr. Owen delays sending the statement. I think you better box and send to me as we talked; put in what you like without much reference to the mortgage, as I do not think there will ever
52 be any claim made under it. Please let me hear from you on these matters, as I fear delays will be detrimental. I have arranged the interest with Elwood, and have seen Mr. Farley, and can procure some delay there, if I can see how we can raise the money to meet it a few weeks hence. We ought to get enough together to take care of these payments. Let me hear from you, if convenient, immediately. With kind regards to you,

I am, very truly, &c.,

O. M. BENEDICT.

SCHEDULE C.

ROCHESTER, *Dec. 23d*, 1861.

Mrs. N. P. STEWART, *Detroit:*

Received yours by due course of mail, and its contents noted and fully understood; it will all be well and shall attend to your interests. I think I shall succeed in doing something for you.

I wish Mr. Owen would answer my suggestions to him, so that I can see to some matters while in New York, as I intend to go this week. If he will write at once I will be obliged. You know I asked him to take $3,000 or $4,000 for the bank's interest in that chattel mortgage. See him and have him write at once; ask him and Mr. Sanger to do it. In respect to the assignment, I have not changed my mind at all. I should have been glad to have seen Mr. Gray, and to learn what benefit could arise from an assignment. He might write me and explain. In respect to my being one of the assignees, I hardly know what to say, nor do I see what benefit I could be; it looks to me as if it would be disastrous in any view. You cannot, after an assignment is made, control any

property, and it would all go. You better box, as I said to you, and send to me, or as you may see fit, such of the property as we con-
53 cluded ought to be devoted to the payment of your sister's demands. Pack silver, such as urn, knives, forks, spoons, china, glassware, &c. You remember that a bill of sale was made to Rebecca when I was there. If you want to sell some of the knives and forks, you may send them to me, with the prices.

If I am well enough I design to go to New York on Thursday evening. I have not been very well since my return home, and have spent four days in the trial of our cause. I shall endeavor to do for your interests, and I think I see where and how it is to be done.

Let me hear from you on receipt of this, so that I shall get your letter by Thursday morning.

Very truly, &c.,

O. M. BENEDICT.

SCHEDULE D.

ROCHESTER, *March* 27, '62.

Mrs. N. P. STEWART, *Detroit :*

I am in receipt of yours of the 26th inst., and regret the position of affairs. I am now well satisfied that a journey to Detroit would be a useless expense, unless I could have the ear of Mr. Emmons, nothing could be probably done, and I infer that there is no probability that he would give matters any attention. You are aware that I am, in Mr. Martindale's absence, quite alone, and it is very difficult for me to be absent even for a day. Yet I should have gone to Detroit before this day, if I could have seen that matters were in shape so we could do something. I am willing and anxious to be of some service in the adjustment of Mr. Stewart's affairs, but there can be no use in making journeys and doing nothing. You know that I drew and executed several papers when last in Detroit, and I am not aware that I could add to their efficacy now. I wish Emmons or Gray would see
54 what they think ought to be done, and there would be time to consult in respect to it. I feel very anxious to have Mr. Stewart cared for, but do not see, as I have said, that my presence there without Emmons or Gray's plans before me could be of any service. Ask Mr. Emmons or Gray to write to me, if they will, what they think ought to be done.

Mrs. Stewart, an assignment instead of furnishing you anything for expenses, must necessarily have shorn you of all means. An assignment could not create property nor put you in funds. Have you sold the carriage or horses? If not you had better while the power and authority to do so continues.

Do you want the taxes paid on the Iowa lands? They should be to save it. I have not yet been able to get matters with Litchfield in shape to make it safe for me to make an offer for the chattel mortgage to Mr. Sanger. Now, as to money, you ought not to use it up just now, and thus put everything beyond your reach, but sell some things there and expend the proceeds, rather than draw upon this fund and then find both gone. Still, if it is insisted upon, I have no power or disposition to decide how it shall be done. I advised when there what I thought ought to be done in respect to certain articles of property. I have never heard whether anything has been done in pursuance of such advice and suggestions.

On the receipt of this please see Emmons. Send for him to come to

the house to see you, and he will come; also Gray, and let them fix upon a plan which they think ought to be adopted. I have confidence that either, or both, will advise you to a judicious course, if they can see the whole case. It was very queer if Mr. Stewart wants me to come up mainly to bring money, that can be sent just as well. Let me hear as soon as you see E. and G.

Yours, very truly,

O. M. BENEDICT.

55 SCHEDULE E.

ROCHESTER, *April 5th*, 1862.

Mrs. N. P. STEWART, *Detroit:*

I have received yours of yesterday, and am sorry to hear of your accumulated troubles. Do you know what the character of the claim is for which the furniture is attached? Is it an execution, or what? I have a sort of suspicion that it is for taxes, for I remember that when I was up something was said by some one about taxes at Pontiac.

Can you answer me this? then I can tell better far, for taxes any property on the premises may be taken without regard to ownership, in this State, and I think it is so there.

Answer by return mail, and I will advise you what to do, as I do not now know whether you can hold or not, and if for taxes, probably you would fail in a replevin suit.

It is too late to-day, but I will send you $250 on Monday.

Yours, &c.,

O. M. BENEDICT.

SCHEDULE F.

ROCHESTER, *April 22d*, 1862.

Mrs. N. P. STEWART, *Detroit:*

Please find enclosed check for $100. Let me hear that you receive it. I really hope that something will be done to aid you to save something.

You do not say how Mr. Stewart is. Does he improve any? Please remember me to him, and assure him of my willingness to come up if I can aid any in putting his affairs in shape.

Yours, very truly,

O. M. BENEDICT.

56 SCHEDULE G.

(Quit-Claim Deed. Printed and sold by Benton & Andrews, Rochester.)

This indenture, made this twenty-seventh day of May, in the year of our Lord one thousand eight hundred and sixty-two, between Nelson P. Stewart and Mary A., his wife, of Detroit, of the first part, and Daniel W. Powers, of Rochester, N. Y., of the second part, witnesseth, That the said party of the first part, in consideration of the sum of five hundred dollars to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have bargained, sold, remised and quit claimed, and by these presents do bargain, sell, remise and quit claim, unto the said party of the second part, and to his heirs and assigns forever, all that tract or parcel of land situate in the town of Irondequoit, County of Monroe and State of New York, beginning in the center of the river road and on the north line of the

land of Joseph Farley, south 87° 30′ E. along the north line of said line of said land thirty one chains 41 links, thence south one degree 45′ west parallel with the east line of said J. Farley's land, eight chains and 58 links to the centre of Buckthorne Avenue; then south 88° 30′ west along the center of said avenue, being thirty-seven and one-half links north from the center of a buckthorne hedge, thirty chains fifty-three links to the center of the aforesaid river road, thence along the center of said road north one degree 30′ E. eight chains seventy-nine links; thence north two degrees west four chains ninety-one links to the place of beginning, containing thirty acres of land. Also all that tract or parcel of land situate in the town aforesaid, bounded as follows: beginning at a point in the center of the Ridge road nine chains and two links easterly at right angles from the east line of the Carthage tract; thence north one degree 45′ east parallel with the east line of said tract, eight chains
57 and forty links to a stake; thence north 87° 30′ west four chains and forty-four links to a stake; thence south 1° 45′ west parallel with the east line, nine chains and eighty-eight links to the center of the Ridge road, thence north 68° 15′ east along the center of said road two chains and fifty-two links, to an angle thence north thirty-one degrees east along the center of said road to the place of beginning, containing four acres of land, being lot four (4) on a map of J. Farley's farm, made by F. J. M. Cornell, surveyor, recorded in Monroe Co. in liber 117 of deeds, page 498. Also the following described land beginning on the north line of the Ridge road at a stake distant four chains and seventy-nine links at right angles from the east line of J. Farley's land, thence north 1° 45′ E. seven chains and twenty-three links to a stake standing 17½ links south of a small hickory tree marked; thence north 87° 30′ west, four chains and twenty-three links to a stake; thence southerly parallel with the east line seven chains and ninety-four links to the north line of the Ridge road; thence north 81′ east along the north line of said road to the place of beginning, containing three and one-fifth acres of land, designated on said map as lot No. (3.) Also, all that tract or parcel of land situate in said town of Irondequoit, being part of a tract of land conveyed to Joseph Farley by deed from John Craig and wife, dated Nov. 15th, 1843, and bounded as follows: On the north by the north line of said tract, on the east by the west line of a three-acre lot heretofore conveyed by J. Farley and wife to John Logan, and on the south by a continuation of the line of the hedge on the south side of Buckthorne avenue, and on the west by the Genesee River; also, lots Nos. 8, 9, 10, 11, and 12 on the said Cornell's map aforesaid, containing altogether about $12\frac{29}{100}$ acres. Also, a certain other lot on said tract lying south of the Ridge road, and bounded and described as follows, viz: Beginning at a point in the center of the Ridge road, N. 6° 30′ west from a large oak tree, thence on a line through said tree south 6° 30′ east two chains and twenty-three links to the south line of said tract; thence along said line south 88°
58 east 85 links to the east line of said tract; thence along said line north 31° east four chains and forty links, to the centre of said road; thence along the center of said road south 68° 15′ west three chains and sixty-five links to the place of beginning, containing about ¾ of an acre of land, for all of which reference is made to the aforesaid map. Also, all that tract or parcel of land situate in Irondequoit aforesaid, known and distinguished as follows: Beginning at a point on the top of a high bank of the Genesee River, where the north line of the thousand-acre tract intersects said bank; thence southerly, following the course of said bank twenty-seven chains and six links to the division line

between banks of N. P. Stewart and Charles T. Cherry; thence easterly in the course of said division line to the said Genesee River; thence northerly, descending said river to the north line of the aforesaid thousand-acre tract; thence easterly in said line to the place of beginning. Also, all that tract or parcel of land situate in said town of Irondequoit, and known as lots numbered six and seven (6) and (7), according to the aforesaid map of the Farley farm, and bounded as follows: On the south by the center of the Ridge road, on the west by the center of Clinton street, on the north by the lot No. eight (8), on the east by lot No. five (5) and part of lot No. four (4), containing four acres of land. Together with all and singular the hereditaments and appurtenances thereto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, and demand whatsoever of the said party of the first part, either in law or equity, of, in, and to the above bargained premises with the said hereditaments and appurtenances, to have and to hold the said premises to the said party of the second part, his heirs and assigns, to the sole and only proper benefit and behoof of the said party of the second part, his heirs and assigns forever.

59 In witness whereof the parties of the first part have hereunto set their hands and seals the day and year first above written.

Sealed and delivered in presence of—

N. P. STEWART. [L. S.]
[L. S]

SCHEDULE H.

Mr. JOHN CRAIG, *Rochester, N. Y.:*

I am satisfied that there is no use in the further prosecution of this case, and I request you to settle it up without further appeal or expenses, and oblige yours, &c.

ROCHESTER, *June* 13*th*, 1862.

ROCHESTER, *June* 13*th*, 1862.

N. P. STEWART, Esq.:

On the other side you will find a request to Mr. Craig to settle and pay up the Dehon matter. They will sue him on his bond unless it is done up without delay, and Mr. Craig does not feel willing to do it without your direction.

Please sign and return the paper to me by return mail.

I have not heard from any of you since I was there. Don't fail to answer by return mail, for I fear Mr. Craig will be sued if it is not done up promptly.

Yours, &c.,

O. M. BENEDICT.

SCHEDULE I.

ROCHESTER, *March* 13*th*, 1862.

Mrs. N. P. STEWART, *Detroit:*

I have just rec'd yours of 12th, and I regret to say that my en-
60 gagements are such that it is utterly impossible for me to leave home this week; the earliest moment I can leave is Monday eve'g, which, of course, brings me to Detroit on Tuesday morning; if I could this week I would, for I appreciate your and Mr. Stewart's anxiety.

If this will do write me on the receipt of this, so that I shall receive your letter by Saturday night's mail. Don't fail in this.

Let everything rest till I come, and you need not inform Gray that I am coming.

Say to Mr. Stewart that I will come and do what I can for him. Hoping that you are quite recovered from your illness, and that you are all in improved health,

I am, very truly, &c.,

O. M. BENEDICT.

SCHEDULE J.

ROCHESTER, *April 24th*, 1862.

Mrs. N. P. STEWART, *Detroit:*

Enclosed please find mem. from St. Luke's record, showing your marriage to have taken place Dec. 20th, 1853.

I thought some time ago that you had better ship the stuff as was suggested.

Mr. Stewart could send to me anything he chose as security to me, which has not been already assigned to you and your sister. I think you had better send me that carriage if it cannot be sold there.

Write by return mail, as I shall leave home for a few days after next Tuesday morning. Let me know immediately what you do.

I received another long letter to-day from Mr. Romeyn, but of no definite interest or account.

Yours, &c.,

O. M. BENEDICT.

61 SCHEDULE K.

ROCHESTER, *July 2nd*, 1862.

Mrs. N. P. STEWART, *Detroit:*

Your letter of the 1st inst. is rec'd and its contents almost surprised me.

If Mr. Stewart fully understands the memorandum I gave you, I am satisfied he would not be dissatisfied. He will remember that Mr. Farley had a decree of foreclosure and sale of your farm.

On the 3rd of May, 1861, Mr. Farley consented to postpone the sale, provided one thousand should be paid 1st July, 1861. July came and the money was not paid. On the 19th of July it was further suspended by giving our note of $800, which I endorsed at 3 mos. and the small note, which is in the acc.

$500 was paid by the sale of wheat, leaving $300 of the 800 unpaid when it fell due in Oct., and which remained unpaid until the sale of the farm. Mr. Farley further delayed proceedings to sell at my earnest solicitations from 21st Oct. to Dec., when the matter was finally consummated—so much for the $300 item and small note.

As to the interest to Elwood, who should have paid that? It was a part of the lien upon the farm; how should it have been paid? I confess I do not see. There was no way to do but to pay, or allow a sale upon Elwood's decree, in which case you would not have received a dollar. I spent considerable time and took the time and trouble to go to Detroit to save you what was saved, and I think I get a poor return for it. I am sure if Mr. Stewart will understand how it is in fact that he will be the last man to complain of me.

In respect to the other, the New York matter, the course will only make it cost Mr. Craig more money in interest and cost; it is wrong, but I cannot say more than I have nor state the case more plainly than I have. If you and Mr. Stewart choose to listen to other persons,
62 who know but little of what they speak, all well. I can only advise what I deem to be the proper course and stop there. Mr. Stewart knows I never had any confidence in the Dehon appeal since I ex'd it. I hope I shall hear from you on the receipt of this and be informed what is the ultimate conclusion in all these matters. You can send me receipt for $241, the am't I handed you on the 27th June, whether you are satisfied with this explanation or not.

I hope and trust I have made myself understood, whether it is satisfactory to any one or not. I have endeavored to protect your interests, and Mr. Stewart knows very well that I have time and again procured time and delay on his matters by incurring personal obligations here for him. I wish you would write by return mail what the decision is upon all the matters.

Yours, &c.,

O. M. BENEDICT.

SCHEDULE L.

ROCHESTER, *Oct. 30th*, 1860.

N. P. STEWART, Esq., *Detroit:*

DEAR SIR: I have yours of 27th. I wrote you on the 25th in respect to the Freeland, Squires & Co.'s claim, which you have before this. Give me early answer in respect to it, and place that in the best shape you can for them. I hope you will get the Saginaw matter in proper shape, for out of it you can make money beyond question.

I have the promise of those New York lawyers, Tracy, Wait & Olmstead, to make that motion in the Dehon case without further delay. I don't see but there is a calm in matters. The Washington St. property is to be put up again on the 15th of November, as you will see by the notice.

I would like to know definitely whether I shall rely upon some cash when you receive your money from the D. & M. Co.
63 I would like it very much, and would consider it a favor if you will do me up then. I have labored pretty faithfully for you another year, and have never allowed an opportunity to slip to serve you in your interests, as I think you know, and I think if you add for services to the balance of last year one thousand dollars it would not be far out of the way, do you?

Tell me.

Then I have paid on the Cornwall farm	$839 70
Ins.....	7 75
	$847 45

Besides some expenses, not amounting to very much, however.

I understand you to say that the expenses incurred by you in the Detroit and Milwaukee matter would be paid by the company, is that so?

I let Fred have $50 last summer some time when he wanted it.

I have written Gen'l Clark, but got no answer in any form. I wish he would come or speak that you might know what to rely upon. I shall send to him again this week.

Very truly, &c.,

O. M. BENEDICT.

64 SCHEDULE M.

ROCHESTER, *Nov. 3d*, 1860.

N. P. STEWART, Esq., *Detroit:*

DEAR SIR: I have yours of 2d inst., and for your kind expressions I am obliged. I have seen Fred to-day. He says he wrote you yesterday. I will restate as well as I can. If we find any errors they will be reviewed with pleasure.

Aug. 15th, 1859, I gave you am't		$1,200 00
And some searches which I paid, say		25
		$1,225 00
I said we had rec'd $50, $50, $250	$350	
Besides which Mr. Martindale rec'd	100	
	$450	450 00
Leaving due last yr		775 00
I said to you Oct. 30th, 1860, add to that for services since		1,000 00
Paid out expenses, &c., to Nov. 1st		31 50
		$1,031 50
1860.—Advanced to Fred		50 00
		1,081 50
22d May, paid on Cornwall farm	$839 70	
" " ins	7 75	
		847 45
April 24th, bal. cash on $850.00	$45 78	
Rec'd fr. Mr. Stewart	100 00	
15th Sept.—Bal. remaining on $105	8 38	
	$154 16	

I do not see that I can do better with this now. I have made no computation of interest, as you will see.

I don't think that Emmons should repudiate his agreement; if he agreed to pay he ought to stand by it, but I suppose he has a great many at his elbow.

Hoping and trusting that all will prove satisfactory,

I am, very truly,

O. M. BENEDICT.

65 EXHIBIT 1.

Whereas on or about the 24th day of October, A. D. 1859, one Theodore Dehon, of New York, recovered a judgment in the supreme court against Nelson P. Stewart, for the sum of $10,184.83, entered upon a report of referee, from which judgment said Stewart has appealed to the general term of the supreme court, and for the purpose of staying proceedings upon the said judgment, the undersigned, John Craig, has consented to sign and execute the necessary undertaking to stay the proceedings upon said judgment.

Now, for the purpose of securing the said Craig for becoming such surety (in addition to other securities made to him), the said Nelson P. Stewart hereby sells, assigns, and transfers to said Craig the annexed

lease of Congress Hall, executed by R. D. Cook to me, and said Craig is hereby authorized to demand and receive the rents reserved by said lease for the term thereof, or until the said Craig shall be relieved from liability on his undertaking, from which rents said Craig is to pay the interest upon the mortgages now on said premises, held by himself and Asa Sprague, the insurance thereon, and the balance of said rents are to be held by said Craig to meet any liability upon his said undertaking upon the appeal aforesaid, upon which balances so remaining in his hands said Craig is to allow interest to said Stewart.

And for the more ample protection of said Craig, it is hereby agreed that in case said Cook, from any cause, shall fail to meet his rents, or shall fail to perform his covenants, or to keep said house, and the said premises shall be vacated, or said lessor shall be entitled to the possession; that then, and in that case, the said Craig shall have full power and authority to take the actual possession of said premises, and relet the same in the name of said Stewart, holding the lease and rents under this assignment for the term or period for which he shall remain
66 responsible upon said undertaking. When said Craig shall be relieved of responsibility upon the said undertaking, he is to render an account and pay over the rents which may have accumulated in his hands as above provided.

NELSON P. STEWART.
JOHN CRAIG.

ROCHESTER, *April 24th*, 1860.

Lease.

This indenture, made the twenty-second day of December, in the year of our Lord one thousand eight hundred and fifty-nine, between Nelson P. Stewart, of the city of Detroit, in the State of Michigan, party of the first part, and Robert D. Cook, of Niagara, in the State of New York, party of the second part, witnesseth:

That the party of the first part, for and in consideration of the rents, covenants, and agreements hereinafter mentioned and contained, on the part of the said party of the second part, his executors, administrators, and assigns, to be paid, observed, and performed, has demised and leased, and by these presents does demise and lease unto the said party of the second part, his executors, administrators, and assigns, all that certain lot, lots, and premises situate near and westerly of the railroad depot, in the city of Rochester, in the State of New York, and known as and called "Congress Hall," the same being now and heretofore used for the purpose of an hotel, together with all and singular the benefits, liberties, and privileges to the said premises belonging; to have and to hold the said demised premises, with the appurtenances, unto the said party of the second part, his executors, administrators, and assigns, for and during and until the full end and term of five years next ensuing the first day of May next, fully to be complete and ended; yield-
67 ing and paying therefor, during the continuance of this lease, unto the said party of the first part, his heirs, and assigns, the annual rent of three thousand dollars per annum, the same to be paid monthly, and in advance.

And the party of the first part does hereby further agree to give, at the expiration of the said term, a new lease of said premises to said party of the second part, for five additional years, provided the party of the second part desires to have the same upon such terms and at such rent as the party of the first part can obtain from others.

And further, the party of the first part agrees that, if necessary, he will, during said term, at his own expense, put a new roof upon the said hotel, which is on said demised premises.

And the said party of the second part for himself, his executor, administrators, and assigns, does covenant well and truly to pay, or cause to be paid, unto the said party of the first part, his heirs, and assigns, at the days and times above mentioned, the rent above reserved; and further, that during the said term he will, at his own cost and expense, make all necessary repairs upon said premises (save putting on, if necessary, a new roof, which is above provided for), and that at the expiration of said term he will deliver up said premises in as good repair and condition as he receives the same, usual wear and tear and accidents by fire and the elements excepted, and at the end of said term shall and will peaceably and quietly leave, surrender, and yield up the said premises unto the said party of the first part, his heirs, and assigns; provided always, and these presents are upon this express condition, that if it shall so happen that the rent above reserved, or any part thereof, be behind, or unpaid, at the times or on the days above mentioned for the payment thereof, or in case of the non-performance of any of the covenants made by the said party of the second part, at any of the times mentioned for the performance thereof, then and from thenceforth it shall and may be lawful for the said party of the first part,
68 his heirs, and assigns, to re-enter into the said demised premises, or any part, in the name of the whole, to re-enter and the same to have again, retain, repossess, and enjoy, and the party of the second part, his heirs, executors, administrators, or assigns, and all others, tenants or occupiers of said premises hereby demised, or any part thereof, thereunto and therefrom utterly to expel, put out, and remove, and from and after such rentry made, this lease and every part thereof shall cease and be absolutely void, as it respects the covenants to be performed by the said party of the first part. And the said party of the first part, for himself, his heirs, and assigns, does hereby covenant and agree to and with the said party of the second part, his heirs, executors, or administrators, or assigns, paying the rent above reserved in manner aforesaid, and observing, keeping, and performing all and singular the covenants and agreements hereinbefore mentioned, on his and their parts to be kept and performed, shall and may peaceably and quietly have, hold, occupy, possess, and enjoy the said demised premises, with the appurtenances, for and during the said term, without any lawful let, quit, hindrance, or molestation of the said party of the first part, his heirs or assigns, or any other person or persons claiming or to claim, by, from, or under him, or them, or any other person or persons having or lawfully claiming any rights in the said premises.

In witness whereof the parties hereunto have interchangeably set their hands and seals, the day and year first above written.

NELSON P. STEWART. [L. S.]
ROBERT D. COOK. [L. S.]

Signed, sealed, and delivered in presence of—
WILLIAM GRAY.
GEORGE K. JOHNSON.

69 MONROE COUNTY:

On this 24th day of April, 1860, personally appeared before me Nelson P. Stewart and John Craig, and severally acknowledged the exe-

cution of the within instrument by them respectively, for the purposes therein mentioned, both of whom are known to me.

CHAUNCEY PERRY,
Commissioner of Deeds.

EXHIBIT 2.

Supreme court.

JOHN CRAIG
against
ELISHA C. LITCHFIELD, IMP'D WITH NELSON P. Stewart and George K. Johnson.

The undersigned, to whom the above cause was referred by order of the supreme court, reports:

That prior to the 22nd of November, 1859, one Theodore Dehon recovered judgment upon the report of a referee, in the supreme court against Nelson P. Stewart for the sum of $10,184.83; that on the day last aforesaid, the said Stewart appealed to the general term of said court from the said judgment.

That upon such appeal an undertaking was duly executed by the said Stewart, and by the said plaintiff and one Joseph Farley, as sureties of said Stewart, whereby, after reciting the above facts, the said Stewart, the plaintiff, and Farley undertook to pay all costs and damages which might be awarded against the said appellant on said appeal not exceeding two hundred and fifty dollars, and that if said judgment appealed from or any part thereof should be affirmed, the appellant should
70 pay the amount directed to be paid by said judgment or such part thereof as to which said judgment should be affirmed.

That subsequently such proceedings were had upon said appeal, that on the 21st November, 1851, the said judgment was duly affirmed by the general term with costs.

And the said Dehon having died, and by his will appointed Maria L. Dehon his executrix, it was then and there adjudged and ordered on the petition of the said executrix, that the said Maria L. Dehon should recover of the said Nelson P. Stewart, the appellant, the amount of said judgment with interest from the 24th day of October, 1859, and one hundred and twelve dollars and four cents costs of said appeal, which said judgment was duly filed and docketed on the 26th day of February, 1862; and the judgment roll may be referred to as a part of this report for greater certainty. It was further proved that on or about the 23rd day of April, 1860, the said Nelson P. Stewart with his wife duly executed a mortgage to the said plaintiff in order to indemnify and save harmless said Craig from all damages, costs and expenses by reason of his becoming such surety upon the undertaking above mentioned as aforesaid, and to indemnify said Craig against liability upon said undertaking upon real estate in the city of Rochester, known as Congress Hall property, and upon about fifty acres of farming lands in the town of Irondequoit, both of said parcels being in the county of Monroe, and both of which are more particularly descibed in said mortgage, which was duly acknowledged and recorded in the clerk's office of said county, and which may be referred to as part of this report for greater certainty. It was further proved that on the 12th of March, 1862, the said Stewart duly appealed to the court of appeals from the judgment of the general term above mentioned, and the said plaintiff and Farley, as the

sureties of Stewart, executed and acknowledged the usual undertaking to stay proceedings on said judgment until the determination of said appeal.

71 That the sufficiency of said sureties was duly excepted to by the respondent on said appeal, and on the 8th day of May, 1862, the attorney of the respondent, by stipulation in writing of that date, extended the time for the sureties to justify to the 22nd of May, 1862, at 10 a. m. That said sureties, nor did either of them justify at the time last aforesaid, or at any other time, nor was said Craig requested to justify; and that no further steps have been taken, or were intended to be taken by the appellant in the prosecution of said appeal, but on the contrary, under the advice of counsel he intended to abandon the same; and although no order dismissing said appeal was ever entered.

It was also proved that on the first day of June, 1860, the said Stewart, one George K. Johnson, and the defendant Litchfield, executed and delivered to the plaintiff the bond with the penalty, recitals, and provisions and condition set forth in the complaint, which bond may be referred to by the parties to this suit, as part of this report for greater certainty. That the judgment in favor of Burr and other trustees of the Madison County Bank for $2,675.24, docketed on the 26th day of October, 1859, against the said Stewart was then unpaid, and a lien upon the premises embraced in the mortgage of said Stewart and wife to said plaintiff, as recited in said bond and mentioned in said complaint.

That an execution had been issued upon said judgment as recited in said bond, and was then in the hands of the sheriff of Monroe County, and in pursuance thereof, the said sheriff afterwards, with the knowledge of the defendant Litchfield, duly sold according to law the said mortgaged premises in parcels, on the 17th day of December, 1860, to one B. R. Wendell and another as the highest bidders, and that certificates of said sale were in due form of law executed by said sheriff and filed in the office of the clerk of Monroe County, as required by the statute in such case provided.

72 That on the 17th day of March, 1862, Daniel W. Power, a junior judgment creditor by virtue of a judgment in his favor, duly redeemed the said mortgaged premises from said sale, and on the 21st day of March, 1862, received from said sheriff deeds of the same according to law.

That said deeds respectively bear date on the 21st day of March, 1862, and were duly acknowledged and recorded in the office of the clerk of Monroe County, and may be referred to as parts of this report, should the same be necessary.

It was also proved that the said Stewart and wife, by deed dated the 27th day of April, 1860, and duly acknowledged and recorded on the first of May, 1860, conveyed to one Henry K. Sanger part of the said mortgaged premises, or all his right, title, and interest in and to the same.

It was further proved that on the 17th day of July, 1862, a suit was commenced by Maria L. Debon, executrix as aforesaid, against the said plaintiff and the said Joseph Farley, upon the undertaking by them executed with said Stewart and as his sureties and first above mentioned, and such proceedings were afterwards had that on or about the 7th day of August, 1863, a judgment was duly rendered against the said sureties for $12,301.24, including interest and costs.

That the judgment roll in said cause was duly filed on the same day, and as a copy of the same may be referred to as part of this report for greater certainty. That the amount of said judgment was subsequently,

and within a short time after the rendition thereof, paid by the said plaintiff.

That notice of the commencement of the suit was at the time given by the said Craig to the said Stewart.

I find, as a conclusion from the evidence, that the value of the mortgaged premises so sold and redeemed as aforesaid, over and above all incumbrances thereon prior to said mortgage, exclusive of the judgment upon which said premises were sold, exceeded the sum of five thousand dollars, the penalty of the bond in suit, and that the amount for
73 which the plaintiff was liable on said undertaking which he has paid, exceeds the sum last mentioned after deducting all monies received by the plaintiff from said Stewart, or from securities furnished by him to the plaintiff on account of or applicable to said undertaking by way of indemnity or security against the same.

That the redemption of said premises as above mentioned was not for the benefit of said Stewart or said plaintiff, or either of them, but for the benefit of said Powers.

That the said judgment last mentioned was, at the time said promises were redeemed, in full force, and not paid or satisfied.

I find as conclusions of law—

1st. That the defendant, the obligors in the bond in question in this action, were bound to free the mortgaged premises from the lien of the judgment mentioned in the condition, or pay to the plaintiff a sum equal to the value of said lien, and not exceeding the penalty of their obligation.

Second. That the appeal to the court of appeals did not extinguish or suspend the rights of the plaintiff in this respect.

Third. That under the facts in this case the plaintiff is entitled to judgment for five thousand dollars, with costs.

Let judgment be entered accordingly.

Dec. 3rd, 1863.

Fees, $50.

A. GARDINER, *Referee.*

74 EXHIBIT 3.

Supreme court.—Place of trial, county of Madison.

ELISHA C. LITCHFIELD, PLAINTIFF,
ag'st
JOHN CRAIG, DANIEL W. POWERS, AND GEORGE K. JOHNSON, defendants.

Amended complaint.

The plaintiff complains, and upon information and belief states: That on or about the 25th day of November, 1859, one Theodore Dehon, of the city of New York, recovered against one Nelson P. Stewart, of the city of Detroit, in the State of Michigan, since deceased, a judgment in the supreme court of the State of New York for the sum of $10,184.83, the roll whereof was filed in the office of the clerk of the city and county of New York, from which judgment the said Stewart brought an appeal to the general term of said supreme court; that for the purpose of staying the collection of said judgment pending said appeal undetermined, the said Stewart gave an undertaking on such appeal in the form required by the statute in such case made and provided, in and by which the de-

fendant, John Craig, and one Joseph Farley became sureties for the payment of such judgment in case the same should be affirmed on such appeal, which undertaking was duly filed and a copy thereof served on such appeal, and the sufficiency of the sureties in such undertaking excepted to by the respondent on such appeal; and that on such exception the said sureties, Craig and Farley, duly justified, and that the same, as to form and manner of execution and the sufficiency of such sureties, was duly approved.

75

That said Stewart paid the defendant, Craig, the sum of one thousand dollars as the consideration for his executing such undertaking and procuring the execution thereof by said Farley, and that in consideration of such payment to him the said Craig further undertook and agreed to furnish security on appeal from the judgment of the general term to the court of appeals in case the judgment should be affirmed by the general term and the said Stewart should bring such appeal; that such judgment was so affirmed by the general term, and said Stewart brought such appeal, and said Craig, in pursuance of such agreement, executed the undertaking on such appeal, and procured the same to be executed by the said Farley and to be delivered for use on such appeal, and the same was duly filed and a copy thereof served on such appeal; that the sufficiency thereof was excepted to by the respondent on such appeal, but that the said Craig and Farley failed and refused to justify on such appeal, although requested to, and that by reason thereof said appeal became of no effect, and said judgment against said Stewart became absolute, and he was thereby deprived of the benefit of the opportunity of having the judgment reviewed by the court of appeals and reversed for error.

That the said defendant, Craig, as an indemnity against his liability as such surety, took from said Stewart security by means of mortgages on various real and personal property of great value in the counties of Monroe and Erie in this State.

That said Stewart, as a further indemnity and protection to the said defendant, Craig, against his said liability, transferred to him the rents of the hotel property known as Congress Hall, and authorized him to receive, collect, and hold the net proceeds of the same for such purpose, and that he has collected and realized therefrom for several years annually large sums of money as such net proceeds, for which he should account, and which he should apply on reduction of the amount which he claims to be due him, as hereinafter stated.

76

That at the time of the execution of the mortgage or mortgages on the real estate in Monroe County there was a judgment duly docketed in said county against said Stewart for the sum of $2,675.24, in favor of the trustees of the Madison County Bank, and that the said Stewart, to indemnify the said defendant, Craig, against the lien and encumbrance of such judgment as against such mortgage, gave to him, said Craig, a bond executed by said Stewart and this plaintiff, and the defendant Johnson, as sureties, bearing date June 1st, 1860, in the penalty of $5,000, conditioned that if said Stewart or the said sureties should discharge said premises so mortgaged from the lien of such judgment, and keep the same free therefrom, and should fully preserve and keep unimpaired the security of said mortgage from and against the lien of said judgment, then such obligation should be void, otherwise to remain in force and effect; that the aforesaid bond so executed by the said Stewart and Johnson and the plaintiff was so executed by them gratuitously and without any consideration, and after the said Craig had executed and furnished said first undertaking, and without any obligation

on the part of said Stewart to furnish such bond or in any manner to indemnify said Craig against the judgment in said bond mentioned.

That divers parcels of property in said Monroe County belonging to said Stewart, including the property so mortgaged to said defendant, Craig, were subsequently, and on or about the 12th day of January, 1861, under and in pursuance of the arrangement hereinafter mentioned, sold by the sheriff of said county, under and in pursuance of an execution on said judgment in favor of said trustees of the Madison County Bank, for a sum about sufficient to satisfy said judgment and the expenses of such sale.

77 That the defendant Daniel W. Powers, a son-in-law of the said defendant, Craig, recovered a judgment in the supreme court of this State against the said Stewart for the sum of $1,481.78, on or about the 23d of January, 1860, the record whereof was filed in said court of Monroe County; that the said Stewart arranged, settled, and paid said Powers the amount due on said judgment, and directed and procured the said Powers to assign and transfer the same to one Oliver M. Benedict, in trust for himself, said Stewart; that said Benedict was at that time the agent and attorney of said Stewart, and that the whole consideration for such assignment proceeded from said Stewart, and was paid by him, and the same was so made to said Benedict for the benefit of said Stewart and as his representative.

That during the year 1861 the said Stewart became hopelessly embarrassed in his affairs, and wholly without credit, and that the property belonging to said Stewart, in the said counties of Monroe and Erie, so mortgaged to the said defendant Craig, was an ample protection and indemnity to him against his liability on said undertaking on said appeal, notwithstanding the same were subject to the prior lien of said judgment in favor of the trustees of said Madison County Bank; that the said Stewart held and owned other real and personal property in said county of Monroe. of great value, subject to the lien of said last mentioned judgment, and not covered by said mortgage, of much greater value than the amount due on such last mentioned judgment; that the said defendant, Craig, knew the situation of said Stewart and of his affairs, and formed the design of getting possession and control of the property of said Stewart without paying any consideration therefor, and looking to and availing himself of the aforesaid bond of indemnity of the plaintiff and his said mortgage on property in Erie County as his protection and indemnity against his liability on the undertaking so executed by him as aforesaid, which were more than

78 sufficient for that purpose, if he could succeed in enforcing them.

That it was well known that the defendants, Craig and Powers, had been largely interested with said Stewart in property in said Monroe County, and had been acting with and for him in respect thereto, and they were supposed by the public fully to represent Stewart's interest therein; that the said Craig, in pursuance of the aforesaid design, procured the said Benedict, in fraud of said Stewart and of the plaintiff, and in violation of his duty as agent and attorney to the said Stewart, to reassign and retransfer said judgment, which had been entered in favor of said Powers, to him, said Powers; that such reassignment was so made for the purposes hereinafter set out, and without any consideration therefor, and with full knowledge on the part of said Powers and said Craig of the facts, in respect to the payment of said judgment by said Stewart to said Powers, and its assignment by him to said Benedict for and on account of said Stewart, as hereinafter set forth; that on the sale of said Stewart's property under

the execution in favor of the trustees of said Madison County Bank, it was arranged by the defendants, Craig, and Powers, acting in concert, that all the property of the said Stewart in said Monroe County should be sold for a sum just sufficient to satisfy said judgment, and for that purpose they, with the aid of said Benedict, acting as it was supposed by all the persons conducting the sale, and the public, for and on behalf of said Stewart, bid upon the different parcels of such property such sums as should make it necessary to put up and have sold all the different parcels belonging to said Stewart, and that, accordingly, and by means of such management, all such parcels were sold as aforesaid.

That subsequently the said Craig, in pursuance of such design, in the name of said Powers, as such junior judgment creditor, and under color of said junior judgment, paid the amount of said judgment in favor of the trustees of such bank, with interest and costs, and redeemed the
79 said premises from the sheriff's sale in said Powers' name, but for his use; that said junior judgment was in fact a fraudulent and colorable judgment as hereinabove stated, and that such redemption was colorable and fraudulent on the part of the said Craig, as against said Stewart and the plaintiff; and that by means thereof, the said Craig acquired and took for his own use and in the name of said Powers, as tenant in fee of the said premises, without other payment than above stated, and that the premises, the title and use of which the said Craig so acquired, then were, and still are, of a value beyond the sum so paid by him on such redemption, sufficient to save and indemnify him against all liability or loss which he may incur or sustain by reason of said undertaking; that the mortgage given by said Stewart to said Craig, upon the property in Erie County, was so given in consideration of and to secure the payment of the sum of five hundred dollars, conditioned that the said Stewart should indemnify and save harmless the said Craig from all damages, costs, and expenses by reason of his having executed the said undertaking; that subsequent to the execution of said mortgage to said Craig, and on or about the 15th day of March, 1861, the said Stewart, for a good and sufficient consideration, conveyed the property in Erie County, covered by said mortgage, to the said plaintiff, and that he is now the owner and holder thereof.

That said Craig, in pursuance of the aforesaid design, has commenced an action in the supreme court of this State, in the county of Monroe, upon the said bond so given by the plaintiff, and said Stewart and Johnson, on which he claims to recover of the plaintiff in this action, and said Johnson, the sum of $5,000, the full penalty of said bond; and he has also commenced an action in this court in Erie County for the foreclosure of the said mortgage upon the said premises in said county, and has made the plaintiff a defendant therein; that the plaintiff herein has answered the complaint in each said action, and the said actions are at issue, undetermined.

80 That by means of the arrangement and contrivances hereinabove set forth, the said Craig has divested the property in Monroe County covered by the mortgage to him from the lien and security intended by said mortgage, and has acquired the title thereto and benefit thereof by means of said fraudulent redemption, without giving said Stewart or the plaintiff herein, any benefit or advantage thereof, as a security and indemnity to him against his liability on said undertaking, and that he now seeks, by means of said two pending actions, to collect the amount of said judgment so appealed from, together with interest and the costs thereof, out of the plaintiff's said property in Erie County,

and the plaintiff personally on said bond, to the great wrong and injury of the plaintiff.

That the said judgment in favor of said Dehon was affirmed on said appeal and judgment of affirmance entered thereon, and an action was brought against said Craig, by the representatives of said Dehon, upon the said undertaking, and a judgment entered therein against him, said Craig, by arrangement, on or about the 7th day of August, 1862, for the sum of $12,301.24; that said judgment against said Craig, was on the same day assigned to the said Daniel W. Powers, upon the payment to the plaintiff therein of the sum of $11,632.

That the redemption of the property sold by the sheriff of Monroe County, by and in the name of said Powers, and the taking of the assignment of the judgment against said Craig by him, were severally done by the request and in the interest of said Craig; and that each act and thing done by said Powers in respect thereto was so done by him at the instigation and for the benefit of said Craig, and to enable him to carry out the design aforesaid; and that said Powers took and now holds title to the lands so redeemed, and to the judgment so assigned, wholly for the benefit of said Craig.

That the said Stewart, in or about the month of September, 1861, became wholly incapacitated, by reason of mental and physical disabilities, from managing his affairs and protecting his interests, and so
81 continued until his death, which took place in the month of May, in the year 1863.

That the said Craig also held as security for his said liability on said undertaking chattel mortgages on personal property, situate in said Monroe County, of great value, the lien and security of which, upon a portion of such personal property, he has negligently and fraudulently allowed to run out, so that the same has ceased to be available as such security; that by means of the premises, and in breach of his duty to said Stewart, and in fraud of said Stewart and the plaintiff's rights, the said Craig has acquired and possessed himself of property belonging to said Stewart, of very great value beyond the consideration paid by him therefor, and claims to hold it absolutely, and without any liability to account to the plaintiff, as such obligor, on said bond to him, said Craig, and to enforce to the full extent said bond and said mortgage on said property in Erie County, without making any allowance for the property so acquired by him in Monroe County, upon the liability outstanding against him on said undertaking.

That, unless said Craig is restrained by the injunction of this court from prosecuting the said actions, and compelled by the judgment of this court to account in this action for the property so acquired by him, great and irremediable injury and damage will accrue to the plaintiff herein.

That the defendant Johnson is not within the State of New York, and is not a citizen, inhabitant, or resident thereof, and his consent to be joined as a plaintiff in this action cannot be obtained, and the plaintiff is informed and believes that said Johnson is a proper and necessary party to the action, and therefore makes him a defendant herein.

Whereupon the plaintiff demands judgment in this action against the defendants, and that the said Craig be enjoined and restrained from prosecuting his action upon said bond of indemnity against the
82 plaintiff, and now pending in Monroe County, and his action for the foreclosure of the mortgage given by said Stewart on property in Erie County, and now pending in said Erie County, during the pendency of this action and ever afterwards, and that the said Powers

be debarred and excluded from any personal benefit or use of the property, judgment, and other things by him acquired as aforesaid; and that said Craig be required to account with the plaintiff for the rents, issues and profits of the property so mortgaged to him, and for the value and proceeds of the property belonging to said Stewart, which he has acquired as aforesaid, and which said Craig held as security by means of chattel mortgages; and that said Craig be compelled to credit the same upon the amount paid by him, by reason of his execution of said undertaking; and that an account respecting such transaction be taken and stated; and that, on the plaintiff's paying such balance as may appear due thereby, the said defendants, Craig and Powers, surrender and deliver up, for cancellation or contribution, the said bond, and satisfy and discharge, or assign to the plaintiff the mortgage on the property in Erie County, and that the plaintiff be subrogated to all rights and remedies of said Craig as against said Stewart, and the property formerly owned by him, and upon which said Craig has a lien; and that the rights of the said Johnson in the premises may be adjudged and determined; or that the plaintiff may have such other or further relief as to the court may seem meet and agreeable to equity, with the costs of this action.

TRACY, WAIT AND OLMSTEAD,
Plaintiff's Attorneys, 18 *William Street, New York.*

CITY AND COUNTY OF NEW YORK, *ss:*

Elisha C. Litchfield, being duly sworn, says he is the plaintiff in this action; that the foregoing amended complaint is true to his own
83 knowledge, except as to those matters stated therein on information and belief, and as to those matters he believes it to be true.

ELISHA C. LITCHFIELD.

Sworn to before me, this 16th day of November, 1863.
[L. S.] FREDERIC BULL,
Notary Public.

[U. S. int. rev. stamp, 5 cents, cancelled.]

EXHIBIT 4.

Supreme court.

ELISHA C. LITCHFIELD
ag'st
JOHN CRAIG, DANIEL W. POWERS, AND GEORGE K. JOHNSON.

First. The defendant, John Craig, for his separate answer to the amended complaint in the above entitled action, denies that Nelson P. Stewart paid him one thousand dollars for furnishing sureties on the undertaking given on the appeal to the general term of this court described in the amended complaint, but alleges that said Stewart authorized him to appropriate one thousand dollars of the rents which he should receive to the payment thereof, and that he has received more than sufficient to pay the same.

Defendant denies that he or Joseph Farley neglected or refused to justify as surety on the undertaking upon the appeal to the court of appeals mentioned in said complaint, or that either was ever requested to justify or to attend for that purpose, or was, in any manner, notified or required so to do.

84 Defendant states that at the time of the execution by said

Stewart to him of the mortgages, &c., for his indemnity for the execution of the undertaking on appeal in the Dehon case, there was a judgment docketed in Monroe County in favor of the trustees of the Madison County Bank against said Nelson P. Stewart, for the sum stated in said complaint, which was a lien upon the real estate mortgaged to him by said Stewart as aforesaid, and he therefore admits the same. That he was uninformed and ignorant of the existence of said judgment at the time he executed such undertaking as surety, and at the time he took the said mortgages upon said Stewart's said real estate in said Monroe County, and that being informed thereof, before justification after exception to the sureties, he refused to justify us such surety on the undertaking on appeal to the general term, until he should be fully protected against the lien of said judgment. That thereupon, and to induce and procure him to justify, said Stewart caused to be delivered to him, said Craig, a bond bearing date June 1st, 1860, in the penalty of $5,000, as stated in said complaint, which said bond is in the words and figures following, to wit:

Know all men by these presents, that we, Nelson P. Stewart, of Detroit, Michigan; George K. Johnson, of Grand Rapids, Michigan; and Elisha C. Litchfield, of Cazenovia, Madison County, New York, are held and firmly bound to John Craig, of Rochester, New York, in the penal sum of five thousand dollars, for which sum well and truly to be paid to the said John Craig, his executors, administrators, or assigns, we bind ourselves, jointly and severally, and our respective heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated at Detroit, on the first day of June, A. D. one thousand eight hundred and sixty.

The condition of this obligation is as follows:

Whereas, Theodore Dehon, of New York, did heretofore recover against said Nelson P. Stewart a judgment in the supreme court of New York for the first judicial circuit, for the sum of ten thou-
85 sand dollars and upwards (as by reference to the record whereof will more fully appear, that being the only judgment in said court of said Dehon against said Stewart).

And whereas said Stewart did appeal from said judgment to the general term of said supreme court, which appeal is still pending and undecided, and did give and undertaking on said appeal to stay execution on said judgment.

And whereas the above named John Craig did, on said Stewart's request, become surety on said undertaking together with Joseph Farley. And whereas, for the indemnification of said John Craig, said Stewart did heretofore mortgage to said John Craig certain real estate situated in Erie County and Monroe County, New York. And whereas on a portion of said premises so mortgaged to said Craig by said Stewart, the Madison County Bank of New York, or the trustees thereof, have caused a levy to be made by virtue of an execution issued upon a payment against said Stewart in favor of said bank or said trustees, in the supreme court of New York, for the sum of two thousand five hundred dollars, and interest and costs. Now, if said Stewart, and said Johnson and said Litchfield, or either of them, shall, before the sale, by virtue of any process issued upon or through said judgment of said Madison County Bank or its trustees, of any portion of the premises so mortgaged by said Stewart to said Craig, discharge said premises from such process and from the lien of said judgment, and render and keep said property so mortgaged free therefrom, and shall in all respects fully and entirely free and relieve said property so mortgaged to said Craig from

the lien of said judgment, and fully preserve and keep unimpaired the security of said mortgage to said John Craig from and against the lien and operation of said judgment, so that said security shall not be thereby lessened or impaired, then this obligation to be void; otherwise to remain in full force and effect.

NELSON P. STEWART. [L. S.]
GEORGE K. JOHNSON. [L. S.]
ELISHA C. LITCHFIELD. [L. S.]

Signed and sealed in presence of—
FRED'K S. STEWART.

86 Defendant says that after the delivery of said bond to him at the request of said Stewart, he and said Farley justified, relying upon said bond, and defendant denies that said bond was executed gratuitously and without consideration. Defendant states that said Stewart, at the time of the execution of said undertaking and the taking of said mortgages, represented the said real estate to him without the lien of said judgment, upon which statement he relied in the execution of said undertaking and the taking of said mortgages, and therefore refused to justify as such surety until he was protected against the said judgment; and that said bond was delivered to the defendant for a valuable consideration.

Defendant denies that the sale on the Madison County Bank judgment took place about the 12th of January, 1861, but alleges that the sale, by virtue of said judgment, took place on or about the 17th of December, 1860.

Defendant denies that he was ever a party to or had any knowledge or information of any arrangement, under and in pursuance of which any parcels of property in Monroe County belonging to said Stewart were ever sold by the sheriff of said county under and in pursuance of an execution on said judgment in favor of the trustees of the Madison County Bank.

Defendant alleges that he knows of no property belonging to said Stewart in Monroe County that was not sold under the execution issued upon said judgment, and is informed and believes that all of the property of said Stewart in said county was sold under said execution on said judgment. Defendant alleges that he knows of no property in Erie County belonging to said Stewart, except that covered by said mortgages to him, which property in Erie County does not exceed in value $4,000, on which the plaintiff claims a lien to the extent of $10,000 and over, prior and paramount to defendants.

87 Defendant denies, on information and belief, that said Stewart ever paid, arranged, or satisfied the judgment in favor of Daniel W. Powers, mentioned in the complaint, and alleges, on information and belief, that the same was for a valuable and adequate consideration assigned to O. M. Benedict as his property absolutely. Defendant denies that he knew the situation of said Stewart or his affairs, except in respect of their own dealings with each other, or that the said defendant ever formed the design of getting possession or control of the property of said Stewart without paying any consideration therefor, or otherwise, and of looking to or availing himself of the aforesaid bond of indemnity of the plaintiff and his said mortgage on property in Erie County, as his protection and indemnity against his liability on the undertaking so executed by him as aforesaid; or that the said bond and mortage on property in Erie County were more than sufficient for that purpose, if he could succeed in enforcing them.

The defendant, Craig, denies that he and the said Powers had been largely interested with said Stewart in said Monroe County, or had been acting with or for him in respect thereto, or in any manner or shape the said defendant had been so interested or acting; but as to whether they were supposed by the public fully to represent said Stewart's interest therein, the defendant, Craig, says he has no knowledge or information sufficient to form a belief, and therefore he denies the same. The said defendant denies that he, in pursuance of any design whatever, procured the said Benedict in fraud of said Stewart or of the plaintiff, or in violation of his duty as agent and attorney to the said Stewart, or otherwise, to reassign or retransfer any judgment whatever, which had been entered in favor of said Powers or any other person, to him said Powers; or that on the sale of said Stewart's property under the execution in favor of the trustees of said Madison County Bank, it was arranged by the defendants Craig and Powers, acting in concert or otherwise, that all the property in said Monroe County should be
88 sold for a sum just sufficient to satisfy said judgment, or any other sum; or that for that or any purpose they, with the aid of said Benedict, or otherwise, acting for or on behalf of said Stewart or otherwise, bid upon the different parcels of such property such sums as should make it necessary to put up and have sold all the different parcels belonging to said Stewart, with any view or reference on the part of the defendant Craig to have sold all the different parcels belonging to said Stewart; or that accordingly and by means of such arrangement all such parcels were sold as aforesaid. The said defendant says he made no arrangement or suggestion, and had no control or voice in respect of said sale, or the order or prices at which the different parcels of land were struck off and sold at said sale.

The said defendant says he has no knowledge or information sufficient to form a belief as to whether the persons conducting or connected with such sale or the public supposed the defendants Craig and Powers, and the said Benedict, or any of them, acted for or on behalf of said Stewart in their bids, or otherwise, at such sale, and therefore denies the same and each allegation thereof.

The defendant Craig denies that he ever, in pursuance of any design, in the name of said Powers as such junior judgment creditor, or a judgment creditor in any way, or under color of said junior or any judgment creditor, paid the amount of said judgment in favor of the trustees of said bank, with interest and costs, or any part thereof, or redeemed the said premises from the sheriff's sale in said Powers' name, or any name, for his or any one's use; or that by means thereof, or any means, the said Craig acquired or took for his own use in the name of said Powers, or in any name, as tenant in fee, or otherwise, the said premises, or any right, title, interest, or estate therein.

Defendant alleges on information and belief that the said judgment in favor of Daniel W. Powers was, at the time the redemption thereunder from the sale under the Madison County Bank judgment
89 aforesaid, a good and valid judgment in full force and effect; and that neither said judgment nor the assignment thereof to said Benedict, nor the reassignment thereof to said Powers, nor said redemption was fraudulent or colorable, or in any way affected or impaired the rights of said Stewart or the plaintiff.

Defendant says he has no knowledge or information sufficient to form a belief, as to whether it was for a good or sufficient consideration that the said Stewart conveyed the property in Erie County covered by said mortgage to the plaintiff, and therefore denies the same.

court of this State, in the county of Monroe, upon the said bond so given by the plaintiff and said Stewart and Johnson, on which he claim to recover of the plaintiff herein, the sum of $5,000, the full penalty of said
93 bond, and defendant therefore admits the same, and states that the plaintiff herein answered the complaint in said action before the commencement of this action, and in his answer the plaintiff herein set up and claimed as a good and valid defence in said action the same matters for which this action is brought, and on the trial thereof was allowed to and did introduce proofs in respect of all the allegations contained in the complaint herein. In which said action Hon. Addison Gardiner was duly appointed a sole referee to hear and determine the same by an order of this court, and the said referee has made his report, in which he has found as facts the contrary and opposite of the allegations in said answer in said action, which report was on the fifth day of December, 1863, duly filed in the Monroe County clerk's office; and the plaintiff in that action, John Craig, has recovered against the defendant therein, Elisha C. Litchfield, a judgment on the merits thereof for $5,000 damages and $179.69 costs and disbursements, which judgment was entered in said clerk's office on said fifth day of December, 1863, and the judgment-roll in said action was filed in said office on said day; all of which will more fully appear by a reference to said judgment-roll, which said judgment still remains in full force and effect, and the defendant insists that the same is a bar to this action.

OSCAR CRAIG,
Att'y for Def't, John Craig.

94 MONROE COUNTY AND CITY OF ROCHESTER, *ss:*

John Craig, being duly sworn, says he is one of the defendants in above-entitled action and the defendant who makes the foregoing answer; that the foregoing answer is true to his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

JOHN CRAIG.

Subscribed and sworn to before me this 9th day of December, 1863.

A. VAN INGEN,
Commissioner of Deeds.

[Rev. stamp, 5 cents.]

EXHIBIT 5.

Supreme court.

ELISHA C. LITCHFIELD
ag'st
JOHN CRAIG, DANIEL W. POWERS, AND GEORGE K. JOHNSON.

Daniel W. Powers, one of the defendants above named, for separate answer to the amended complaint in the above-entitled action, by O. M. Benedict, his attorney, says that he is informed, and believes it to be true, that Theodore Dehon recovered a judgment in the supreme court of the State of New York against Nelson P. Stewart, as set forth and alleged in said complaint, and he therefore admits the same. He is informed, also, that said Stewart appealed from said judgment
95 to the general term of said supreme court, and that to stay proceedings upon said judgment an undertaking was executed on behalf of said Stewart, with said John Craig and Joseph Farley as sureties, and he therefore admits the same, and also that the sureties were excepted to by the appellee, Dehon, and that said sureties justified and

were approved, but, on information and belief, he alleges that said Craig and Farley refused to justify as such sureties until the execution of the bond of said Stewart, Litchfield, and Johnson, as hereinafter mentioned and set forth.

And this defendant, further answering, saith that he is informed and believes it to be true that said Craig took security from said Stewart as in said complaint alleged, as his indemnity for signing said undertaking, and procuring said Farley also to sign the same, and he admits the same.

Defendant, upon information and belief, denies that said Stewart paid said Craig one thousand dollars for so furnishing sureties, but he, upon like information and belief, alleges that said Stewart authorized said Craig to appropriate one thousand dollars of the rents of Congress Hall, which he might receive, to the payment thereof, and that said Craig has received more than sufficient to pay the said $1,000.

Defendant, upon information and belief, denies that said Craig and Farley neglected or refused to justify as sureties on the undertaking to the court of appeals, and upon information and belief he denies that either said Craig or said Farley were requested to justify or to attend for that purpose, or were in any manner notified or required so to do, and alleges that said Stewart concluded to and did abandon said appeal.

Defendant says that he is informed and believes that at the time of the execution by said Stewart to said Craig of the mortgage, &c., for his indemnity for the execution by him and said Farley of the said undertaking on the appeal in the Dehon case, there was a judgment docketed in Monroe County in favor of the trustees of the Madison
96 County Bank against said Nelson P. Stewart for the sum stated in said complaint, which was a lien upon the said real estate covered by the mortgage of said Stewart to said Craig, and he therefore admits the same.

Upon information and belief he states and alleges that at the time said Craig became surety for said Stewart upon said appeal, and at the time he took said mortgage aforesaid, said Stewart made to said Craig a statement of the condition of said real estate in respect to title and incumbrances upon which said Craig relied, and that said Stewart did not inform said Craig of the said Madison County Bank judgment, and said Craig was at that time uninformed and ignorant of said judgment; and that afterwards, and before justification of sureties after exception, said Craig was informed of said judgment, and that the same was a lien prior to his said mortgage. He therefore refused to justify as such surety until such judgment lien should be removed, or he was fully protected against the same; that thereupon, and to induce and procure such justification and to protect said Craig, said Stewart caused to be delivered to said Craig the bond referred to in said complaint, bearing date June 1st, 1860, which is in the words and figures following, to wit:

Know all men by these presents that we, Nelson P. Stewart, of Detroit, Michigan; Gerry H. Johson, of Grand Rappids, Mich.; and Elisha C. Litchfield, of Cazenovia, Madison County, New York, are held firmly bound to John Craig, of Rochester, N. Y., in the penal sum of five thousand dollars, for which well and truly to be paid to the said John Craig, his executors, administrators, and assigns, we bind ourselves jointly and severally, and our respective heirs, executors, and administrators firmly by these presents. Sealed with our seals and dated at Detroit on the first day of June, one thousand eight hundred and sixty. The consideration of this obligation is as follows:

Whereas, Theodore Dehon, of New York, did heretofore recover
97 against said Nelson P. Stewart a judgment in the supreme court of the State of New York for the first judicial circuit for the sum of ten thousand dollars and upwards (as reference to the record whereof will more fully appear, that being the only judgment in said court of said Dehon against said Stewart); and whereas said Stewart did appeal from said judgment to the general term of said supreme court, which appeal is still pending and undecided, and did give an undertaking on said appeal to stay execution on said judgment; and whereas the above named John Craig did, on said Stewart' request, become security on said undertaking (together with Joseph Farley); and whereas, for the indemnification of said John Craig, said Stewart did heretofore mortgage to said John Craig certain real estate situated in Erie County and in Monroe County, New York; and whereas, on a portion of said premises so mortgaged to said Craig by said Stewart, the Madison County Bank, or the trustees thereof, have caused a levy to be made by virtue of an execution issued upon a judgment against said Stewart in favor of said bank or said trustees in the supreme court of New York, for the sum of two thousand five hundred dollars and interest and costs. Now, if said Stewart and said Johnson and said Litchfield, or either of them, shall, before the sale, by virtue of any process issued upon or through said judgment of said Madison County Bank or its trustees, of any portion of the premises so mortgaged by said Stewart to said Craig, discharge said premises from such process and from the lien upon said judgment, and render and keep said property so mortgaged free therefrom, and shall in all respects fully and entirely free and relieve said property so mortgaged to said Craig from the lien of said judgment, and fully preserve and keep unimpaired the security of said mortgage to said Craig from and against the lien and operation of said judgment, so that his security shall not thereby be lessened or impaired, then this obligation to be void; otherwise to remain in full force and effect.

98 NELSON P. STEWART. [L. S.]
GEO. K. JOHNSON. [L. S.]
ELISHA C. LITCHFIELD. [L. S.]

Signed and sealed in presence of—
FRANK S. STEWART.

And that after the delivery of said bonds to him, at the request of said Stewart, said Craig and Farley justified as sureties upon said bond.

And defendant, upon information and belief, denies that said bond was executed gratuitously and without consideration; but on the contrary, this defendant alleges, upon information and belief, that said bond was executed upon good and sufficient consideration.

This defendant denies that the sale on the Madison County Bank judgment took place about the 12th of January, 1861, and alleges that said sale, by virtue of said judgment, took place on or about the 17th day of December, A. D. 1860.

Defendant admits that he recovered a judgment against Nelson P. Stewart for the sum of $1,481.78, as in said complaint alleged, but he denies that said Stewart paid, arranged, or settled the same with this defendant. On the contrary, he alleges that O. M. Benedict paid to this defendant the amount of said judgment, and took an assignment thereof from this defendant, and defendant has no knowledge or information, nor does he believe the said assignment was for the benefit of said Stewart; that he understood from both Stewart and Benedict, that

it was assigned to said Benedict, to be held for the amount as security to said Benedict.

Defendant admits that said Stewart had some real estate in Monroe County, not included in said Craig's mortgage; but upon information and belief he deniss that it was sufficient to pay the said Madison County Bank judgment. Upon like information and belief, he denies that said Craig knew the situation of said Stewart, or that he formed the design of getting possession of said Stewart's property without paying any consideration therefor, or the design of getting possession thereof in any manner, or for any purpose whatever.

99 Defendant denies that he or said Craig, to this defendant's knowledge, had been largely or at all interested with said Nelson P. Stewart in property in said Monroe County or elsewhere, or that he, defendant, or said Craig, to his knowledge, had been acting for said Stewart in respect to any property in Monroe County or elsewhere; and what the public supposed in respect thereto this defendant is entirely ignorant, never having heard anything about it one way or the other.

And this defendant denies that said Craig, in pursuance of such alleged design or otherwise, procured said Benedict to re-assign to this defendant the said judgment; nor did said Craig, to the knowledge of this defendant, in any manner procure such re-assignment, but said judgment was re-assigned at the request of this defendant, and to enable this defendant to redeem real estate sold under the Madison County Bank judgment, and for no other or different purpose; and defendant denies that it was so re-assigned in fraud of the rights of said Stewart, or by said Benedict in violation of his duty to said Stewart.

This defendant denies that there was at any time or under any circumstances any arrangement between said John Craig and this defendant in respect to the sale of said Stewart's property under and by virtue of the Madison County Bank judgment; nor was there ever even a conversation in respect to any arrangement in respect to said sale; that this defendant did not attend said sale, nor did he take any interest therein, nor did he in any manner, directly or indirectly, direct, or even suggest, as to how, when, or in what manner the sale should be conducted or take place, nor anything in respect thereto; and what the persons attending such sale, or what the public supposed in respect to said Benedict, defendant has no knowledge or information sufficient to form a belief.

This defendant is informed and believes, and upon such information and belief he alleges, that said sale was made under the direc-
100 tion and control of plaintiff, in all its detail, as to what should be sold, and suggesting or directing as to amount of bids on parcels to be sold.

This defendant denies that said Craig paid the amounts of the said Madison County Bank judgment and redeemed the real estate held by virtue thereof, or that said Craig in any manner redeemed, or attempted so to redeem, or that the redemption was made by him in the name of this defendant, nor was it made for the use of said Craig.

And this defendant denies that the judgment by virtue of which such redemption was made was fraudulent or colorable, or that the redemption was fraudulent or colorable in anywise. And this defendant denies that said Craig took, by virtue of such redemption, any title or interest in said premises, or any part thereof. And defendant states and alleges that prior to the sale of the said real estate by virtue of the execution issued upon the said bank judgment, the said Nelson P. Stewart and wife conveyed by warranty deed all their right, title, and interest

to a part of the real estate in Monroe County, covered by the mortgage of said Craig, and which was sold on the said execution, and which, as defendant is informed and believes and alleges, was, at the time of said sale, and up to the time of the redemption by this defendant, owned by one Sanger, of Michigan, and the balance, which was redeemed by defendant, was worth a few hundred dollars over the amount paid on such redemption, but not enough to pay in full the judgments which defendant then held against said Stewart, and which were liens on such real estate. Defendant admits that Dehon recovered judgment against said Craig upon his undertaking for the amount stated in said complaint, but upon information and belief he denies that it was recovered by arrangement; on the contrary, on information and belief, he alleges that it was recovered by due course of action and after notice given to said Stewart of the pendency of said action. Defendant denies that he
101 took the assignment of said judgment, or made the redemption for the benefit of said Craig, but on the contrary he alleges that he took and made the same on his own account; that he made the redemption and took the assignment of said judgment, paying his own money, doing so without any request on the part of said Craig; and he denies that he holds the same to the use of the said Craig.

And the defendant, further answering, alleges, on information and belief, that the said plaintiff herein directed and controlled the sale of said real estate under the said Madison County Bank judgment, and particularly directed in respect to the order and circumstances of such a sale, and that such sale was made at his request, and by his specific direction, and in such a manner as to make it necessary for the sheriff to sell all of Stewart's real estate in Monroe County, and defendant is informed and believes that a small balance of said judgment yet remains unsatisfied.

O. M. BENEDICT,
Attorney for Defendant Powers.

MONROE COUNTY, *ss:*

Daniel W. Powers, one of the above named defendants, being duly sworn, says that he has read the foregoing answer and knows its contents; that the same is true of his own knowledge, except as to those matters stated on information and belief, and as to those matters he believes it to be true.

D. W. POWERS.

Subscribed and sworn this 9th day Dec., A. D. 1863, before me.
A. VAN INGEN,
Commissioner of Deeds.

[Stamped.]

102 EXHIBIT 6.

Supreme court.

HENRY TEN EYCK, PLAINTIFF,
ag'st
JOHN CRAIG AND ELISHA C. LITCHFIELD,
defendants.

Place of trial, county of Monroe.

The plaintiff, for an amended complaint, complains of the above-named defendants, and states:

That one Nelson P. Stewart, since deceased, on or about the first day

of January, 1859, became seized in fee simple of certain premises in the city of Rochester, in the county of Monroe, and in the State of New York, the same being adapted for and used as a hotel, known as Congress Hall, under and by virtue of a deed of conveyance thereof, made and executed by Silas D. Walbridge and wife, and bearing date the first day of January, 1859, and recorded the tenth day of said month, in the office of the clerk of the said county of Monroe, which premises are more particularly described as follows: All that tract or parcel of land situate in the city of Rochester, county of Monroe, and State of New York, and described as follows: Beginning at the intersection of the west line of Mill street with Railroad avenue, and running thence westerly on the south line of said avenue, one hundred feet; thence southerly on the line parallel to the west line of said Mill street, one hundred feet; thence easterly on a line parallel with the south line of
103 Railroad avenue to Mill street; thence northerly on the west line of Mill street to the place of beginning; that such conveyance was made subject to the extent of the amount due thereon to a mortgage given by John Craig, one of the defendants, and Silas D. Walbridge to Lewis Brooks and Asa Sprague, dated January 1, 1853, and recorded on the tenth day of said month in said clerk's office, in liber 63 of mortgages, at page 379, for $22,000, which had been reduced by payment, so that at the date of the delivery and record of said deed, the amount due thereon did not exceed $6,000, or thereabouts, and also subject to the extent of the amount due thereon to a certain other mortgage given by the said Silas D. Walbridge to the defendant Craig, dated August 1, 1853, and recorded on the 29th day of said month in said clerk's office, in liber 58 of mortgages, at page 281, for $8,000, which had been reduced by payments, so that at the date of delivery and record of said deed the amount due thereon did not exceed the sum of $6,000; that, on or about the 23d of April, 1860, the said Stewart, then being so seized of said premises subject to said mortgages to the extent aforesaid, executed and delivered to the defendant Craig a mortgage upon real estate situate in Genesee and Erie counties, in this State, to indemnify him, said Craig, against the liability he had assumed, or was about to assume for said Stewart, on becoming one of said Stewart's sureties in an undertaking given by said Stewart, on an appeal to the court of appeals, brought by him in a suit pending in the supreme court of said State, between himself as defendant and appellant against Maria L. Dehon, executrix of the last will and testament of Theodore Dehon, deceased, as plaintiff and respondent, from a judgment entered in said cause against him, said Stewart, on the 26th day of February, 1862, on direction of the general term of said supreme court affirming a judgment rendered against him, said Stewart, in said court, on
104 the 24th day of October, 1859, for the sum $1,018\frac{83}{100}$, with costs, which mortgage was recorded on the 24th day of April, 1860, in said Monroe County clerk's office, in liber 97 of mortgages, at page 290, in the execution of which mortgage, Mary A., wife of said Stewart, joined.

That the said Stewart and wife, on the 27th day of April, 1860, executed a deed of said premises, subject to the first two mortgages hereinbefore described, to the extent aforesaid, to Henry K. Sanger, the payment of the amount due on said two mortgages being assumed by the said Sanger, by deed bearing date the 27th day of April, 1860, and containing full covenants of warrantee of title except as to the mortgage debt, assumed and recorded on the first day of May, 1860, in the said county clerk's office, in liber 157 of deeds, at page 115, which two

mortgages were then and now are held and owned by the defendant Craig.

That soon after the conveyance aforesaid to said Sanger, and before the death of said Sanger, the said Nelson P. Stewart died, leaving the said Mary Ann Stewart, his widow, surviving him, who still lives and resides in Detroit, in the State of Michigan, at the time of the commencement of this suit, and of the amendment of complaint.

That said Sanger has departed this life since the conveyance to him last above mentioned, leaving a last will and testament, wherein and whereby he devised all his estate, both real and personal, including his rights in the foregoing described property, to his wife, Caroline Sanger.

That said will was duly proved as a will of real estate, and that the said Caroline Sanger, prior to the 16th of April, 1867, conveyed the said property to the plaintiff in this action, by deed duly executed and recorded in the office of the clerk of said county of Monroe, on the 16th day of April, 1867.

That the said Stewart, at the said time he executed and delivered to said Craig said indemnity mortgage, or since that time, also executed and delivered to him a chattel mortgage on the furniture in Con-
105 gress Hall, as security for his liability as surety on said undertaking, and at the same time authorized him, by an apt and proper instrument in writing therefor, to hold possession of said premises and property, and receive the rents and profits thereof, and allow the same to accumulate in his hands as a fund for his further protection against said liability, and to apply the same to the liquidation of any loss that might accrue thereby, and that thereupon, and by virtue and in pursuance thereof, he, said Craig, took possession of said premises and property as tenant of said Stewart, under and by virtue of the writing last aforesaid, and with the right also of mortgagee in possession under the mortgages held and owned by him as aforesaid, and has thence hitherto, as plaintiff is informed and believes, by the authority aforesaid, collected and received the rents, issues, and profits thereof, and that since the execution of said mortgage said Craig received other moneys and property belonging to said Stewart, which should be applied in payment and discharged of the said liability of the said Stewart to said Craig, hereinafter stated, as the plaintiff is informed and believes, the particulars of which the plaintiff is unable to state, but which on the accounting hereinafter prayed will more fully appear.

That the defendant Craig, by reason of having become security on said undertaking, became liable to pay the judgment against the said Stewart therein mentioned, and paid a considerable sum in the discharge of said liability.

That at the time of the execution of said indemnity mortgage by said Stewart to said defendant Craig, the defendant Litchfield executed a bond, at the request and on behalf of said Stewart, to said Craig, in the penalty of $5,000, conditioned that the obligees in said bond named should protect certain property therein named, and on which said defendant Craig had a lien as said security against his liability as surety on said undertaking, from the lien of a certain judgment against
106 said Stewart also therein specified, upon which said bond the defendant Craig, on the fifth day of December, 1863, moved a judgment against the defendant Litchfield upon said bond for the sum of $5,179.69, the amount of the penalty thereof, and the costs of the suit, which judgment the defendant Litchfield has fully paid and satisfied to the defendant Craig, and that by means thereof he, said Craig, has received the sum of $5,000, and interest thereon, from the date of the

recovery of said judgment properly applicable upon the amount he became liable to, and did pay in discharge of his liability as surety on said undertaking hereinbefore referred to as hereinafter mentioned.

That the said Craig foreclosed the said indemnity mortgage in respect to the premises in Genesee and Erie Counties covered thereby, and sold the same and realized therefrom a large sum of money, and more than sufficient with the moneys realized by the said Craig from other securities received from said Stewart as indemnity against said liability on said bond, to indemnify himself against and reimburse himself for the moneys so paid by him in discharge of his said liability as surety as aforesaid, and from the rents, issues and profits of the Congress Hall property, so received as aforesaid, he has realized a sum sufficient to keep down the interest on the amount due on the mortgages, subject to the payment of which the property was conveyed by said Stewart to said Sanger as hereinbefore mentioned, and to satisfy a large portion of the principal thereof remaining due and unpaid thereon.

That by reason of the aforesaid payment by him to the defendant Craig the said defendant Litchfield claims a right of subrogation to the securities held by the defendant Craig as an indemnity against his liabilities as such surety in said undertaking, and to enforce said securities for his own benefit to the extent of the aforesaid sum paid by him to the defendant Craig, and the interest thereon as against the plaintiff's right to redeem, hereinafter claimed and set forth.

107 That the plaintiff claims and insists that he is entitled to redeem the said Congress Hall property, upon payment of what shall be found due to said Craig on the accounting herein prayed, or to the defendants Craig and Litchfield, if it shall appear that said Litchfield has the interest he claims in the defendant Craig's securities, or any other interest in the premises, which payments this plaintiff is ready and willing to make, when the amounts due are ascertained and liquidated, and upon such payment claims and insists the defendant Craig shall discharge all his liens on said Congress Hall property and deliver over to plaintiff possession of said property, and discharge from all incumbrances thereon.

Whereupon the plaintiff demands judgment in this action as follows: That the defendant Craig account with the plaintiff for all the moneys received or collected upon or by virtue of the aforesaid securities received by him from said Stewart, on account of his said liability as surety for him as hereinbefore mentioned, and any other securities held by him as indemnity as aforesaid, or for or on account of said mortgage, debts or otherwise which are not herein enumerated.

That the defendant Litchfield interplead with the defendant Craig in this suit, and establish his right of subrogation as claimed by him, or that the plaintiff may have the benefit of the defendant Litchfield's aforesaid payment to him, as against him, the defendant Craig, and that the defendant Craig account for the same as payment to him in like manner as if the same had been repaid to him by said Stewart, and that the defendant Litchfield be barred of any right of subrogation to the benefit of the sureties of the defendant Craig as against this plaintiff.

Also, that upon payment of the amounts found upon an accounting to be due to him by reason of the aforesaid payment by him in discharge of his liability as aforesaid, or upon the mortgages hereinbefore men-
108 tioned held by him, the defendant Craig may be adjudged and decreed to render up to the plaintiff the possession of the said Congress Hall property, and discharge the mortgages thereon of record

so that as to the defendant Craig the title and possession of the property aforesaid shall be made complete and perfect.

J. MASON,
Plaintiff's Attorney, Hamilton, N. Y.

STATE OF NEW YORK,
County of Monroe:

Henry Ten Eyck, being duly sworn, says that he is the plaintiff in this action, and the foregoing complaint is true to the knowledge of deponent, except as to matters on information and belief, and as to those matters he believes it to be true.

H. TEN EYCK.

Sworn to before me this 8th day of November, 1867.

B. T. CLARKE,
Notary Public for Madison County.

EXHIBIT 7.

Supreme court, county of Monroe.

HENRY TEN EYCK, PLAINTIFF,
ag'st
JOHN CRAIG, IMPLEADED WITH ELISHA C. Litchfield, defendant.

The defendant John Craig answers the complaint herein, and respectfully shows to this court:

That he admits that said Nelson P. Stewart was at some period
109 in his lifetime seized in fee of the premises in said complaint particularly described, and that he was so seized at the time stated in said complaint. He admits that said Stewart became so seized by virtue of a conveyance in fee from said Walbridge, and that the same was made subject to the mortgage described in said complaint, or to so much thereof as is in said complaint stated to have been due thereon.

But he further saith, upon information and belief, that at the time of the conveyance aforesaid by said Walbridge to said Stewart, the said Stewart, in order to secure to said Walbridge the payment of seven thousand dollars, part of the purchase price thereof, executed and delivered to said Walbridge his bond in the penal sum of fourteen thousand dollars, conditioned for the payment of said sum of seven thousand dollars with interest, in five equal annual payments from the date thereof, with interest annually, and gave to said Walbridge, to secure the payment of said bond, a mortgage upon said premises, dated January 1st, 1859, and having the same condition as in said bond stated and above set forth, which mortgage was afterwards duly recorded in the office of the clerk of Monroe County, in liber 91 of mortgages, at page 389, on the 10th day of January, 1859.

And this defendant further saith that said last mentioned mortgage was, on the 29th day of January, 1859, for a full and valuable consideration, duly sold and assigned by said Walbridge to this defendant, and he has since continued to be and now is the owner thereof.

And he further saith that the interest due upon said bond and mortgage up to March 17th, 1862, has been paid; but no more of the interest, nor any of the principle sum, has at any time been paid; and this defendant admits the execution of a mortgage by Nelson P. Stewart

and wife to him, dated April 23d, 1860, upon certain premises in Erie County, and upon the premises particularly described in the complaint herein, but which mortgage did not embrace any lands in Genesee
110 County; and he admits that such mortgage was given to indemnify him as surety upon an undertaking given upon appeal by said Stewart; and this defendant is informed and believes that the action referred to in said complaint was one in which said Dehon was plaintiff and said Stewart defendant, but this defendant refers to the said mortgage on record, as in said complaint stated, for a more particular statement of the terms thereof.

And the defendant further saith, as to the alleged conveyance to said Henry K. Sanger by said Nelson P. Stewart and wife, and the terms and conditions thereof, and as to the undertakings and agreements therein on the part of said Sanger, this defendant has no knowledge or information sufficient to form a belief; but this defendant denies that he did at the alleged time of said conveyance hold said mortgage, before executed by said Walbridge and this defendant to said Brooks and Sprague; but he admits that he is now the owner and holder of said mortgage, and that he has at all times been and now is the owner and holder of the said other mortgage described in said complaint as executed by said Walbridge to this defendant, and dated August 1st, 1853.

And this defendant, upon information and belief, admits that at some time (but when this defendant doth not know) the said Nelson P. Stewart died, leaving the said Mary Ann Stewart, his widow, surviving him, but whether she now lives or whether she was alive at the time of the commencement of this action, or, if alive, where she at either of said periods resided or where she now resides, this defendant doth not know, and has not knowledge or information thereot sufficient to form a belief.

And this defendant further saith that he hath no knowledge or information sufficient to form a belief as to whether the said Sanger has at any time departed this life, nor whether he left a last will and testament, nor whether he devised all or any of his estate, whether real or
111 personal, or both, or his rights, if any he had, in the property in said complaint described or referred to to his wife, Caroline Sanger, nor whether the said will, if any was made, was ever proved as a will of real estate or otherwise, nor whether she, the said Caroline Sanger, at any time in said complaint stated, or at any other, conveyed the said premises to the plaintiff herein, nor whether the said deed from her, if any, was recorded.

And this defendant denies that at any time the said Stewart executed and delivered to him the mortgage of indemnity in said complaint, and in the answer above referred to, or at any other time, the said Stewart executed and delivered to him a chattle mortgage on the furniture in Congress Hall or upon any other property, as security against his liability as surety upon such undertaking.

And this defendant denies that the said Stewart at the time in said complaint stated, or at any other time, by an instrument in writing or otherwise, authorized him to hold possession of said premises, and to receive the rents and profits thereof, as stated in said complaint, or otherwise, except as hereinafter stated and set for h; and he denies that he at any time took possession of said premises or property as mortgagee, in possession or otherwise, under the mortgages in said complaint stated, or any or either of them, or as tenant of said Stewart, under or by virtue of the writing in *in* said complaint stated, or otherwise.

And this defendant denies that by the authority in said complaint

MONROE COUNTY, *ss:*

John Craig, being duly sworn, deposes and says that he is the defendant above named, and that the foregoing amended answer has been read by him, and is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

JOHN CRAIG.

Sworn to before me December 14, 1867.

A. VAN INGEN,
Notary Public.

116, 117 EXHIBIT A.

Whereas, on or about the 24th day of October, A. D. 1859, one Theodore Dehon, of New York, recovered a judgment in the supreme court against Nelson P. Stewart, for the sum of $10,184.83, entered upon a report of referee, from which judgment said Stewart has appealed to the general term of the supreme court, and for the purpose of staying proceedings upon the said judgment, the undersigned, John Craig, has consented to sign and execute the necessary undertaking to stay the proceedings upon said judgment.

Now, for the purpose of securing the said Craig for becoming such surety (in addition to other securities made to him), the said Nelson P. Stewart hereby sells, assigns and transfers to said Craig the annexed lease of Congress Hall, executed by R. D. Cook to me, and said Craig is hereby authorized to demand and receive the rents reserved by said lease for the term thereof, or until the said Craig shall be relieved from liability on his undertaking, from which rents said Craig is to pay the interest upon the mortgages now on said premises, held by himself and Asa Sprague, the insurance thereon, and the balance of said rents are to be held by said Craig to meet any liability upon his said undertaking upon the appeal aforesaid, upon which balances so remaining in his hands said Craig is to allow interest to said Stewart.

And for the more ample protection of said Craig, it is hereby agreed that in case said Cook, from any cause, shall fail to meet his rents, or shall fail to perform his covenants, or to keep said house, and the said premises shall be vacated, or said lessor shall be entitled to the possession; that then, and in that case, the said Craig shall have full power and authority to take the actual possession of said premises—and relet the same in the name of said Stewart, holding the lease and rents under this assignment for the term or period for which he shall remain
118 responsible upon said undertaking. When said Craig shall be relieved of responsibility upon the said undertaking, he is to render an account and pay over the rents which may have accumulated in his hands as above provided.

NELSON P. STEWART.
JOHN CRAIG.

ROCHESTER, *April 24th*, 1860.

Lease.

This indenture, made the twenty-second day of December, in the year of our Lord one thousand eight hundred and fifty-nine, between Nelson P. Stewart, of the city of Detroit, in the State of Michigan, party of the first part, and Robert D. Cook, of Niagara, in the State of New York, party of the second part, witnesseth:

That the party of the first part, for and in consideration of the rents, covenants, and agreements hereinafter mentioned and contained, on the part of the said party of the second part, his executors, administrators and assigns, to be paid, observed and performed, has demised and leased, and by these presents does demise and lease unto the said party of the second part, his executors, administrators, and assigns, all that certain lot, lots and premises situate near and westerly of the railroad depot, in the city of Rochester, in the State of New York, and known as and called "Congress Hall"—the same being now and heretofore used for the purpose of an hotel—together with all and singular the benefits, liberties and privileges to the said premises belonging; to have and to hold the said demised premises, with the appurtenances, unto the said party of the second part, his executors, administrators and assigns, for and during, and until the full end and term of five years next ensuing the first day of May next, fully to be complete and ended, yielding
119 and paying therefor, during the continuance of this lease, unto the said party of the first part, his heirs and assigns, the annual rent of three thousand dollars per annum, the same to be paid monthly, and in advance.

And the party of the first part does hereby further agree to give, at the expiration of the said term, a new lease of said premises to said party of the second part, for five additional years, provided the party of the second part desires to have the same upon such terms, and at such rent as the party of the first part can obtain from others.

And further, the party of the first part agrees that, if necessary, he will, during said term, at his own expense, put a new roof upon the said hotel, which is on said demised premises.

And the said party of the second part, for himself, his executor, administrators and assigns, does covenant well and truly to pay, or cause to be paid, unto the said party of the first part, his heirs and assigns, at the days and times above mentioned, the rent above reserved; and further, that during the said term he will, at his own cost and expense, make all necessary repairs upon said premises (save putting on, if necessary, a new roof, which is above provided for), and that at the expiration of said term he will deliver up said premises in as good repair and condition as he receives the same, usual wear and tear and accidents by fire and the elements excepted. And at the end of said term, shall and will peaceably and quietly leave, surrender and yield up the said premises unto the said party of the first part, his heirs and assigns; provided always, and these presents are upon this express condition, that if it shall so happen that the rent above reserved, or any part thereof, be behind or unpaid at the times or on the days above mentioned for the payment thereof, or in case of the non-performance of any of the covenants made by the said party of the second part, at any of the times mentioned for the performance thereof, then and from thenceforth it shall and may be law-
120 ful for the said party of the first part, his heirs and assigns, to re-enter into the said demised premises, or any part, in the name of the whole, to re-enter, and the same to have again, retain, repossess and enjoy, and the party of the second part, his heirs, executors, administrators, or assigns, and all others, tenants or occupiers of said premises hereby demised, or any part thereof, thereunto and therefrom utterly to expel, put out and remove, and from and after such re'ntry made, this lease and every part thereof shall cease and be absolutely void, as it respects the covenants to be performed by the said party of the first part. And the said party of the first part, for himself, his heirs and assigns, does hereby covenant and agree to and with the said party of the second

part, his heirs, executors, or administrators, or assigns, paying the rent above reserved in manner aforesaid, and observing, keeping and performing all and singular the covenants and agreements hereinbefore mentioned, on his and their parts to be kept and performed, shall and may peaceably and quietly have, hold, occupy, possess and enjoy the said demised premises, with the appurtenances, for and during the said term, without any lawful let, quit, hindrance or molestation of the said party of the first part, his heirs or assigns, or any other person or persons claiming or to claim, by, from or under him, or them, or any other person or persons having or lawfully claiming any rights in the said premises.

In witness whereof, the parties hereunto have interchangeably set their hands and seals, the day and year first above written.

NELSON P. STEWART. [L. S.]
ROBERT D. COOK. [L. S.]

Signed, sealed and delivered in presence of—
WILLIAM GRAY.
GEORGE K. JOHNSON.

121, 122 MONROE COUNTY:

On this 24th day of April, 1860, personally appeared before me Nelson P. Stewart and John Craig, and severally acknowledged the execution of the within instrument by them respectively for the purposes therein mentioned, both of whom are known to me.

CHAUNCEY PERRY,
Commissioner of Deeds.

123, 124 SCHEDULE 8.

[Supreme court.

H. R. Selden.

HENRY TEN EYCK
against
JOHN CRAIG, IMP'LD, &C.

G. F. Danforth.

Tried at Monroe special term, July 14th, 1871. Hon. James C. Smith, J.

The answer admits that the title to Congress Hall was in Stewart at the time of the mortgage.

Mr. Selden put in evidence the mortgage of Stewart to Craig, recorded in liber 97, p. 290, dated April 23d, 1860.

Also deed of Stewart and wife to Henry K. Sanger, dated April 27th, 1860, recorded in liber 157, p. 115, marked B.

It was admitted that Mr. Sanger died before July, 1864.

Mr. Selden also put in evidence the will of Henry K. Sanger, dated May 8th, 1862, admitted to probate July 19th, 1864, in Wayne County probate court, Michigan, together with a stipulation dated September 8th, 1868, in reference to the reading of the bill marked C.

Also a deed from Mrs. Sanger to Henry Ten Eyck, dated January 3d, 1867, recorded April 16th, 1867, in liber 210, page 214, marked D.

Mr. Selden read from the answer of Mr. Craig, commencing at fol. 16, and including the exhibit referred to therein.

Mr. Selden put in evidence Mr. Craig's receipts for the rents of Congress Hall, marked E.

PURCELL, EDWARD C., sworn for the plaintiff and examined by Mr. Selden, testified:

Where do you reside?

At Rochester.

125 What is your business?

I keep a hotel.

Do you keep Congress Hall?

Yes, sir.

How long have you kept that hotel?

Nearly seven years.

Prior to that time did you act as clerk for Mr. Scranton?

I did.

How long?

About three years.

Did you pay the rents for Mr. Scrantom, or sometimes pay them for him?

Sometimes.

To whom did you pay them?

To John Craig.

How often did you pay them?

Every month.

What was the rent?

Three hundred dollars a month.

Do you know who was the lessee named in the lease under which Mr. Scrantom occupied?

I think Mr. Craig.

I mean the lessee?

Mr. Cook's lease was assigned to Scrantom, I suppose. I never saw his lease. Mr. Scrantom bought out Cook's lease.

Did you act as clerk for Scrantom as long as he kept the hotel?

Yes, sir.

Do you recollect when he ceased to keep it?

I think December, 1862 or 1863.

Who took the lease after he left?

I did. I bought out Mr. Scrantom's lease.

How long after he purchased did his lease expire?

I think I purchased of him the fore part of December, and his lease was to expire the following May. Then I got a lease of him. Before his lease expired Mr. Craig executed a lease to me for five years.

126 Did you occupy as long as the lease continued?

Yes, sir, and that expired in May, 1870, and then I received a new lease from Mr. Craig for five years commencing the 1st of May, 1870.

At what rent?

At $400 a month.

How much did you pay under your first lease?

$300 a month, the same as Scrantom paid.

Since that the lease has been renewed, since the first of May, 1870, at $400 a month?

Yes, sir.

While Scrantom occupied, was the rent paid to any one but Mr. Craig?

It would be paid sometimes at Mr. Powers' banking office for Mr. Craig.

It was placed to his credit, sometimes?

Mr. Powers used to receive it for him.

Have you paid the rents regularly since you were lessee?

Yes, sir; up to the present time.

Cross-examined by Mr. DANFORTH:

Money has been retained for damages caused by the elements, from time to time?

Yes, sir.

When you speak of paying you include the damages?

In some instances there has been some money deducted for damages.

You include the allowances for damages?

They should be deducted.

The plaintiff here rested.

Mr. Danforth moved for a nonsuit.

Denied and exception taken.

Mr. Danforth offered in evidence a judgment roll, William M. Burr, Henry Ten Eyck, Benjamin R. Wendall, and Russell R. Freeman, survivors, &c., plaintiffs, against Nelson P. Stewart; filed October 25th, 1859; amount $2,675.24. No. 1.

Also, execution upon the same, directed to the sheriff of Mon-
127 roe County, received the 26th of October, 1857, and return "made by the sale of real property, the amount of the within execution, except $1.60." No. 2.

Also sheriff's certificate of sale, dated December 17th, 1860, reciting the execution already in evidence, and describing the premises embracing Congress Hall, and stating that the same was sold to John Craig for $5. No. 3.

Also a deed from the sheriff to Daniel W. Powers, dated 21st of March, 1862, reciting the judgment and execution and stating that Powers had redeemed; acknowledged 25th day of March, 1862, and recorded on the same day, in liber 168, at page 404. No. 4.

Also the redemption papers reciting the judgment of Powers against Stewart; assignment from Powers to Benedict and reassignment from Benedict to Powers. No. 5.

Also deed from Daniel W. Powers to John Craig, dated 7th May, 1864; consideration $1,753.53. No. 6.

The plaintiff here resumed.

Mr. Selden put in evidence the pleadings in the case of Litchfield against Craig and others, in the suit commenced by Litchfield to stay the proceedings in the suit on the five thousand dollar bond, together with a stipulation thereto attached.

Mr. Danforth objected as inadmissible; that the answer of Mr. Craig was not admissible in this suit for any purpose; that the answer of Mr. Powers was inadmissible as a pleading, and also that his admissions were not competent as against Mr. Craig.

Overruled and exception taken.

(Mr. Powers' answer was verified on the 9th of December, 1863.)

POWERS, DANIEL W., sworn for the plaintiff, and examined by Mr. Selden, testified:

Where do you reside?

In Rochester.

What is your business?

A banker.

128 How long have you been engaged in that business?

Twenty-two or three years.
At what place?
Corner of Buffalo and State streets, or near there.
Has Mr. Craig ever been engaged with you in banking?
No, sir; he has kept an account with me.
Has Mr. Craig made your office his place of business any part of the time?
Yes, sir.
For how long?
I should think for twelve or fifteen years.
During all that time has he kept his banking account with you?
Yes, sir.
What relation do you hold to him?
Son-in-law of his.
How long have you been his son-in-law?
About fifteen years.
Have you resided with him all that time?
I have.
Were you acquainted with Nelson P. Stewart in his lifetime?
Yes, sir.
Did you do business with him?
I did some business with him.
Did you recover a judgment against him in January, 1860?
I think I did.
For about how much?
Fourteen or fifteen hundred dollars.
Did you get your pay on that judgment?
I think I did.
From whom did you get it?
I assigned the judgment to Mr. Benedict.
From whom did you get the judgment to pay it?
From Mr. Benedict, I think; I would not be positive of that; I assigned the judgment to him.
Was Mr. Stewart present when it was done?
No, sir; I think not.
129 Do you remember about what time the assignment was made to Benedict?
April 10th, 1860.
How much did Benedict pay you for the judgment?
I could not say.
Have you the assignment there?
Yes, sir.
What does that specify as the consideration?
There is no consideration put in, but it says: "For value received." The amount of the judgment is inserted.
Do you remember putting in an answer in the case of Litchfield against Craig and you?
I don't remember about it, whether I was made a party or not.
Do you remember whether Stewart was present at the transaction?
I don't recollect.
Did you understand from Benedict or from Stewart for what purpose Benedict took the assignment?
(Mr. Danforth objected.)
What was said by either of them in regard to the reason for which the assignment was to be made?
(Mr. Danforth objected.)

Did you ever hear any conversation between Benedict and Stewart in regard to this judgment?

(Mr. Danforth objected upon the ground that such a conversation was inadmissible.)

Received for the purpose of showing notice to Mr. Powers.

Objected to as immaterial. Overruled and exception taken.)

I don't recollect that I did, in regard to this judgment. Benedict and Martindale were held on the paper.

Did you understand from both Stewart and Benedict that that judgment was assigned to Benedict to be for the amount of it, as security to Benedict?

(Same objection, same ruling & exception.)

It would be very difficult for me to say; the matter has passed out of my mind.

130 Do you recollect whether or not you stated that fact in your answer to Mr. Litchfield's complaint?

(Mr. Danforth objected.)

I should say that I did, if that is my answer.

Is or is not that your recollection, at this time?

I really could not recollect; it was in 1863; is almost ten years ago, and my attention has never been called to it.

I suppose you intended to state the matter truly in that answer?

(Mr. Danforth objected as incompetent and *and* immaterial. Sustained and exceptions taken.)

Is that the assignment of Mr. Benedict to you?

Yes, sir; and from me to Mr. Benedict.

Did Benedict reassign the judgment to you?

Yes, sir; the 17th of March, 1862.

What consideration did you pay him for reassigning it?

I think I paid him nothing.

Is that the assignment to you?

Yes, sir.

(Mr. Selden put in evidence the two assignments, Exhibit G.)

Do you know whether Stewart furnished Benedict the money to pay you the judgment?

No, sir.

Did you learn from Benedict that he did?

No, sir; I did not.

Did you learn from Stewart that he did?

I did not.

You have no knowledge upon that subject?

No, sir.

Was Benedict an endorser upon the paper on which that judgment was recovered?

Not on that paper, but on paper given to take this up, which I still retain.

Was he the counsel and adviser of Mr. Stewart, at Rochester?

(Mr. Danforth objected as immaterial. Objection overruled and exception taken.)

I think he was the attorney, and done business for him.

Don't you know he was his attorney, and did a large amount of business for Stewart?

I knew he came down with him to get this amount of money.

131 Was Mr. Benedict the endorser of a good many notes that you discounted for Mr. Stewart?

(Mr. Danforth objected as inadmissible, and as not the best evidence. Question reserved.)

No, sir, not that I know of, except the renewal of this one.

How many times was it renewed?

I don't remember now. First it was a draft on New York and then something else.

Was Mr. Stewart a good deal embarrassed about that time?

I should think he was by his not paying those drafts.

Do you know of his being?

(Mr. Danforth objected.)

Did Benedict frequently apply to you in his behalf, to extend this paper?

(Mr. Danforth objected. Objection overruled and exception taken.)

I think this note never was extended.

The debt?

I think the debt was extended on different drafts.

Was it done through Mr. Benedict generally?

I think it was, as he was the endorser.

Did you subsequently convey this Congress Hall property that the sheriff conveyed to you, to Mr. Craig?

Yes, sir.

Do you recollect what time you deeded it to him?

I don't recollect now.

Was it about May, 1864?

I should think likely.

What did you do with the property in the mean time?

Nothing. Mr. Craig kept the management of it and paid the interest on the mortgages.

Did he receive the rents?

I think he did.

Were the rents sometimes received by you for him, and placed to his credit?

I think they were.

Have you his pass books here?

I believe they are here.

132 What did Mr. Craig pay you, if anything, on the conveyance of the property to him?

He paid me the amount expressed in the deed.

What was the value of the whole property at that time, in your opinion?

(Mr. Danforth objected as inadmissible. Objection overruled and exception taken.)

I should put the property at from twenty to thirty thousand dollars at that time.

Has it increased in value very much since that time?

Yes, sir.

What is its value now?

(Mr. Danforth objected; sustained & exceptions taken.)

What did you do with the money that you received from Mr. Craig for this property? Did you pay any of it to Benedict?

No, sir.

Nothing before nor since, having reference to that matter?

No, sir.

Or anything on account of that judgment?

No, sir; the money I was after was for another judgment.

Benedict had paid you that amount?

(Mr. Danforth objected.)
Did Mr. Benedict give you the judgment?
(Mr. Danforth objected.)
He assigned me the judgment.
Without any consideration?
I paid him nothing for it.

Cross-examined by Mr. DANFORTH:

At the time of the redemption of this property by you were you aware of the amount of incumbrances upon it?
I knew something near what they were.
You may state.
I supposed them to be something in the neighborhood of $20,000.
Was that aside from the indemnity mortgage?
Yes, sir.
I understood you to say that you had another judgment, subsequently recovered, and that your object was in part to protect that?
Yes, sir; docketed 12th of January, 1861. That was for a deficiency on a mortgage foreclosure, and it was $1,438.25.
133 That judgment was docketed?
Yes, sir.
On what property was the foreclosure?
On property adjoining Congress Hall.
Did you convey the property to Mr. Craig at any time?
I sold it to him after I did the other Congress Hall property; it adjoined it and connected with it.
After you became the purchaser, Craig had the management of the property, you said. State what you mean by that.
It was understood that he should collect the rents as he had, and pay the interest on the encumbrances and pay the taxes and insurance and make the repairs necessary; the property was very badly out of repair.
Under what arrangement was that done?
No other person besides myself.
Was there any writing between yourself and Mr. Craig in reference to that?
I don't recollect that there was.
Did you at any time satisfy yourself as to the value of the property, and as to whether or not it exceeded the incumbrances that were then upon it?
(The judgment roll of the judgment in favor of Mr. Powers and against Stewart, docketed the 12th of January, 1861, was considered in evidence. No. 7. Also the docket of the same.)
After you conveyed to Mr. Craig did he lease the property?
Yes, sir.
In his own name?
Yes, sir.
Do you know whether he made any repairs upon it?
He did.
Did you at any time hear of Caroline Sanger making any claim to the property, of any description?
(Mr. Selden objected; overruled & exception taken.)
I never did.
Or after the conveyance to you by the sheriff, did you hear of Mr. Stewart making any claim to the property?
I never did.
Or of Mr. Sanger?

No, sir.

134 Re-examined by Mr. SELDEN:

What was that suit about?

The foreclosure of a mortgage I held on the property adjoining Congress Hall.

The barn property?

Yes, sir; I held two mortgages; one I took up from the Savings Bank, of $1,500, and mine was $1,500, I think. I think I foreclosed the Savings Bank mortgage, but I don't recollect which I foreclosed.

How much was the property struck off for?

I don't now recollect—a nominal sum.

Did you bid it off yourself?

I don't recollect.

Cross-examined by Mr. DANFORTH:

This mortgage that was foreclosed was a junior mortgage?

Yes, sir.

Who held the prior mortgage?

The Savings Bank.

How much was that?

Fifteen or sixteen hundred dollars. The other was junior mortgage, given to Mr. Walbridge.

(The deed from King, referee, to Powers, was received in evidence, dated January 12th, 1861, and recorded in liber 162, page 42. No. 8.)

At the time you redeemed Congress Hall property did you redeem other property?

Yes, sir.

Were you present at the sale upon the Madison County judgment?

No, sir.

What other property did you redeem?

Some farming property in Irondequoit, and some property on Washington street in the city.

The Irondequoit property consisted of several parcels?

Yes, sir; five or six.

Do you recollect the whole amount of the redemption?

135 I should think it was between three or four thousand dollars that I paid for redeeming. I don't remember the exact amounts. He paid the judgment and interest and costs.

Examined by Mr. WHITTEMORE:

Why didn't you redeem by virtue of the other judgment?

I redeemed it all at the same time and in the same manner.

Didn't you know then that the Sanger deed was the prior lien?

No, sir; I think not.

Didn't you so state in your former testimony?

It may have been so, but I don't recollect it.

The priority of the Sanger deed might have been the reason you didn't redeem under the other?

It might have been.

What did you do with the Congress Hall barn after you bid it off?

I rented it.

Subsequently to that what did you do with it?

After I sold it I didn't do anything with it.

Did you sell it?

Yes, sir; to Mr. Craig.

What did you get for it?

Some $3,000.

What was it worth?

I think I got all it was worth. I would have sold it to anybody as well as to him.

Do you remember hearing Mr. Craig testify on the other suit?

I don't think I did.

CRAIG, JOHN, sworn in his own behalf, and examined by Mr. Danforth, testified as follows:

You are the defendant in this case?

Yes, sir.

I place in your hands the deed from Powers to yourself, of the Congress Hall property. Did you receive that deed from any one; and, if so, from whom?

136 I received it from Mr. Powers, probably within a day or two from its date, and maybe on the same date.

State whether, on the receipt of that deed, you went into possession of the Congress Hall property, as owner.

Yes, sir; I considered myself in possession after the date of the deed.

Did you put any tenant in the house by lease?

Yes, sir.

Who was it?

Edward C. Purcell.

Is that the lease?

Yes, sir.

The lease was put in evidence by Mr. Danforth. No. 9.

By whom was that guaranty executed, on the back of the lease?

Miles Spencer.

(The guarantee was read in evidence by Mr. Danforth.)

Did you subsequently execute another lease?

Yes, sir.

(Record of the lease between the same parties, dated the 29th of November, 1869, leasing Congress Hall for five years from the first day of May, 1870, for a yearly rent of $4,800, payable monthly; recorded in liber 233, page 208. No. 10.)

You were in court yesterday when Purcell was sworn?

Yes, sir.

You received the rents under the lease assigned to you, and the subsequent rents were received under the leases which have been put in evidence by me?

Yes, sir.

Did you make any repairs or alterations in the buildings?

Yes, sir.

To whom was the property assessed?

To me.

And you paid the taxes?

Yes, sir.

During the time Powers held the title, do you know to whom it was assessed?

137 No, sir; I did not.

Will you state whether any claim to that property was made upon you, by either Mr. Stewart or Mrs. Sanger, at any time after you became the purchaser and owner?

Never.

From the time that you received the deed down to the day of trial, has there been any interruption in your ownership or claim of title?

Not the least.

State the amount of the repairs and improvements you have put upon the premises.

I can't, with any exactness.

As near as you can.

In the neighborhood of $12,000.

And you have paid taxes annually upon it?

Yes, sir.

About how much?

That I can't state. I have paid different kinds of taxes—internal revenue taxes, &c.

And during that time you have controlled the property, as owner?

Yes, sir.

And claimed to be owner?

Yes, sir.

At the time you became the purchaser of this property, you knew the encumbrances upon it?

I thought I knew the encumbrances upon it.

What were they?

There were three several mortgages.

Aside from the Dehon judgment and the indemnity mortgage?

Yes, sir.

State what they were.

One was given by Walbridge and Craig to Asa Sprague and Elias Brooks, of which remained unpaid, of principal, $6,000. It was given for purchase money. The original sum was about $20,000, I
138 should think. That was reduced to $6,000 before the mortgage of Stewart was given to me, I think. The next mortgage was from Silas D. Walbridge to me.

(The first named mortgage was considered in evidence as defendants' Exhibit No. 11.)

Go on.

The next mortgage was from Silas D. Walbridge to me. I don't recollect the amount distinctly, but I think it was five or six thousand dollars. Six thousand, I imagine.

(Considered in evidence as defendants' Exhibit No. 12.)

The third mortgage?

It was given by Nelson P. Stewart to Silas Walbridge, if I recollect right.

Do you recollect the amount of that?

Not distinctly; six or seven thousand dollars unpaid.

You paid Mr. Powers the consideration money expressed in the deed?

Yes, sir.

(The mortgage from Stewart to Walbridge was considered in evidence as defendants' Exhibit No. 13.)

Did you at any time have possession of these premises in any other way than as owner under that deed?

No, sir.

Did you ever go into possession under either of the mortgages you have testified to, or under the indemnity mortgage?

No, sir.

Did you ever assume to exercise any control over the premises until you became the owner, under the deed which I have shown you?

No, sir.

Question by the COURT:

At what time did you, in fact, take possession?

About the time the deed is dated, up to the 9th or 10th of May, 1864. I considered myself the owner, and would be in possession, only it was leased. The lessee had possession.

That was Mr. Scrantom?

139 Yes, sir.

Mr. DANFORTH resuming:

And when that lease was out you took possession and leased it?

Yes; I had no possession during that lease.

The lease set out in the answer?

The lease Stewart made to Cook.

By Mr. WHITTEMORE:

The Cook lease didn't expire until 1865?

I think it was in 1865.

Cross examined by Mr. SELDEN:

Was there any difference between the management or control of the property by you between the time when you took the assignment of the Cook lease and the time that lease ran out?

I don't know that there was.

You kept on in the same way?

Yes, sir; in the same way.

You received the rents the whole time during the life of that lease?

Yes, sir; according as those receipts specify. Some of the time something was kept back.

You received all that was paid?

Yes, sir.

What change occurred after that lease expired?

I let the premises in my own name.

Who paid the taxes during the life of the Cook lease?

I did.

All the time?

Yes, sir.

All of them?

Yes, sir.

Were there any special local assessments during that time?

I don't recollect.

If there were any, I suppose you paid them?

I paid whatever there was.

140 Whatever repairs there were on the premises you paid after it was assigned to you?

Yes, sir; whatever repairs belonged to the lessor.

You bid off that property on the sale on the Madison County Bank judgment?

Yes, sir.

For five dollars?

Yes, sir.

And that was redeemed by Mr. Powers?

Yes, sir.

Did you ever get your money back that you paid the sheriff?

Yes, sir.

Who paid it to you?

The sheriff.

At what time—about the time of the redemption?

Pretty soon after.

You have spoken of other mortgages upon Congress Hall property

that were prior to your indemnity mortgage; were there any other encumbrances that were prior to your indemnity mortgage?

Not that I remember.

Did you own all these mortgages at the time you took the indemnity mortgage?

I am not sure, but I think not. I think the mortgage of Sprague and Brooks came into my hands afterwards. I am positive I owned the other two.

If you didn't own that one at the time, you purchased it afterwards?

Yes, sir.

How long afterwards?

I couldn't tell.

Had you any other mortgage on any other property in which the same parties were concerned, Brooks and Sprague or Walbridge, of that amount?

I couldn't say.

Had you any other mortgage against Stewart on property in the city except the one assigned to you by Walbridge?

I believe not, except the indemnity mortgage.

141 Did the indemnity mortgage cover a farm in Irondequoit?

Yes, sir; I think so.

As well as Congress Hall?

Yes, sir.

What is the value of that farm?

I couldn't tell.

It was——

(Mr. Danforth objected as immaterial.)

Who bid off that farm on the execution of the bank judgment; it was sold on that judgment?

Yes, sir.

Who bid it off?

I don't recollect the name it was bid off in, but I know the agent.

Who was the agent?

Mr. Warner.

What was the farm sold for?

One lot was sold for $800 and one for $1,600, as I saw by the papers.

It was sold in several parcels?

Yes, sir; Mr. Warner bid them all off for a man by the name of Wendell, if I recollect right.

Do you know whether there was any prior incumbrance upon it?

I think there was.

Do you know whether those lands were redeemed by any one?

I understood they were.

From whom did you understand so?

I understood from Mr. Powers that he redeemed them.

All the Irondequoit property?

All that was sold by the sheriff's sale. I understood that he sold the Irondequoit property to Mortimer F. Reynolds.

All of it?

Yes, sir.

Do you know what he sold it for?

No, sir; the Washington street property he sold to O. M. Benedict and John Craig.

For how much?

I don't recollect now how much it was.

Do you know what it was bid off at?

Yes, sir; when he got in a tight place, which was pretty often, and not only often but all the while.

Was he a large operator in real estate here?

Not very.

Did he own a good many pieces of real estate in and about the city?

Not many; I think he had to do with two or three farms and with this house and lot on Washington St. and with Congress Hall. I think he made a trade with Walbridge and got some lots in the west part of the city.

In relation to all these matters you were his adviser, more or less?

Yes, sir; when he talked with me I advised him.

Did you go to Detroit to attend to business there for him?

I went up there, I don't remember how many times.

Did you, before he was stricken with paralysis?

Yes, sir.

And afterwards?

Yes, sir; my impression is that I was there twice before he was stricken with paralysis, and once or twice afterwards.

Did you go there to see Mrs. Stewart in relation to the affairs of the estate after his death?

No, sir; I have no recollection of any such thing, and I don't think I did.

What was his condition, with regard to ability to do business, when you were there after the paralysis?

In pretty bad condition—pretty shakey.

Could he converse?

Yes, sir; but it was with great difficulty that he could articulate, and it was with great difficulty that he could understand; still he would make himself understood to a pretty fair extent. It was hard work to converse with him; he was in pretty bad shape.

146 Were you endorser upon a note for twelve or fifteen hundred dollars, held by Mr. Powers, which was ultimately sued and prosecuted to judgment against Mr. Stewart?

Yes, sir; I believe I was. My impression is that I was on all the paper Powers held, in some form or other.

The judgment I allude to—was it assigned by Mr. Powers to you?

I have seen an assignment here, this morning, to which I suppose you allude. That was assigned to me.

Did you re-assign the same judgment to Mr. Powers?

Yes, sir; just as it is here.

Who furnished the money; how much did you pay Mr. Powers for the assignment?

The face of it—whatever there was due.

Who furnished the money to pay for the judgment?

My impression is I paid that myself, out of my own money; I think I did.

Did Mr. Stewart, at that time, place in your hands about that amount of money, for the purpose of paying that judgment?

No, sir; I don't think he did; not for that specific thing.

Did he, about that time, let you have any money?

Yes, sir.

About what amount?

I cannot tell, but I presume it was about the amount of that judgment. It was after I bought it, I think.

About how long after, according to your recollection?

It is not a recollection; it is my impression it was but a few days

after. I had considerable confidence in Mr. Stewart's ability and his intention to keep me straight, and sometimes he drew on me, and sometimes I drew on him, and money would be realized on paper without his furnishing the money. I negotiated paper and raised money to a considerable extent.

Do you recollect any instance in which he furnished money to you?

147 I cannot give you instances and specific amounts, but there was considerable money passed through my hands.

And you paid a good deal for him?

Yes, sir.

When you paid did you pay with the expectation that he would reimburse you soon?

Certainly; I didn't intend to give it to him.

Were you examined as a witness in the case of Litchfield against Craig, before Judge Gardiner?

Yes, sir.

In relation to the assignment of this judgment?

I think so.

Have you seen the minutes of your testimony recently?

Yes, sir; what purported to be it, and I suppose it was.

How much was Stewart indebted to you at the time you purchased this judgment from Powers?

I don't know how much it was. There were charges for professional services, and then he always promised to make me a full and fair compensation for the responsibility and the general running I did for him, the amount of which was never settled between us.

Aside from that class of claims, how much?

I should think nearly $2,000.

In the examination I have mentioned, did you testify "I think Stewart owed me about $800 at the time I re-assigned the judgment"?

That related to the professional services, without reference to the general claim. I think I was at Detroit two or three times before Mr. Stewart was paralyzed.

In regard to his business?

Yes, sir; I think I spent several days there when Mr. Litchfield was present, considering his interests.

In that examination did you testify, "I think I never advanced to buy up judgments against Stewart. The consideration of the assignment of the Powers judgment to me was money"?

148 I think that is substantially correct. I think I received from him about the amount of that judgment about that time.

Did Stewart say anything to you about that assignment?

He told me to take it.

Was that before or after he sent you the money?

Before.

Did he say whether he would send you the money, at that time?

Mr. Stewart said to me that he would send me some money, and whatever he sent, to give him credit on my own account, and to take the judgment and hold it as my own. He preferred to put it in that shape.

Did you say on examination befort "Mr. Stewart said he wished I would consider the money paid on my account, and take an assignment of the judgment as my security"?

Very likely; I see it is so in the minutes. "This was when he paid me the money."

The substance was that he sent you the money, and you were to take it and hold it for so much against him?

Yes, sir.

You advanced the money for the assignment?

I think so.

And he sent the money afterwards?

I think he did. I do not think it was long before he sent it to me, or paid it to me. I don't know how I got it.

Did you credit it to him on his account?

I cannot tell; I have not looked.

Did he, after that, transfer any property to you, of any account—sofa, chairs, book case, pair of horses, or anything?

He did not transfer any horses to me. In respect to the furniture, the place had been sold, and Stewart and I went down and looked over what was in the house, and there were a few articles of furniture
149 I took and sent up town; we never agreed on any price for it. There was a sofa and two or three chairs and a book-case.

What about the span of horses?

Nothing, with him.

You bought them of his son or somebody else?

I bought the span of horses of somebody else. Stewart had nothing to do with them. Stewart claimed he had nothing whatever to do with them, and I guess it was true. I paid the other man for them.

Did you receive some Iowa lands?

(Mr. Danforth objected.)

Did he convey the Washington st. property to you, or part of it?

I don't know; I don't remember.

Did you testify on the other examination, "I took a deed of 33 feet on Washington street in this city"?

I think that is so.

And did he convey the title of Congress Hall and the livery barn with the same understanding as he did that Washington street property?

I do not remember that that was conveyed to me. I think he did the barn.

Saying that if anything did come from it you would have it?

Yes, sir; something like that. I don't think Mr. Stewart intended to cheat me at all.

You re-assigned the Powers judgment to Powers?

Yes, sir.

At what time?

I presume it was the 17th of March, 1862.

Did you receive any consideration for the re-assignment?

No, sir.

Have you ever received any consideration for it?

I never have received any consideration for this assignment, if you put it precisely in that form.

Did you make any claim to the avails of the judgment in any way?

No, sir; not that I recollect of.

Was your account, that you have alluded to, independent of the general claim for services, settled with Mr. Stewart—I mean the amount of it?

150 That is my handwriting. (Exhibit H.)

What legal services were there after that date?

I cannot give the dates. Mr. Whittemore brought a suit against Stewart; I cannot tell whether it was before or after. I think there were legal services after that.

(Mr. Selden put in evidence a receipt of May 3, 1861, of notes of Mr. Stewart, signed Benedict & Martindale; Exhibit H.)

Does that receipt embrace what you have alluded to as your professional account against Stewart, for about $2,000?

I suppose it does.

Look at these letters, and state by whom they were written.

They are in my handwriting.

They were written and sent to the persons to whom they were addressed, at the time of their respective dates?

I know nothing to the contrary. I should suppose so.

Mr. Martindale was your partner?

Yes, sir; prior to his going to the war.

(Mr. Selden offered in evidence copies of various letters from Mr. Benedict to Mr. and Mrs. Stewart; marked I.

Mr. Danforth objected, as incompetent in the action against Mr. Craig.

Mr. Selden stated that they were only offered as evidence of the intimate relations between the witness and Mr. and Mrs. Stewart.

Mr. Danforth objected further that they were mere declarations of a competent witness, but one who stood in no relation of privity with the defendant; not a party to the suit, or having any interest in the subject matter. That many of them were narratives of past transactions, and none of them relating to the issue.

Mr. Danforth objected, specifically, to the letters dated in 1859, and also to the letters to Mr. Stewart, as immaterial.)

151 Do you know where Mr. Stewart died?

I do not.

Do you know whether he was living in 1862?

I should think so.

In 1861 and 1862, were you the legal adviser and counsel of Mr. Craig and Mr. Powers?

Yes, sir; I did some things for them. I find on my register two suits commenced in the spring of 1861, one by Mr. Whittemore, and another; and precisely how far they went I can't say. I don't know what was done. There was an answer put in, and the case put upon the calendar for trial.

Were those notes that were given for the account paid?

No, sir.

Didn't you get pay for them in Iowa lands?

I don't know whether I shall or not.

You have the lands yet?

I had to pay pretty hard to get the lands; they had been sold for taxes.

You have not been in your office to look up the letters?

No, sir.

Cross-examined by Mr. DANFORTH:

I call your attention to the receipt of May, 1861. You say you received notes which, when paid, would be in full payment for legal services. Have those notes ever been paid?

No, sir.

How is it in reference to the subsequent services; have you been paid for those?

No, sir.

Or for the liability you incurred as indorser?

No, sir; unless you call that furniture pay.

Have you been paid in full?

No, sir. The demand is entirely open and unliquidated.

Are you able to state the amount that would be due to you?

152 For those services and accommodations he assured me I should be paid. I did an immense amount of work and running for that man, and incurred an immense liability; and if I should begin to charge as much as Litchfield did, it would be a large amount.

Aside from the legal services, what would be the amount of his indebtedness to you?

I don't think $3,000 would more than pay me. I should not want to go through it again.

Do you know what the value of Congress Hall was in 1862; did you know the encumbrances upon it?

I suppose I did, exactly.

What was the property worth at that time?

I didn't suppose it was worth much if anything above the incumbrances. I thought it was regarded as a drug beyond that.

The plaintiff again rested.

CRAIG, JOHN, recalled and examined by Mr. DANFORTH:

At the time you received the deed from Powers, or at any time before that, had you any knowledge whatever of the transaction between Benedict and Mr. Stewart in reference to the judgment in favor of Powers against Stewart?

(Mr. Selden objected. Received and exceptions taken.)

I hadn't any knowledge upon that subject.

Did you have any knowledge or information as to the circumstances under which the judgment was reassigned by Mr. Benedict to Mr. Powers?

I didn't know anything about it. I supposed the redemption was made upon another judgment that Mr. Powers held. I find I am mistaken since this suit commenced.

(It was conceded that this action was commenced by the service of summons and complaint, the 15th of July, 1867.)

153 EXHIBIT 9.

Supreme court, Monroe special term *term*, July, 1871.

HENRY TEN EYCK
ag't
JOHN CRAIG AND ELISHA C. LITCHFIELD.

The court, having tried this cause, finds the following facts:

On the 23d of April, 1860, Nelson P. Stewart, then being the owner in fee of certain real estate, situate in the city of Rochester, known as Congress Hall, executed a mortgage of that property, and of a farm in Erie County, to the defendant John Craig, to indemnify him for becoming Stewart's surety in an undertaking made to stay proceedings on a judgment recovered in the supreme court on the 24th day of October, 1859, in favor of Maria L. Dehon, executrix, against Stewart for $10,184.83, on an appeal taken by Stewart from said judgment. At the time of the execution of said mortgage, said Congress Hall property was subject to three prior mortgages, amounting to about $19,000, two of which were then owned by the defendant Craig, and the third by Asa Sprague, who subsequently transferred it to the defendant Craig. The said Congress Hall property was also subject, at the time of the execution of said indemnity mortgage, to a lease executed by said Stewart

to Robert D. Cook for the term of five years from the first day of May, 1860, at a rent of $3,600 a year, payable monthly in advance.

On the 24th of April, 1860, Stewart assigned said lease and the rents payable thereon to Craig, as further indemnity for his becoming surety as above stated, by an instrument in writing, of which the following is a copy, to wit:

(Here follows a copy of the assignment, a copy of which is given in Craig's answer Exhibit 7, hereto annexed.)

154, 155 Craig was made liable on his said undertaking as surety, and was compelled to pay $12,301.24 thereon, on the 7th of August, 1862.

Craig for'closed his indemnity mortgage, so far as it related to the property in Erie County, and realized therefrom the sum of $2,615.88.

At the time when Craig signed said undertaking and took said indemnity, said Congress Hall property was subject to a judgment theretofore, recovered in the supreme court in favor of the Madison County Bank or the trustees thereof, against said Stewart for the sum of $2,500 and costs, of the existence of which judgment Craig was ignorant at the time. On being informed of it, he refused to justify as a surety to said undertaking, unless he was indemnified against said judgment, and therefore Stewart executed a bond, dated the 1st day of June, 1860, and procured the same to be executed by George K. Johnson and the defendant Elisha C. Litchfield, as his sureties, in the penal sum of $5,000, conditioned to protect said Congress Hall property against the judgment last above mentioned, which bond was delivered to Craig, and he then justified as surety to the undertaking given on the appeal.

On the 5th day of December, 1863, Craig recovered a judgment on said last mentioned bond, against Litchfield, for $5,179.69, which judgment Litchfield paid to Craig.

On the 17th of December, 1860, the Congress Hall property was sold on an execution issued upon said judgment, in favor of the Madison County Bank, and was bid off at such sale by the defendant Craig for the sum of five dollars.

On the 17th of March, 1862, Daniel W. Powers, by virtue of a judgment recovered by him against Stewart, on the 26th of January,
156 1860, for $1,481.78, redeemed the Congress Hall property from said sale, and on the 21st of March, 1862, the sheriff, in completion of such sale, executed a deed of said property to Powers.

On the 7th of May, 1864, Powers, by deed of that date, conveyed said property to the defendant Craig, in consideration of the sum of $1,753.53, paid by Craig. The deed was recorded 9th of February, 1867.

The judgment under which Powers redeemed had been sold and assigned by him before the redemption, and on the 10th of April, 1860, to Oliver M. Benedict, of Rochester, in consideration of the amount then due on the judgment paid by Benedict to Powers at the time.

On the day of the redemption, to wit, the 17th of March, 1862, Benedict reassigned the judgment to Powers, without any valuable or valid consideration. At the time of each of those assignments, and for several years next preceding that time, Benedict, who was an attorney and counsellor at law, was the attorney of Stewart, both in law and in fact, and was his confidential adviser. He purchased said judgment, and took the assignment of it in his own name, at the request of Stewart. And the money which he paid for it to Powers was furnished by Stewart, or was replaced by him immediately after such payment, in pursuance of an arrangement between him and Benedict, made before the

money was paid by Benedict. There is no evidence that the assignment of the judgment from Benedict to Powers was authorized by Stewart, or that he knew of it. Previously to the time of such assignment, and in September, 1861, or thereabouts, Stewart became paralytic, and was thereafter incapable of doing business, or even talking, except with great difficulty, and to a very limited extent. Benedict continued to attend to Stewart's business after his paralysis, as before, and went to Detroit several times, where Stewart resided, to advise with him and his wife in regard to his affairs. In the years 1861 and 1862, Bene-
157 dict was also attorney and counsel of both Powers and Craig, and part of the time during those years Craig made Benedict's office his place of business. During the period of the transactions above stated, Powers was the son-in-law of Craig, and lived in the same family with him. During much of that period Craig kept his bank account with Powers, and at the same time made the banking office of the latter his place of business.

While Powers held the legal title to Congress Hall, to wit, from March, 1862, to May, 1864, he did not take possession of the premises or receive rents on his own account, but he occasionally received the rents as Craig's agent, and placed them to Craig's credit in his bank. The defendant, Craig, received the rents of Congress Hall, had the management of the property, paid the taxes and interest on the incumbrances, and made repairs uninterruptedly from the commencement of the term of the lease to Cook, to wit, the first day of May, 1860, to the time of the trial of this action, and has never accounted to Powers for the rents received while Powers had the legal title. Down to the time when Powers redeemed, Craig kept the accounts with Stewart, but after that time he kept them with Congress Hall, and not at any time with Powers. When Craig took the deed from Powers the premises were occupied by Purcell, the assignee of Cook, the original lessee. On the 27th of October, 1864, Craig leased the premises to Purcell for the term of five years from the first day of May, 1865, and subsequently to the latter date Purcell occupied under that lease, and paid rents to Craig as his landlord.

The rents which, as stated, were $300 a month under the Cook lease, were the same under the Purcell lease, to May, 1870, and thereafter were $400 a month. By the agreement between Stewart and Craig, the latter was not only to be indemnified against loss by reason of becoming surety on the appeal, but was also entitled to take out of the rents the sum of $1,000 as a compensation for furnishing sureties on the undertaking given on such appeal.

158 On the 27th of April, 1860, Stewart and his wife conveyed Congress Hall to Henry K. Sanger, by deed, subject to the several mortgages above stated, except the indemnity mortgage. Sanger died previously to July, 1864, leaving a will duly executed, bearing date the 7th of May, 1862, which was admitted to probate 19th of July, 1864, and by which he gave to his wife all his real estate, real and personal, and named her as sole executrix. Mrs. Sanger, wife of Henry K. Sanger, as devisee and executrix, conveyed Congress Hall to the plaintiff, Henry Ten Eyck, by deed dated 3d of January, 1867, and recorded 16th of April, 1867. The deed recites a consideration of $200.

This action was commenced 13th of July, 1867. On these facts the court decides as a mater of law:

That the defendant Craig, on entering upon the collection of the rents on the assignment of the lease of the Congress Hall property, was in the position of a trustee for Stewart in respect to the leased property, and

his purchase of the same while he occupied that position inured to the benefit of the cestui que trust at his election.

That when Benedict, the confidential adviser of Stewart, held the judgment under which Powers redeemed, he held it in trust for Stewart. Powers, as the assignee of Benedict, without consideration, took Benedict's right in the judgment, and no more. When Powers redeemed he took the land subject to the trust which attached previously to the judgment in his hands.

From the intimate relations existing between Powers and Craig, and from the circumstances above found, respecting their dealings with each other, and with the Congress Hall property, Craig is chargeable with notice of said trust.

That Stewart, while he owned the Congress Hall property, had the right to redeem the same, on paying to Craig the amount of his liens and advances, over and above his receipts.

159 That the plaintiff Ten Eyck, by means of the successive conveyances above stated, has succeeded to such right of Stewart to redeem said property, and is entitled to redeem.

That the plaintiff is entitled to a judgment.

(1.) Declaring that the plaintiff has the right to redeem the Congress Hall property, on paying to the defendants Craig and Litchfield, respectively, the sums to which they are equitably entitled, such payment to be made in sixty days after such sums shall be finally ascertained and determined, as provided by the judgment.

(2.) Directing that a referee be appointed to take and state the accounts, and that on the accounting before him, Craig be charged with the rents and profits received by him from the Congress Hall property, and with all moneys collected by him upon or by virtue of the above mentioned, or any other securities received by him from said Stewart, as indemnity for his said liability as surety, including the $5,000 and interest thereon, received from Litchfield, and that he be credited with the sums paid by him in discharge of his said liability as surety for Stewart, with the sum of $1,000, which, by the agreement, he was allowed to retain out of the rents, as compensation for procuring sureties, with all just allowances, and particularly with all necessary repairs made by him to the Congress Hall property, with all permanent improvements made by him to said property, before the filing of the lis pendens in this action, and service of the summons on him, and also with the amount of his liens on said property, other than said indemnity mortgage, and that said Craig pay or receive, as the case may be, the balance found by the referee, and confirmed by the court.

(3.) Directing that, as between Craig and Litchfield, said Litchfield be subrogated to Craig's rights and securities to the extent of $5,000 and interest, collected of Litchfield by Craig.

(4.) Directing that, upon payment by the plaintiff of the amount
160 found due to the defendants, respectively, at the time and in the manner provided by the judgment, the defendant Craig convey said Congress Hall property to the plaintiff and render up to him the possession thereof and execute and deliver discharges of the mortgages held by him thereon.

The questions of costs are reserved till the coming in of the report.

JAMES C. SMITH,
Just. Sup. Court.

(Endorsed:) Bill in equity. Filed September 20, 1876.

161 U. S. circuit court, second circuit, northern district of New York.
In equity.

HENRY N. WALKER AND JOSEPH P. WHITTEMORE
vs.
DANIEL W. POWERS AND OSCAR CRAIG, executors of, &c., of John Craig and Daniel W. Powers, personally, Helen Maria Powers, devisee, &c., *on* John Craig, impleaded with Henry Ten Eyck, defendants.

These defendants respectively, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainants' bill of complaint to be true in such manner and form as the same are therein set forth and alleged, do demur thereto; and for causes of demurrer show:

1st. That the said complainants have not nor have either of them in and by their said bill, made or stated such a case as doth or ought to entitle them, or either of them, to any such discovery or relief as is thereby sought and prayed for, from or against these defendants.

162 2d. That the said bill of complaint does not state facts sufficient to give this court jurisdiction of the suit, nor does it state sufficient ground for its interference.

3d. The bill of complaint shows that the plaintiffs' remedy, if any, is at law, and that they have not, nor has either of them, exhausted their or his legal remedies.

4th. It appears on the face of the bill of complaint that the suit was not commenced within ten years after the cause of action, if any, accrued.

5th. It appears on the face of the bill of complaint that the suit was not commenced within six years after the discovery by the complainant of the facts constituting the alleged frauds.

6th. The bill of complaint does not show that the facts constituting the alleged frauds could not, with reasonable diligence, have been discovered sooner.

7th. It appears by the bill of complaint that Mrs. Stewart and Mrs. Sanger and the devisees and executors named in the will, the heirs of the deceased Nelson P. Stewart, and his children Frederick Stewart, Helen McConnell, and Adeline M. Johnson are proper and necessary parties to said bill of complaint.

9th. It appears that Henry N. Walker has no interest in any of the subject-matters of the suit.

10th. It appears by the said bill that the same is multifarious, inasmuch as it is exhibited against the several defendants above named, for several distinct matters and causes, in many whereof, as appears by said bill, the defendant Daniel W. Powers personally is in no wise interested, and in many whereof the defendant Helen Maria Powers is in no wise interested, and in many whereof the defendants Oscar Craig and Daniel W. Powers, executors, &c., are in no wise interested.

Wherefore, these defendants respectfully demand the judgment of this court, whether they, or either them, shall be compelled to make any further or other answer to the said bill, or any of the matters

163 and things therein contained, and prays to be hence dismissed, with their reasonable costs in this behalf sustained.

DANIEL W. POWERS AND
OSCAR CRAIG,
Executors, &c., of John Craig.
DANIEL W. POWERS AND
HELEN MARIA POWERS.

DANFORTH & SHEPARD,
Solicitors for Defendants.
GEO. F. DANFORTH,
Of Counsel.

I certify that, in my opinion, the above demurrer is well founded in point of law.

GEO. F. DANFORTH.

UNITED STATES OF AMERICA,
Northern District of New York, to wit:

Daniel W. Powers, being duly sworn, deposes and says: I am one of the defendants in the above entitled suit; the demurrer aforesaid is put in under the advise of counsel, and is not interposed for delay.

D. W. POWERS.

Subscribed and sworn this 7th day of February, A. D. 1877, before me.
[L. S.] J. D. HUSBANDS,
U. S. C't C't Com. in and for said District.

(Endorsed:) Demurrer. Filed Feb. 10, 1877.

164

165 At a special term of the circuit court of the United States of America for the northern district of New York, in the second circuit, held at the city of Utica on the 17th day of February, in the year of our Lord one thousand eight hundred and seventy-eight.

Present: The honorable Alexander S. Johnson, circuit judge.

HENRY N. WALKER & ANOTHER
vs.
OSCAR CRAIG & OTHERS.

On motion of Theodore Bacon, complainants' solicitor, ordered that the demurrer of the defendants to the bill of complaint herein, filed Feb. 10, 1877, be, and the same is hereby, set down for a hearing on the first Monday of March next, or as soon thereafter as counsel can be heard.

166, 167 At a stated term of the circuit court of the United States of America for the northern district of New York, in the second circuit, held at the village of Canandaigua on the 20th day of June, in the year 1878.

Present: Hon. Samuel Blatchford, circuit judge.

HENRY N. WALKER AND JOSEPH P. WHITTEmore
vs.
DANIEL W. POWERS AND OSCAR CRAIG, executors of, &c., of John Craig, & Daniel W. Powers, personally, Helen Maria Powers, devisee, &c., of John Craig, impleaded with Henry Ten Eyck.

This cause having come on to be heard upon the bill of complaint

herein and the demurrer of the above named defendants, and having been argued by George F. Danforth, of counsel for the defendants, and Henry R. ~~Selam~~, and Joseph P. Whittemore in person and as counsel for the complainants:

Seldon

168 Now, therefore, in consideration thereof, it is ordered, adjudged, and decreed, and the court doth hereby order, adjudge, & decree, as follows, viz: That said demurrer be allowed, and the said complainants' bill of complaint be, and the same is hereby, dismissed with costs to the defendants to be taxed.

(Endorsed:) U. S. circuit court, north'n dist. of N. Y. Henry N. Walker & another vs. Daniel W. Powers & ano', ex'rs, &c., & al. Decree allowing demurrer. Danforth & Shepard, sol'rs for def'ts., 43 Powers Block, Rochester, N. Y. Filed Oct. 9, 1878.

169 U. S. circ't court, north'n dist. of N. Y. In equity.

HENRY N. WALKER & ANO.
vs.
OSCAR CRAIG & DANIEL W. POWERS, EX'RS, &c., & al.

Defendants' costs & disbursements.

Docket fee, March, 1877, deduct $20	$20 00
" " June, 1878 " $10	20 00
Printing demurrer book	194 00
" points	37 25
	$271 25
Clerk's fees (to be inserted by him)	72 05
	343 30
Deduct	30
	313 30

NORTHERN DISTRICT OF NEW YORK, *ss:*

George F. Danforth, being duly sworn, says that he is one of the defendants' attorneys herein, and that the foregoing costs and disbursements have been necessarily made or incurred in this action, and that the same have been actually paid by said defendants.

GEO. F. DANFORTH.

170 Subscribed and sworn to before me this 8th day of October, 1878.

[L. S.] J. D. HUSBANDS,
U. S. C't C't Commissioner in & for said District.

Taxed at $313.30 this 15th day of October, A. D. 1878.

CHARLES MASON, *Clerk.*

To THEODORE BACON, Esq.,
Pl'ffs' Sol'r:

SIR: Take notice that the within bill of costs & disbursements will be presented for adjustment & taxation to the clerk of the U. S. circ't

court, at his office in the city of Utica, on the 15th day of October, 1878, at ten o'clock a. m.

Yours, &c.,

DANFORTH & SHEPARD,
Def'ts' Sol'rs.

(Endorsed:) U. S. circuit court, north'n dist. of N. Y. Henry N. Walker & ano. vs. Daniel W. Powers & ano., ex'rs, &c., & al. Def'ts' costs & disbursements & notice of adjustment. Danforth & Shepard, sol'rs for def'ts, 43 Powers Block, Rochester, N. Y.

Service of a copy of the within bill of costs & notice of adjustment & taxation is hereby admitted.
Oct. 8th, 1878.

THEODORE BACON.

Filed Oct. 15, 1878.

171 Wherefore the defendants' costs are taxed at three hundred and thirteen dollars and thirty cents, as appears by their bill of costs filed October 15, 1878, and hereto annexed.

Whereupon the said pleadings, order and final decree, together with the papers in the said cause, are duly annexed hereto, and the decree is duly signed and enrolled pursuant to the rules and practice of this court this 15th day of October, A. D. 1878.

CHARLES MASON, *Clerk.*

172 (Endorsed:) U. S. circuit court, north. dist. of N. Y. In equity. Henry N. Walker and Joseph P. Whittemore vs. Oscar Craid and Daniel Powers, executors, &c., et al. Enrolled decree. Danforth & Shepard, def'ts' sol'rs. Costs, $313.30. Filed October 15, 1878, 3 o'clock p. m.

173 Circuit court of the United States for the northern district of New York.

HENRY N. WALKER AND JOSEPH P. WHITTEMORE
vs.
OSCAR CRAIG AND OTHERS.

BLATCHFORD, J.:

The debt alleged to be due to Walker is not established by judgment. This must be done, I think, before he can maintain this suit. Especially is this so, as the statute of limitations seems to have run against the claim. The allowance of the claim by the commissioners of the probate court of Michigan can be of no force as against the defendants.

As to the judgment recovered by Whittemore against Stewart it was paid and satisfied by the sale of Congress Hall. The bill is not filed as a bill in aid of the ejectment suit either as a bill of discovery or otherwise.

As to the Chester judgment I do not think it can be made the foundation of this suit until the remedy on it by execution is exhausted.

174 The plaintiffs seek to treat the defendants as trustees and also to regard the case as one of administration, but I do not think that the death of Stewart varies the general and well-settled rule, nor that the plaintiffs are absolved from the necessity of exhausting all legal

herein and the demurrer of the above named defendants, and having been argued by George F. Danforth, of counsel for the defendants, and Henry R. ~~Selam~~, and Joseph P. Whittemore in person and as counsel for the complainants:

Seldon

168 Now, therefore, in consideration thereof, it is ordered, adjudged, and decreed, and the court doth hereby order, adjudge, & decree, as follows, viz: That said demurrer be allowed, and the said complainants' bill of complaint be, and the same is hereby, dismissed with costs to the defendants to be taxed.

(Endorsed:) U. S. circuit court, north'n dist. of N. Y. Henry N. Walker & another vs. Daniel W. Powers & ano', ex'rs, &c., & al. Decree allowing demurrer. Danforth & Shepard, sol'rs for def'ts., 43 Powers Block, Rochester, N. Y. Filed Oct. 9, 1878.

169 U. S. circ't court, north'n dist. of N. Y. In equity.

HENRY N. WALKER & ANO.
vs.
OSCAR CRAIG & DANIEL W. POWERS, EX'RS, &c., & al.

Defendants' costs & disbursements.

Docket fee, March, 1877, deduct $20	$20 00
" " June, 1878 " $10	20 00
Printing demurrer book	194 00
" points	37 25
	$271 25
Clerk's fees (to be inserted by him)	72 05
	343 30
Deduct	30
	313 30

NORTHERN DISTRICT OF NEW YORK, *ss:*

George F. Danforth, being duly sworn, says that he is one of the defendants' attorneys herein, and that the foregoing costs and disbursements have been necessarily made or incurred in this action, and that the same have been actually paid by said defendants.

GEO. F. DANFORTH.

170 Subscribed and sworn to before me this 8th day of October, 1878.

[L. S.] J. D. HUSBANDS,
U. S. C't C't Commissioner in & for said District.

Taxed at $313.30 this 15th day of October, A. D. 1878.

CHARLES MASON, *Clerk.*

To THEODORE BACON, Esq.,
Pl'ff's' Sol'r:

SIR: Take notice that the within bill of costs & disbursements will be presented for adjustment & taxation to the clerk of the U. S. circ't

court, at his office in the city of Utica, on the 15th day of October, 1878, at ten o'clock a. m.

Yours, &c.,

DANFORTH & SHEPARD,
Def'ts' Sol'rs.

(Endorsed:) U. S. circuit court, north'n dist. of N. Y. Henry N. Walker & ano. vs. Daniel W. Powers & ano., ex'rs, &c., & al. Def'ts' costs & disbursements & notice of adjustment. Danforth & Shepard, sol'rs for def'ts, 43 Powers Block, Rochester, N. Y.

Service of a copy of the within bill of costs & notice of adjustment & taxation is hereby admitted.
Oct. 8th, 1878.

THEODORE BACON.

Filed Oct. 15, 1878.

171 Wherefore the defendants' costs are taxed at three hundred and thirteen dollars and thirty cents, as appears by their bill of costs filed October 15, 1878, and hereto annexed.

Whereupon the said pleadings, order and final decree, together with the papers in the said cause, are duly annexed hereto, and the decree is duly signed and enrolled pursuant to the rules and practice of this court this 15th day of October, A. D. 1878.

CHARLES MASON, *Clerk.*

172 (Endorsed:) U. S. circuit court, north. dist. of N. Y. In equity. Henry N. Walker and Joseph P. Whittemore vs. Oscar Craid and Daniel Powers, executors, &c., et al. Enrolled decree. Danforth & Shepard, def'ts' sol'rs. Costs, $313.30. Filed October 15, 1878, 3 o'clock p. m.

173 Circuit court of the United States for the northern district of New York.

HENRY N. WALKER AND JOSEPH P. WHITTEMORE
vs.
OSCAR CRAIG AND OTHERS.

BLATCHFORD, J.:

The debt alleged to be due to Walker is not established by judgment. This must be done, I think, before he can maintain this suit. Especially is this so, as the statute of limitations seems to have run against the claim. The allowance of the claim by the commissioners of the probate court of Michigan can be of no force as against the defendants.

As to the judgment recovered by Whittemore against Stewart it was paid and satisfied by the sale of Congress Hall. The bill is not filed as a bill in aid of the ejectment suit either as a bill of discovery or otherwise.

As to the Chester judgment I do not think it can be made the foundation of this suit until the remedy on it by execution is exhausted.

174 The plaintiffs seek to treat the defendants as trustees and also to regard the case as one of administration, but I do not think that the death of Stewart varies the general and well-settled rule, nor that the plaintiffs are absolved from the necessity of exhausting all legal

remedies before resorting to this suit. The demurrer is allowed, and the bill is dismissed with costs.

J. P. WHITTEMORE for the plaintiffs.
GEORGE F. DANFORTH for the defendants.

(Endorsed:) Circuit court of the United States for the northern district of New York. Henry N. Walker & Joseph P. Whittemore vs. Oscar Craig and others. Decision. Aug't 23d, 1878. Filed August 23, 1878.

175 United States circuit court, northern district of New York.

HENRY N. WALKER AND JOSEPH P. WHITTEMORE
vs.
DANIEL W. POWERS AND OSCAR CRAIG, AS executors, &c., of John Craig, deceased, Daniel W. powers, personally, and Helen Maria Powers.

Know all men by these presents that we, Henry R. Selden and Theodore Bacon, of the city of Rochester, are held and firmly bound to Daniel W. Powers and Oscar Craig, executors of the last will and testament of John Craig, deceased, Daniel W. Powers personally, and Helen Maria Powers in the sum of one thousand dollars, to be paid to them, their executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors and administrators firmly by these presents. Sealed with our seals. Dated this twenty-first day of October, 1878.

176 Whereas the above-named Walker and Whittemore are about to take an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action on the fifteenth day of October, 1878, by the circuit court of the United States for the northern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Walker and Whittemore shall prosecute their said appeal to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation to be void; otherwise to remain in full force and virtue.

HENRY R.
THEODORE BACON. [L. S.]

NORTHERN DISTRICT OF NEW YORK,
Monroe County, ss:

On this 21st day of October, A. D. 1878, before me, the subscriber, personally came Henry R. Selden and Theodore Bacon, to me known to be the same persons described in and who executed the foregoing
177 bond and severally acknowledged that they executed the same.

[L. S.] M. H. BRIGGS,
Notary Public.

NORTHERN DISTRICT OF NEW YORK,
Monroe County, ss:

Henry R. Selden and Theodore Bacon, being severally duly sworn, each for himself says: I am a citizen of the United States and free-holder of

the State of New York. I am worth in property not exempt from execution the sum of two thousand dollars over all my just debts and liabilities.

HENRY R. SELDEN.
THEODORE BACON.

Subscribed and sworn to before me this 21st day of October, A. D. 1878.

[L. S.] M. H. BRIGGS,
Notary Public.

178 (Endorsed:) U. S. circuit court northern district N. Y. Henry N. Walker & Joseph P. Whittemore vs. Daniel W. Powers & others. Bond on appeal. Theodore Bacon, appellants' solicitor, Rochester.

The within bond is approved as to form and sufficiency as a supersedeas.

Dated Oct. 22, 1878.

WM. J. WALLACE,
U. S. Dist. Judge.

Filed Nov. 6, 1878.

179 In the circuit court of the United States for the northern district of New York. In equity.

HENRY N. WALKER AND JOSEPH P. WHITTEmore
vs.
DANIEL W. POWERS AND OSCAR CRAIG, executors of the last will and testament of John Craig, deceased; Daniel W. Powers, personally, and Helen Maria Powers, sole heiress and devisee of said John Craig, impleaded with Henry Ten Eyck.

To the honorable the Supreme Court of the United States:

The appeal of the above-named Henry N. Walker and Joseph P. Whittemore, complainants and appellants, respectfully shows:

That upon the twentieth day of September, 1876, the appellants filed their bill in the circuit court of the United States for the northern
180 district of New York against the above-named defendants and respondents, setting forth certain equitable rights of these appellants, which they charged the above-named defendants to have infringed, and praying for certain equitable relief against them by the decree of said court.

That thereafter the above-named defendants, other than Henry Ten Eyck, appeared in said suit by their attorneys and counsel, and jointly demurred to the said bill of complaint for want of equity and upon other grounds; but the said Ten Eyck was not at any time served with process, and did not appear in said suit.

That said cause came on for hearing upon said bill and demurrer before the said court; and thereupon, on the fifteenth day of October, 1878, a final decree was made and pronounced in said cause,
181 whereby it was in substance adjudged and decreed that the said demurrer was sustained; that the said bill was dismissed as against said defendants, other than Ten Eyck; and that the said de-

fendants, other than Ten Eyck, should recover of these appellants three hundred and thirteen $\frac{30}{100}$ dollars, cost of the said suit; and these appellants refer for greater certainty to the records of the said suit, wherein the said decree was enrolled and filed in the clerk's office of said court, at Utica, the day and year last aforesaid.

And these appellants further show that the matter in dispute in the said suit, and concluded by the said decree, exclusive of costs, largely exceeds the sum or value of five thousand dollars.

Wherefore these appellants appeal from the whole of said decree and respectfully pray that the same, and the bill, demurrer and proceedings in the said cause may be sent to the Supreme Court of the United
182 States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court, and every part thereof, may be reversed and a decree made granting the relief prayed for by said bill, with costs, or such other decree as to the said Supreme Court shall seem just.

Dated October 21, 1878.

THEODORE BACON,
Solicitor for Appellants.
H. R. SELDEN, *Counsel.*

The appeal is allowed as prayed, citation to issue, bond having been approved.

Dated October 22, 1878.

WM. J. WALLACE,
U. S. Dist. Judge.

(Indorsed:) U. S. circuit court, northern district N. Y. Henry N. Walker & Joseph P. Whittemore vs. Daniel W. Powers & others. Appeal. Theodore Bacon, solicitor for complainants & appellants, Rochester. Filed Nov. 6, 1878.

183 By the honorable William J. Wallace, one of the judges of the circuit court of the United States for the northern district of New York.

To Daniel W. Powers and Oscar Craig, executors of the last will and testament of John Craig, deceased; Daniel W. Powers, personally; Helen Maria Powers, sole heiress and devisee of John Craig, deceased:

Whereas Henry N. Walker and Joseph P. Whittemore have lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the northern district of New York, in your favor, and has filed the security required by law, you, and each of you, are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday in October, 1879, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Syracuse, in the northern district of New York, in the second circuit, the twenty-second day of Oc-
184 tober, in the year one thousand eight hundred and seventy eight.

WM. J. WALLACE,
U. S. Dist. Judge.

NORTHERN DISTRICT OF NEW YORK, *ss:*

Due service of the foregoing citation upon me is admitted, at Rochester, in said district, this twenty-fourth day of October, 1878.

GEO. F. DANFORTH,
Solicitor for the above-named Respondents.

(Indorsed:) In the Supreme Court of the United States. Henry N. Walker & Joseph P. Whittemore ag'st Daniel W. Powers & others. Citation. Theodore Bacon, solicitor for complainants & appellants, Rochester. Filed Nov. 6, 1878.

185 UNITED STATES OF AMERICA,
Northern District of New York, ss:

I, Charles Mason, clerk of the circuit court of the United States of America for the northern district of New York, do hereby certify that I have compared the annexed and foregoing papers with their respective originals, and that they are exact copies of said originals remaining of record and on file in my office, and that they comprise a complete transcript of the record and proceedings had in said court in the suit of Henry N. Walker and Joseph P. Whittemore vs. Daniel W. Powers and Oscar Craig, executors, &c., et al.

In testimony whereof I have hereunto set my hand and caused the seal of the said court to be affixed, at the city of Utica, in said district, this sixteenth day of November, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the one hundred and third.

[SEAL.] CHARLES MASON, *Clerk.*

(Indorsed:) Supreme Court of the United States. Henry N. Walker and Joseph P. Whittemore, appellants, vs. Daniel W. Powers and Oscar Craig, executors, &c., et al., appellees. Return on appeal.

(Indorsement on cover:) No. 350. Henry N. Walker and Joseph P. Whittemore, appellants, vs. Daniel W. Powers and Oscar Craig, ex'ors of John Craig, dec'd; Daniel W. Powers, personally; and Helen Maria Powers, sole devisee, &c., of John Craig, impleaded with Henry Ten Eyck. N. New York C. C. U. S. Filed 29th November, 1878.

O

OFFICE SUPREME COURT U. S.
FILED
OCT 6 1881
A. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

HENRY N. WALKER, *et al.*
vs.
DANIEL W. POWERS, *et al.*

No. 350.

J. P. WHITTEMORE,
In Pro. Per.

THEODORE BACON,
Solicitor.

JOHN ATKINSON,
Of Counsel.

Brief and Abstract of Pleadings,

ON

APPEAL FROM DISMISSAL OF BILL ON DEMURRER, BY THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

SUPREME COURT.

OF THE

UNITED STATES.

HENRY N. WALKER, and
JOSEPH P. WHITTEMORE,
Appellants,
vs.
OSCAR CRAIG and others,
Respondents.

APPEAL IN CHANCERY, ON DEMURRER TO BILL.

Abstract of Bill and Brief

FOR APPELLANTS.

The plaintiffs' bill in this case, (filed Sept. 20th, 1876,) was a "creditor's bill" to "discover" and "administer" assets of a deceased debtor, invoking for the benefit of the plaintiffs, and all other creditors of the

decedent, the jurisdiction of the Court of Chancery, for "administration" upon the original ground of equity jurisdiction over "trusts."

In the case at bar, the jurisdiction of the Court in New York was invoked *ancillary* to original administration in Michigan, the domicil of the deceased debtor, and of the suing creditors.

On demurrer to the bill, for want of equity, it was dismissed in the Circuit Court in Chancery for the Northern District of New York, principally on the ground that the suing creditors had not exhausted their remedies at law in the Courts of New York by judgment, execution, and returns "*nulla*," so as to confer the jurisdiction in aid of legal proceedings required in statutory creditors' bills, against living debtors.

In thus dismissing the bill, the Circuit Court followed late decisions of the Courts of New York, which seem to have abandoned the original jurisdiction of chancery over administrations.

See 11 N. Y., 237; 53 ibid, 263; and Estes V. Willcox, Mss. read at the argument.

And the principal point for discussion here, seems to be, whether the Courts of Chancery of the United States shall also abandon that original jurisdiction.

Questions as to the application and effect of statutes of limitation were discussed below, and will be presented here for consideration, to show here, as well as there, that they do not bar the plaintiffs' equity.

The assets sought to be reached and applied by this bill, consist of several parcels of real estate, dis-

posed of in fraud of creditors, by the deceased debtor, in his life-time, and the rents and profits thereof since such disposal.

The bill seeks redress of matters occurring during the years 1860 to 1864, inclusive. Yet no question of *laches* can arise, for the case rests upon record evidence, and testimony upon the points now in controversy, given by the defendants, or those under whom they claim, in open court, with full cross-examination, as early as 1863; and thence to the present time. Yet the benefit of decision, upon the merits, although once attained, favorable to the plaintiffs' case, was lost by a technicality that the bill of the plaintiffs has, thus far, failed to remedy.

The bill sets forth a successful conspiracy, in the life-time of the decedent, to defraud his creditors; through which, the property in question, has come to the defendants as volunteers or participators; which conspiracy, and the fact that the assets sought to be reached by plaintiffs' bill, are the fruits of it, stand confessed by the demurrer.

The demurrer is a joint demurrer of all the defendants, which must prevail on grounds common to all or not at all.

The bill sets forth:

FIRST.

Jurisdictional Parties.

The parties plaintiff, Henry N. Walker and Joseph P. Whittemore, (suing for themselves and all other creditors,) resident in Michigan, bring this bill against the defendants, citizens of New York, residing in Rochester, New York. [Record, p. 1.]

SECOND.

The Plaintiffs' Title to Sue.

The residence and decease of the debtor, Nelson P. Stewart, in Michigan, and his decease in Detroit, on May 11th, 1863, testate and insolvent, leaving a will devising his property, subject to his debts, to his wife, Mary A. Stewart, and his heirs at law.

That the will was never probated nor acted upon. But on petition of a creditor, in pursuance with Michigan statutes, letters of administration were granted, on May 20, 1874, to George K. Johnson, a creditor to the amount of $80.000.

That commissioners were duly appointed, under Michigan statutes, by the Probate Court, to determine and allow claims against the estate, before whom were presented and allowed the claims of Johnson, and those of plaintiff Whittemore; and the claim of plaintiff Walker, presented after the close of the commission, to the Judge of Probate, and *allowed in accordance with the statutes* of Michigan. [Record, p. 2.]

That the estate of decedent *is* justly indebted to the plaintiff Walker, in the sum of $10,000; which was allowed, and adjudged to him by the Court of Probate. And the decedent died indebted to other parties, citizens of Michigan and New York, in whose behalf, as well as of plaintiffs, this suit is brought. [Record, p. 2.]

That plaintiff Whittemore recovered, in his own right, a judgment in the New York Supreme Court, for $12,416.00, on August 20th, 1862, besides costs, upon a debt accrued in 1859, which was docketed, and became a lien on decedent's property in Rochester, N. Y., on August 28, 1862—which judgment remains un-

paid and uncancelled, except as hereinafter mentioned. [Record, pp. 2 and 3.]

That on June 7th, 1862, Elisha W. Chester, a citizen of New York, recovered a *like judgment* against decedent for $12,633.00, and costs—the judgment roll being filed in the County Clerk's office, in New York City, to which *reference is prayed*, for greater *certainty and particularity*. This judgment was docketed early in 1862, in Monroe County Clerk's office, as required by New York statutes, to make it a lien upon decedent's real estate. That this debt accrued in 1858, and the suit was commenced by attachment. But reference to the record, as prayed, will show it to be a judgment in *personam*, by reason of defendants' appearance and defense of the action.

The judgment was duly assigned to plaintiff Whittemore on *March* 7, 1872. [Record, p. 3.]

That no proceedings to prove decedent's will have ever been taken in Michigan, or New York ; nor have proceedings of administration been taken in either New York or Michigan, except as hereinbefore stated. And that decedent *left no property in New York*, at his decease, except that hereinafter stated.

That the widow, heirs and devisees, of decedent, are all citizens of Michigan.

That decedent's only heirs were Frederick S. Stewart, Adeline M. Johnson, and Helen W. McConnell, and they were the only devisees in the unprobated will.

That on July 6, 1872, Whittemore recovered a judgment against said last named heirs, in *scire facias* upon his first named judgment, in accordance with the provisions of the New York code ; and issued execution thereupon, and sold one piece of the property in

question, known as "Congress Hall," a hotel, in the City of Rochester, and bid it in, at the face of the judgment and interest—$21,636.97—and on the *26th day of November*, 1873, took a Sheriff's deed of the same. [Record, pp. 3 and 4.]

That plaintiff Walker had no knowledge of the frauds hereinafter set forth, or of the facts leading to such knowledge, till within six months of the time of filing this bill.

That the other creditors, in whose behalf the bill is filed, and *Chester, of whom Whittemore purchased his 2nd judgment*, never knew of such frauds.

That Whittemore never knew of the frauds *until June* 30, 1871. [Record, p. 4.]

THIRD.

The Case Against the Defendants.

That Stewart, the decedent debtor, was a daring, reckless speculator, in real estate, and contractor for building railroads, &c.

That he owned "Congress Hall Hotel," 100 feet square, on the corner of Mill Street and Railroad Avenue, in Rochester; and the "Congress Hall Livery Barn," 48 feet by 100, in the rear of the hotel. He owned what was known as the "Cornwall Farm," also a fine residence on Washington Street, in Rochester; also a large and valuable farm in Irondequoit, near Rochester, the title to which stood in the name of his wife.

Also 77 acres in Irondequoit, in his own name. He was engaged in two railroad enterprises in Michigan. That the financial crisis of 1857 crippled him; but he held on, hoping to go through. And then, finding himself insolvent, *formed the design* of dispo-

sing of all his property with *intent of hindering, delaying and defrauding his creditors;* and enlisted *Oliver M. Benedict*, his counsel, and confidential agent, and friend; and *John Craig*, now deceased, and *Daniel W. Powers*, Craig's son-in-law, both clients of Benedict, in that design. And with their aid, carried out that design as to the "*Congress Hall Hotel*," *Congress Hall Livery Barn*, and the *Irondequoit Property*, aforesaid. [Record, pp. 4 and 5.]

The bill then proceeds to set forth, in detail, the *modus operandi* of proceeding, in pursuance with the conspiracy, to the accomplishment of its object, through the *engineering of Benedict*, and co-operation of *Craig* and *Powers*, by means whereof, the *Congress Hall Property*, worth $30,000, [Record, p. 7,] and renting at $3,600 per annum, and *its rents since May* 1, 1860; and the "*Congress Hall Barn*," worth $10,000, [Record, p. 9,] and *its rents since November*, 1861, were smuggled into the hands of *John Craig*, now deceased; and the *Irondequoit* 77 *acres* into the hands of *Daniel W. Powers*, one of the present defendants.

Helen Maria, the wife of Daniel W. Powers, sole heiress of John Craig, now holds the *legal title* to the *hotel*, and *barn;* and she is made a party defendant. *Daniel W. Powers*, and *Oscar Craig*, *Executors* of John Craig, and *Powers*, personally, are also made defendants.

There is another defendant, Henry Ten Eyck, who does not join in the demurrer, who is made a party, as the holder of a naked trust of the legal title of the hotel property, whose relations to the case are, subsequently, more appropriately and particularly stated.

The mode of manipulating the conspiracy, by

Benedict, with the dates of the various steps, by the different parties, in carrying it out, needs to be stated in order to a full appreciation of the defendants' claim of repose to their titles, under the New York statutes of limitations.

In 1859, Stewart found himself insolvent.

One *Dehon*, of New York City, had just recovered judgment against him of $10,000, and docketed it, at Rochester, in the Clerk's office.

Benedict notified Stewart of this, and that it had stirred up Craig and Powers to press some small demands which they had against Stewart. Stewart proceeded to Rochester, in April, 1860; and he and Benedict determined to appeal, in order to *get time to pay* the Dehon judgment. A series of transfers of Stewart's property, to Benedict, without consideration, was then inaugurated, and continued through 1860 and 1861, whereby property of Stewart's, of great value, was thus transferred, valued nominally at over $300,000.00. These transfers are particularly set forth in the bill.

The *first transfer* of that series, was of a *judgment*, which had been obtained by Powers, through Benedict, his attorney, in *January*, 1860, upon a note of Stewart's, endorsed by Benedict, for about $1,500. [Record, p. 6.]

The details of the transfer of this judgment, and the accompanying circumstances, need be observed, inasmuch, as it was by means of this judgment that the ends of the conspiracy were, principally, finally accomplished; by covering up the property in question, first, in Powers', and then in John Craig's name.

As we have stated, Stewart had determined to ap-

peal the *Dehon judgment* of $10,000, and came to Rochester in response to letters of Benedict, in April, 1860.

Benedict and Stewart procured Craig, on April 27, 1860, to go bail for Stewart, on appeal of the Dehon judgment ; indemnifying Craig against loss, by a mortgage on one of Stewart's farms in Erie County, N. Y., for $5,000 ; also by *mortgage on Congress Hall*, and the 77 *acres in Irondequoit ;* and by assignment of the term of a lease made by Stewart to Robert D. Cook, of Congress Hall, for five years, at $3,600 per annum, from May 1, 1860—Craig to begin, immediately, the accumulation of the rents, to the end of his indemnity, with power to re-enter, and re-let, in case of default of the tenant ; and finally to account to Stewart, for the rents. [Exhibit 1, p. 34, of Record.]

Stewart, on or prior to April 10, 1860, had put Benedict in funds to pay to Powers the aforesaid judgment of $1,500, and had requested Benedict to pay the money to Powers, and *take an assignment to himself*, of the judgment, instead of discharging it of record, with intent, by its *then present lien*, and by its *future use*, as an unsatisfied judgment, to effectuate the aforesaid design in fraud of Stewart's creditors.

There was a small judgment of $2,600, in favor of the *Madison County Bank*, which was a lien on all the aforesaid property, ahead of the *Dehon judgment*, and ahead of the aforesaid Powers-Benedict assigned judgment.

At the time Craig signed the *Dehon appeal bond*, he did not know of the lien of this latter judgment, and on hearing of it, before justifying on the

appeal bond, refused to justify, until he was protected against that lien. Benedict so notified Stewart, who, on June 1, 1860, gave bond, with *E. C. Litchfield* as surety, in the penalty of $5,000, to indemnify Craig against the lien of that judgment; and then Craig justified upon the Dehon appeal bond, and perfected that appeal.

Subsequently, on December 17th, 1860, all of Stewart's property in Monroe County was sold, upon this Madison County Bank judgment, including "Congress Hall," and "Congress Hall Barn," the Washington Street residence lot, and the Irondequoit farm, of 77 acres. On this sale, Mr. Craig bid in the "hotel" at $5, and Benedict bid in the barn, (which had already been conveyed, without consideration, by Stewart, to him,) at $5.00; and the attorney for the Madison County Bank bid enough on the Irondequoit 77 acres, and the Washington Street lot, (the latter had also been without consideration conveyed to Benedict,) to satisfy the judgment. [Record, p. 11.]

Before Stewart's time of redemption from sale on this Madison County Bank judgment expired, to-wit: September 13, 1861, Stewart, the judgment debtor, was struck with paralysis, (from which he never recovered) and Benedict proceeded to Detroit, and arranged with Stewart's wife for the continuation of the conspiracy. [Record, p. 11.]

On December 17, 1861, at the end of the twelve months allowed to judgment debtors to redeem, Benedict and Craig collusively arranged, [Record, p. 12,] with the same intent of covering up the property for Stewart, as aforesaid, for the lapse of Craig's bid of $5 00, on Congress Hall, without redemption; the Con-

gress Hall barn property having, in the November previous, been safely hived in Craig's name, by payment of the incumbrances thereon, out of the rents collected by Craig, under the assigned term of the lease to Cook, of the hotel.

On March 17, 1862, being the last day for creditors to redeem from the sale on the Madison County Bank execution aforesaid, the subject of redemption from that sale came up for consultation with Benedict, Craig and Powers; and the points considered, were, how best to *conceal Stewart's property* from his creditors, and also *to charge Litchfield* on his aforesaid *bond of indemnity* to Craig, against the lien of that Madison County Bank judgment. [Record, p. 12.] And it was concluded that Benedict should, *gratuitously*, reassign to Powers, the $1,500 judgment, which Powers had assigned to Benedict, on April 10, 1860; and that Powers should redeem the property as creditor, from said execution sale; and thus cut off the lien of Craig's *mortgage upon Congress Hall*, and Irondequoit property as well as the *term of the Cook lease*, which Stewart had assigned to Craig; thus apparently, remitting Craig to his Erie County farm mortgage, Litchfield Bond and the *rents of Congress Hall*, already collected, for his indemnity on the *Dehon appeal bond*.

This plan was thereupon executed, and Powers redeemed accordingly; [Record, p. 13,] paying $1,700 to redeem the Irondequoit 77 acres, and five dollars to redeem Congress Hall, (these two parcels being covered by Craig's indemnity mortgage,) and $1,800 to redeem the Washington Street lot, which was not covered by Craig's mortgage; and Powers took the Sheriff's deed.

Immediately on Powers' reception of the Sheriff's deed, aforesaid, he reconveyed the *Washington Street lot* to *Craig and Benedict*, at the same price he had paid for it; but retained the apparent legal title of *Congress Hall* and *Irondequoit property*, till Craig should recover of Litchfield the damage to his securities caused by that redemption; and immediately after such recovery he conveyed Congress Hall to Craig for a trifling, apparent consideration, as herein after stated.

Suit was commenced by Craig, [Benedict of counsel,] on Litchfield's indemnity bond to Craig, within thirty days after said redemption by Powers, to recover the damages to Craig's securities occasioned by Powers' redemption.

But Craig's liability had *not yet been fixed*, on his bond to Dehon; therefore, Benedict proceeded, [p. 14, and schedule H, of Record,] to manipulate a discontinuance, by Stewart, of that appeal, and to have judgment of $12.000 recovered upon it against Craig; which was brought about in August, 1862, and Craig then paid it.

(At that date, the gross accumulated rents of Congress Hall, in Craig's hands, were $8,400. Rent of barn, $500—making $8,900. Craig had also an indemnity mortgage on the Erie County farm, out of which he subsequently realized $2,600, net, making in all $11,500. (besides Litchfield's bond of $5.000)

The suit against Litchfield was tried in 1863, and resulted in a report, and judgment in favor of Craig, for $5,000, for the damages caused to Craig's security by the redemption, where Powers had paid Craig's *bid of five dollars*, and $1,700 on the Irondequoit 77 acres.

Upon the trial of the case against Litchfield, in

November, 1863, it was claimed, by Litchfield, that the redemption by Powers was collusive and for Craig's benefit.

Upon that trial, evidence, which is incorporated in this bill, was given by *Benedict*, *Powers* and *Craig*, which shows the fact of redemption on the paid up judgment hereinbefore stated. [Record, pp. 15, 16 and 17.] This evidence is relied on as admission of Powers while he held the legal title to the real estate in question; and of all three as *res gestae* of the conspiracy.

Just before this trial, Litchfield had filed a cross-bill, [Exhibit 3, p. 39, of Record,] against Craig and Powers, alleging, substantially, the same matters that were tried before the referee: to which bill Craig and Powers, after the trial, filed sworn answers upon the merits, also setting up the report of the referee as *res judicata*—which answers are incorporated in the plaintiffs' bill in this case. [Exhibits 4 and 5, pp. 44 and 50, of Record.] These answers were put in by Benedict, as counsel, and they agree, substantially, with the evidence given before the referee.

In *March*, 1864, soon after the coming in of the answers aforesaid, Litchfield ceased contending, and paid the judgment of $5,000, and costs. Whereupon Powers, *on May* 9, 1864, conveyed to Craig the Congress Hall property, by quit-claim deed, for $1,563, (although it was then confessedly worth $40,000,) and without any accounting for, or payment of the rents, ($7,600,) which Craig had collected during the two years and two months while Powers held the legal title. This conveyance was subject, however, to $18,000 of mortgages held by Craig, which were on the prop-

erty in April, 1860, when Craig took his indemnity mortgage and assignment of rents as security against liability on the Dehon appeal bond. [Record, p. 18.]

Powers had, in the mean time, to-wit: on April 24, 1862, a little less than a month previous to the decease of Stewart, conveyed the Irondequoit 77 acres to a *bona fide* purchaser for $4,725.

Mr. Craig kept secret Powers deed to him, of Congress Hall, for nearly three years, to-wit: till February 9, 1867, and then had it recorded in the proper Clerk's office.

In July, thereafter, Litchfield caused a bill to redeem, and for an account of the rents of Congress Hall, from Craig's mortgages, including the Dehon indemnity mortgage, to be filed in the name of Henry Ten Eyck, a copy of which bill is annexed, [Exhibit 6, p. 54,] to plaintiffs' bill here, and is made a part thereof.

The relations of Ten Eyck, and the suit brought in his name, to this case, are set out in the plaintiffs' bill, and we now condense and state them:

Three days after Stewart had given Craig the Dehon indemnity mortgage, on Congress Hall, and the assignment of the rents thereof, he returned from Rochester to Detroit, and gave a warranty deed of Congress Hall to Henry K. Sanger, who was cashier of the Michigan Insurance Bank, to which institution Stewart was indebted. This deed was given and received ostensibly as a cumulative security for that debt; but the debt was perfectly secure before, and the deed *was intended as a cover against creditors*, of Stewart's equity of redemption in the property. The Dehon appeal having been taken to gain the four or

five years time then required to get through the Court of Appeals, it was expected that the rents of Congress Hall would, in the meantime, accumulate a fund in Craig's hand to pay it; and the deed to Sanger would assure to Stewart the benefit of such rents, as they should accumulate, in discharge of Craig's indemnity mortgage on Congress Hall.

In 1867, the bank had foreclosed its other securities, *and satisfied its debt* against Stewart, and, on application of Litchfield, for a consideration of $200, the bank caused Mrs. Sanger, sole devisee of her husband, to convey this ostensible legal title to Litchfield's friend, Henry Ten Eyck; and upon that ostensible title, Ten Eyck's bill to redeem was filed, as aforesaid.

Mr. Craig, without raising any question as to whether Ten Eyck's title was a deed, or mortgage, answered Ten Eyck's bill, under oath, setting up the redemption title, which he had obtained from Powers, on May 9, 1864, as aforesaid, in bar of Ten Eyck's right of redemption. [See Answer, Exhibit 7, p. 58, of this Record.]

The issue thus joined came on to be tried before Judge James C. Smith, in July, 1871, and *Benedict*, *Powers*, and *Craig*, gave testimony on that trial, the latter claiming to be a *bona fide purchaser* from Powers, without notice of Stewart's equities, growing out of the transactions between Stewart, Benedict, Craig, and Powers, hereinbefore stated, through which that title was acquired.

The testimony on that trial is annexed to plaintiffs' bill, and made a part thereof, commencing at page 64 of this Record, and is relied on as admissions

of the parties in interest in this suit, as well as *res gestae* of the conspiracy.

On mature deliberation, Judge Smith found that Benedict, being Stewart's attorney, and holding the judgment, that had been paid for with Stewart's money, was chargeable as trustee of the judgment for Stewart; and that Powers, a volunteer assignee of the judgment from Benedict, without consideration, was chargeable with the same trust; and that the circumstances clearly charged Craig, before his purchase, with notice of that trust.

He therefore decreed redemption in favor of Ten Eyck, grantee of the *cestui que trust.*

This finding of Judge Smith, [Exhibit 9, of bill, p. 92 of Record,] and the proceedings in Ten Eyck's suit, are fully set forth in the bill, in anticipation of, and as an answer to any claim of the defendants, of *res adjudicata;* as well as showing the admissions of defendants, and the *res gestae* of the conspiracy.

We call attention to the fact, apparent on examination of these Exhibits, that no question of fraud upon creditors was raised or decided in the case; but Ten Eyck claimed as, and Judge Smith's decree declared, him to be the beneficiary of a *lawful* resulting trust. We thus call attention here, because the Court of Appeals, afterwards, as we shall see, raised a point of fraud upon creditors, and seemed to hold the fact of an intent to defraud creditors so apparent in the Stewart-Benedict-Powers redemption transaction, that it could not be ignored in considering the rights of Ten Eyck claiming as a grantee of a party to the fraud.

The defendant Craig as we have intimated, appealed from Judge Smith's decision, and the Supreme

Court reversed Judge Smith's decree and granted a new trial. 2. Hom 452.

Ten Eyck, thereupon, instead of taking a new trial, stipulated for judgment, absolute, under the N. Y. statutes, and took the case to the Court of Appeals.

The latter Court, in deciding the case, ignoring the opinion rendered in the Supreme Court, ordered judgment final against Ten Eyck, holding, substantially, that the Powers-Benedict redemption transaction was a manifest fraud upon the creditors of Stewart, as well as a legal nullity; which, nevertheless, left intact Craig's bid of $5, and Sheriff's certificate of sale of Congress Hall, as *an equitable title*, which, Ten Eyck, standing in Stewart's shoes, could not be heard to question. 62 N.Y. 406.

This decision in the Court of Appeals was rendered in the Spring of the year 1876.

The plaintiff Whittemore acted as counsel, and was present, assisting in the trial of the Ten Eyck suit, in July, 1871; and from the evidence there given, learned the facts which indicated Craig's complicity, and interest in the Benedict-Powers-redemption-scheme, rather than that he was a *bona fide purchaser* without notice, as he had up to that time claimed.

Therefore, Whittemore immediately proceeded to revive, by *scire facias*, his judgment against Stewart, and to issue execution, and sell, as hereinbefore stated.

There was an understanding between Litchfield and Whittemore, that the judgment of the latter, against Stewart, should be paid out of the avails of recovery in the Ten Eyck suit; Litchfield having represented that Ten Eyck had executed and delivered to the former, a quit-claim deed of Congress Hall, which

to November, 1873, *the date of Whittemore's Sheriff's* deed ; and allowing Whittemore the rents afterwards; and, in the latter event, charging Craig's estate, for the creditors generally, with *all the rents;* also,

That Craig's deed of "*Congress Hall Barn*" be declared fraudulent and void, and that the same be *conveyed to a Receiver* of the Court, and *an account* of the rents thereof be taken for the benefit of all *the creditors.*

That the *defendant Powers* be decreed to account for the avails of the sale of the *Irondequoit* 77 *acres*, and interest from the time he sold it.

Also prayer for process and for general relief.

THE DEMURRER.

The Demurrer of the defendants to the Bill is found at page 86 of the Record.

THE OPINION.

The Opinion of Judge Blatchford, sustaining the Demurrer, and ordering the Bill dismissed, is found at page 89, of Record, was rendered and filed August 23d, 1878.

We beg leave to state, preliminarily, that the plaintiffs in this Bill of Complaint, do not intend to charge the deceased Mr. Benedict with bad faith to his client and friend Stewart; nor do they suppose that Powers and Craig intended to keep the property entrusted to them. But the untimely death of Stewart left it upon their hands in a situation that required exposure of the scheme under which they received it, and its consequent surrender—or its retention—and they chose the latter.

GROUNDS OF DEMURRER

1. That Plaintiffs have stated no Equity.

2. The bill does not state facts sufficient to confer jurisdiction.

3. That bill shows the only remedy, if any, to be at law.

4. That the suit was not commenced within ten years after right of action accrued.

5. That action was not commenced within six years after discovery of the fraud.

6. That bill does not show that reasonable diligence would not sooner have discovered the fraud.

7. That Mrs. Stewart, Mrs. Sanger, the Devisees in the will, and the Heirs, are proper and necessary parties.

8. That Plaintiff Walker shows no interest in the subject of the suit.

9. That the bill is multifarious.

OPINION OF CIRCUIT COURT.

BLATCHFORD, J.:

The debt alleged to be due to Walker is not established by judgment. This must be done, I think, before he can maintain this suit. Especially is this so, as the statute of limitations seems to have run against the claim. The allowance of the claim by the Commissioners of the Probate Court of Michigan can be of no force as against the defendants.

As to the judgment recovered by Whittemore against Stewart, it was paid and satisfied by the sale of Congress Hall. The bill is not filed as a bill in aid

of the ejectment suit either as a bill of discovery or otherwise.

As to the Chester judgment, I do not think it can be made the foundation of this suit until the remedy on it by execution is exhausted. The plaintiffs seek to treat the defendants as trustees, and also to regard the case as one of administration ; but I do not think that the death of Stewart varies the general and well-settled rule, nor that the plaintiffs are absolved from the necessity of exhausting all legal remedies before resorting to this suit. The demurrer is allowed, and the bill is dismissed with costs.

ASSIGNMENTS OF ERROR.

There was error in the judgment of the Circuit, in the following respects, viz.:

1. In adjudging that the debt alleged to be due to plaintiff Walker was not established by judgment.

2. In adjudging that Walker's debt, must have been established by judgment, before he could maintain his suit.

3. In adjudging that the statute of limitations had run awainst Walker's claim.

4. In adjudging that the judgment of allowance of Walker's claim in the Probate Court of Michigan was of no force in establishing the equity stated in plaintiff's bill against the defendants.

5. In adjudging the judgment recovered by plaintiff Whittemore in his own right to have been paid, and satisfied by the sale of Congress Hall.

6. In adjudging that jurisdiotion of the bill, was not sustainable in Whittemore's behalf, as a bill of discovery.

7. In adjudging that execution upon the judgment assigned to Whittemore by *Chester*, was a jurisdictional prerequisite to Whittemore's right to relief in respect to that assigned judgment.

8. In adjudging that the death of the decedent debtor did not authorize the plaintiffs to treat the case as one of administration.

8. In adjudging that the plaintiffs were under a necessity of proceeding to exhaust legal remedies by judgment and execution at law, before resorting to equity, by their bill, for relief.

10. In adjudging that the plaintiffs' bill be dismissed, instead of requiring the defendants to answer it.

THEODORE BACON,
Solicitor for Plaintiffs.

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HENRY N. WALKER, *et al.*
vs.
DANIEL W. POWERS, *et al.*

Brief in Behalf of Plaintiffs.

J. P. WHITTEMORE,
In Pro. Per.

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We beg leave to present the points which we believe to have been decided erroneously by the Circuit Judge, in the order of their respective importance, rather than that observed in the opinion, and then to present the points mooted in the argument below, apparently not decided, as follows :

FIRST.

The Questions Decided.

1. The question of jurisdiction for administration.
2. The right of plaintiff Whittemore to invoke it.
3. The right of plaintiff Walker to invoke it.

SECOND.

Questions Mooted and not Decided.

1. As to the effect of the statutes of limitation and repose of New York, as a protection to the title of defendants.
2. As to multifariousness of the bill.
3. As to the defect of parties.
4. As to the point of *res judicata* of the Ten Eyck case.
5. As to the effect of the Sanger deed under which Ten Eyck claimed.

I.

THE BILL OF THE PLAINTIFFS' IS A BILL FOR ADMINISTRATION, TO ENTERTAIN WHICH, THE JURISDICTION OF THIS COURT IS ADEQUATE AND WELL SETTLED.

Mitf. Pl., pp. 166-7.
1 Story's Eq. Jur., Title Administration, §§ 530 to 549.
1 Story's Eq. Pl., §§ 99 to 102, inclusive.
Hallet vs. Hallett, 2 Paige, 22.
Thompson vs. Brown, 4. J. Ch., 631-637.
3 Atk. Anon., 572.
Adair vs. Shaw, 2 Hare, 310.
Newland vs. Champion, 1 Ves., 105.
Vaughn vs. Simpson, 2 Atk., 31.
Milligan vs. Milledge, 3 Cranch, 220.
Telfair vs. Stead, 2 Cranch, 407.
Hagan vs. Walker, 14 How. U. S., 29.
Green's Adm'rs vs. Creighton, 18 id., 90.
Public Works vs. Columbia College, 17 Wal., 521.
Payne vs. Hook, 7 Wal., 429.

(*a.*) The plaintiffs' bill is ancillary to primary administration in Michigan, in respect of which it is the duty of the Court of Chancery of a neighboring State to lend its aid to collect in the assets, and to distribute them according to the *lex domicilii*, or on application of parties interested, to remit them for administration at home.

Harvey vs. Richards, 1 Mas., 381.
See also McNamara vs. Dwyer, 7 Paige, 239.
Dawes v Head 3. Pick. 144-8.

The case of *Harvey vs. Richards*, was for administration in Massachusetts, ancillary to principal administration of the estate of a decedent, whose domicil was in Calcutta, in the province of Bengal. The Court, per Story, J., p. 412, say: "The "correct results * * * upon principle, would seem "to be, that whether the Court ought here to decree distri-"bution, or remit the property abroad, is a matter, not of "jurisdiction, but of judicial discretion, depending upon the "particular circumstances of each case. That there ought to "be no universal rule on the subject, but that every nation is "bound to lend the aid of its own tribunals for the purpose "of enforcing the rights of all persons having title to the "fund, where such interference will not be productive of in-"justice, or inconvenience, or conflicting equities." * * * * p. 423. "Upon the whole, my judgment is that a "Court of Equity here, has authority to decree distribution "in cases like the present, according to the *lex domicilii*, "upon the application of the legatees, next of kin, or other "competent parties. That whether it will decree distribu-"tion, must depend upon the circumstances of each case; "and that it is incumbent upon those who resist the distribu-"tion, to establish, in the given case, that it may work injus-"tice or public mischief."

II.

THE DEFENDANTS HERE, IN POSSESSION OF THE ASSETS, ARE PROPER PARTIES DEFENDANT; BEING TRUSTEES FOR THE PARTIES INTERESTED, STANDING, BY THEIR OWN WRONG, IN THE PLACE OF EXECUTORS, THEY ARE SUABLE AS THOUGH THEY WERE SO *de jure*.

Milligan vs. Milledge, 3 Cranch, 220.
Rayner vs. Koehler, 14 Eq. Cas., Law Rep., 262.
Vaughn vs. Simpson, 2 Atk., 31.
Adair vs. Shaw, 2 Hare, 310.
Newland vs. Champion, 1 Ves., 105.
Harvey vs. Richards, 1 Mas., 381.

We comment on these cases further on.

(*a.*) The proceeding for administration is a proceeding *in rem*, (*Hallett vs. Hallett*, 2 *Paige* 22,) and one or more creditors, or other distributees may initiate the proceeding in behalf of himself and others, for the benefit of all who may choose to come in and share the fund, or contest the rights of the first, or any other applicant. And "a decree "upon the application of the first creditor is a *judgment in* "*favor of all*," at their own option.

Brinkerhoff vs. Brown, 4 J. Ch., 646.
1 Story Eq. Jur., 546 to 549, inclusive.

III.

AS CITIZENS OF A NEIGHBORING STATE, THE PLAINTIFFS MAY INVOKE THE EXERCISE OF THIS ORIGINAL JURISDICTION OF CHANCERY FOR ADMINISTRATION, WITHOUT RESORTING TO CONCURRENT REMEDIES IN THE STATE COURTS.

Suydam vs. Brodnax, 14 Pet., 67.
Union Bk. of Tenn. vs. Jolly's Adm'rs, 18 How., 503.
Harvey vs. Richardson, ante.
Green's Adm'rs vs. Creighton, 18 How., 90.
Mayer vs. Foulkrod, 4 Wash., C. C. 349 and 354.
Yonley vs. Lavender; 21 Wal., 276.

In the latter case, Washington, J., says: "If the counsel for the defendant meant to argue that, because the "plaintiff might have maintained an action in the State Court "for the recovery of this legacy, therefore the equity jurisdiction of this Court is ousted, we protest against such doctrine. This case is clearly within the jurisdiction of this "Court. * * It is no argument to say that the "plaintiff may have such a remedy * * in the State "Court. The conclusive answer is that the plaintiff is under "no obligation to resort to that jurisdiction."

IV.

THE PLAINTIFFS ARE CREDITORS, ENTITLED, EACH IN HIS OWN RIGHT, TO INITIATE ADMINISTRATION FOR THE BENEFIT OF ALL CONCERNED.

(*a.*) *The Plaintiff Whittemore is so entitled:*

First, Under the judgment recovered in his own right.

Second, Under the judgment assigned to him by Chester.

First, Under his own judgment, and Sheriff's deed under it.

It is objected that the sale of Congress Hall and sheriff's deed paid this judgment, and hence that Whittemore cannot initiate this administration, either as creditor, or purchaser.

To which we answer, that in either character, Whittemore is thus entitled:

1st. As purchaser under his judgment, it is the settled law of New York, as elsewhere, that Whittemore may invoke the aid of this Court, to set aside the fraudulent legal title of the defendants, and is entitled to a conveyance from them.

Hildreth vs. Sands, 2 J. Ch., 35. S. C. in Court of Errors, 14, J. R., 388, per Gardiner, J. 2 Seld., 236. 1 Sumner, 504. ~~7 Wal., 430. 4 Wood, 118. 2 How., U. S., 619.~~

Hildreth vs. Sands, 2 *J. Ch.*, 35-60, *S. C.* 14 *J. R.*, 388, was a bill like that of the plaintiff Whittemore, by a purchaser, (other than the creditor,) at sheriff's sale, to set aside a fraudulent deed, executed and delivered, by the debtor, before the creditor had obtained his judgment.

Chancellor *Kent*, in deciding the case, in Chancery, (p. 50,) says: "There can be no doubt but the plaintiff, as a pur-"chaser, * * is entitled to all the relief that the "creditor himself would have been entitled to; for he stands "in his place, and is armed with his rights." Whereupon, the Chancellor, setting aside the fraudulent deed, decreed a conveyance to the purchaser by the fraudulent vendee.

Mr. Justice *Spencer*, in delivering the judgment of the Court for the Correction of Errors, on appeal of the foregoing case, (p. 497,) says:

"It has been contended that the respondent is not inves-"ted with the rights of Whitney Codwise, *et al*, under whose "judgments he became the purchaser, at a public sale made "by the Sheriff of Kings County, under executions upon "those judgments. The statute, it is urged, protects credi-"tors, only, from fraudulent deeds, and not a person stand-"ing in the situation of respondent. This proposition is, in "my judgment, without any foundation. All the respondent's "right to the land in controversy, is derived from and under "the judgment under which he purchased. The judgments "are his title; and he is placed, by the judicial sale, which "took place, precisely in the place of the creditor. If the "title under the sheriff's sale fails, for want of title in the "person against whom the execution issues, the purchaser is "entitled to a restitution of the money paid." (1, N. R. L., 504.) Decree of Chancellor affirmed.

Thus we perceive that Whittemore is entitled to a decree setting aside the fraudulent conveyance of Congress Hall; and that, by his sale and sheriff's deed, he has merely superadded the right of purchaser to that of creditor. Whereby, in respect to the defendants, the title and rents of Congress Hall

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since May 1, 1860, must be declared assets of the decedent debtor, in respect to which Whittemore, as to his co-plaintiff creditors, gains a preference in the distribution which must follow, giving him the title and the rents after November, 1873, in satisfaction of his judgment, and interest; while his co-plaintiffs, upon granting such decree, would be entitled to the rents at $3600, per annum, from May 1, 1860, to the date of Whittemore's deed—13 years. This preference to Whittemore, we insist, he may waive, and come in, at his own election, as creditor merely, upon his judgment. This is a matter, however, which does not concern these defendants, as to whom, as mere naked trustees, it is *res inter alios acta;* and whose objection in this behalf to the right of Whittemore to join as plaintiff, others, who are defrauded by this adverse title, as well as himself, is, at most, but the objection for multifariousness, specified in 9th and 10th points of defendants' demurrer, (p. 96, of record,) which point is so fully answered by Chancellor *Kent*, in *Brinkerhoff vs. Brown*, 6 *J. Ch.*, 157, (see also *Leigh vs. Thomas*, 2 *Ves., Sr.* 313,) and by Chancellor *Sandford*, 4 *Cow.*, 687-8, and opinion of Senator *Colden*, p. 706-7, that we need only refer to those opinions to answer their objections. And, even if this objection were good; Whittemore's right to decree for Congress Hall, and its rents, being clear, the point as to parties, and multifariousness, was amendable; and his bill should not have been dismissed for want of *any* equity in it; nor should the demurrer be sustained, here, upon that point, it having been dismissed below upon grounds not amendable. See per *Marshall, Ch. J., Milligan vs. Milledge*, 3 *Cranch, ante. Lyon vs. Talmage*, 1, *J. Ch.*, 184-8.* But—

(2.) *Whittemore's judgment is not satisfied, while the defendants hold an adverse legal title to the property, by means of which they claim the judgment to have been paid.*

That legal title, though voidable, is not void, nor is it avoided by Whittemore's deed; but remains, till avoided by some competent Court, as valid as the title the defendants can convey to a *bona fide* purchaser, without notice of the trusts

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The machinery of law, however, was inadequate to the end of such avoidance, except by proceeding upon the assumption of the invalidity which the statute declared, at the peril of justifying such assumption by the verdict of a jury, and judgment of the court; and even this was of no avail for the transmutation of title in actions of ejectment, until the statutes allowing titles to be tried in such actions; whereby, courts of law have attained to a *concurrent* jurisdiction with equity, to charge such titles with trusts, and thereby to execute the *power* given by statute to avoid them. (See *Bean vs. Smith*, 2 *Mas.*, 252, counsel arguendo, p. 262, opinion, p. 269.)

A trust, as defined by Mr. Fonblanque, "Is neither *jus.* "*in re*, nor *ad rem;* neither a right in possession, nor in ac- "tion; but only a confidence and trust, which the common "law, though it took notice of, would not protect, nor give "any remedy for it; but the remedy was only by subpœna "in chancery," enforcible by process of contempt. (1, *Fonblanque Eq.*, *Sec.* 11.)

Until such trust is authoritatively charged upon the conscience of the holder of the legal title, by judgment, or decree, the trust and power of avoidance are dormant; resting, not in the title itself, but in *the conscience* of the party who holds the title, or in that of a grantee with notice.

Hence, the adverse title, of these defendants', stands, as yet, as valid and effectual, as did that of mortgagee, at law, in the olden time, after pay-day— or as that which a trustee acquires by purchase, in breach of the trust of his fiduciary

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relation, a perfect title, until avoided ; and, of course, it has not paid Whittemore's debt.

(3.) *These defendants should be estopped to insist that the property in their hands has paid Whittemore's debt.*

They must insist upon their own fraud as having invalidated their title, in order to make the objection that Whittemore had been paid by the property they withhold from him ; and thus, to assert their own fraud, as the ground of being allowed to retain the fruits of it.

It is true, the fraud is alleged in the bill, and admitted by the demurrer ; but the admission by demurrer may be withdrawn by the answer which the defendants may hereafter make ; so that the present admission is, as we have said, only for the purpose of being allowed to retain the fruits of the fraud admitted, and does not, as an answer to the same effect would do, entitle the plaintiff to a decree.

(4.) *Whittemore's sale and Sheriff's deed, are void. The law is incapable of giving him an execution upon his judgment.*

This has been so held by the Circuit Court below. Hence Whittemore has nothing but his judgment and its lien on the land, and no mode of relief except in equity.

This holding, whether correct or not, establishes the fact that Whittemore's remedy at law is not plain, adequate and complete, and it entitles him to relief here.

(5.) But if Whittemore's proceedings to execution are void, so that he has only a judgment, the objection for want of execution upon it, which the Circuit Court applied to his claim, under the *Chester* judgment, and Walker's claim as a Michigan creditor, remains. Therefore, we answer to that objection:

(*a.*) *That the naked fact of indebtedness, without judgment or execution, is sufficient, in respect to these defendants,*

who have posessed themselves of assets of the deceased debtor, to constitute Whittemore their cestui que trust, and entitles him to proceed in chancery directly against them as his trustees, of the fund in their hands.

The title conveyed by a fraudulent deed is good between the parties to it—and it does not lie with either party, for his own benefit, and of his own motion, to question its validity—certainly not to urge its invalidity as an objection to the necessity of a decree in favor of a creditor seeking to avoid it.

the ground of *trusts* upon which it rests is declared in the opinion of Lord Redesdale,

In *Adair vs. Shaw* 1 *Sch. and L. Froy*, 242, which was bill by a legatee, praying settlement of an estate, and payment of its debts, to the end that the plaintiff's legacy might be paid. We quote from the opinion. (The italics are ours.)

"*The only thing to be enquired of in a court of Equity is,* "whether the property bound by the trust, has come to the "hands of persons who were either bound to execute the "trust, or to preserve the property for the persons entitled to "it; and the *whole* jurisdiction of equity in the administra-"tion of assets, is founded upon this principle, that it is the "*duty of the court to enforce the execution of trusts*; * * "The *sole ground* on which courts of equity proceed, in cases "of this kind, *is the execution of a trust*; and if we revert to "the cases on the subject, we shall find that trusts are en-"forced, not only against those persons *who rightfully are* "*possessed of the trust property, as trustees, but also against* "*all persons who come into the possession of the property* "*bound by the trust*; and whoever so comes into possession

The cases which induced Mr. Justice *Curtis* to make that concession in *Hagan vs. Walker* show, that as early as the year 1737, Lord *Hardwicke* had declared the exception of *debtors* from the general rule aforesaid, in the case of *Beckley vs. Dorrington*, cited, from manuscript, by Lord *Eldon*, in deciding *Alsager vs. Rowley*, 6 *Ves.*, 748, the former of which, Lord *Eldon* had followed without referring to it, in the case of *Utterson vs. Mair*, 2 *Ves. Jr.*, 95; and had there declared the same exception; and had pointed out a ready way of proceeding against debtors, when they were shown, by special circumstances, to have been properly joined; viz: by requiring the executor or administrator to allow his name to be used by a receiver of the court, to sue the debtors, and thus get in the debts of the estate, for the benefit of suing creditors.

Lord Chancellor *Hardwicke*, who, in 1737, declared this exception of *debtors*, from the general rule, also, in 1748, in *Newland vs. Champion*, 1 *Ves.*, 105, declared the *general rule* we have stated, on bill filed by a creditor, *directly* against the possessor of assets; and by his decision in that case, (which we give in full, hereafter,) restricted *the exception* to its narrowest limits; holding that the partnership interest of the estate of a decedent, in the hands of a surviving partner, was "a *specific part* of the estate," and *therefore* not within the exception which he had established in *Beckley vs. Dorrington;* and hence, that no allegation of special circumstances was necessary; and he decreed an accounting to the creditor plaintiff. So also

In *Vaughn vs. Simpson*, 2 *Atk.*, 31, (decided in 1739,) by Lord *Hardwicke*. Counsel stated the same general rule, as then already well established, as broadly as we have stated it. And the Lord Chancellor assented to that statement, with qualifications not affecting its generality, which we will notice in the seqnel.

The case was, *Vaughn*, a bond creditor of *Nut*, filed his bill against *Simpson*, who was administrator of *Nut*, deceased; to reach and apply a legacy, to which the estate of *Nut* was

entitled, in the hands of administrators of one *Hawkins*. (who were also made defendants.)

Lord *Hardwicke* entertained the bill and restrained the administrators of *Hawkins* from paying over the legacy that was due the estate of *Nut;* and in respect to the general rule which counsel had stated, at page 33, he said: "It has been "said at bar that *you may make any person defendant* that "you apprehend has possessed himself of assets upon which "you have a lien. But this, certainly, cannot be laid down "as a general rule; for it would be of dangerous conse-"quence, to insist that you may make any person defendant "who has assets, unless you can show to the Court, that he "*denies that he has such assets, or applies them improperly.*"

As we have said, this qualification does not affect the generality of the rule; but only goes to the point of discretion in administering it, viz: To protection of *casual possessors* of sssets, from being treated like executors *de son tort*, and subjected to costs, when, in fact, not at all culpable. A condition of affairs, which, having led to abuses at law, where, both in England and America, a similar right to proceed against any possessor of assets, as executor *de son tort*, was exercised, (see *Osborne vs. Moss*, 7 *Cow.*, *p.* 61,) but without the power to exercise the discretion here noticed by Lord *Hardwicke*, induced the Legislature of New York, we suppose, to abolish actions against executors *de son tort*, on the law side of their courts.

It may be urged that the expression used by Lord *Hardwicke*, in this opinion, that you may proceed against any person in possession of "assets upon which you have a lien," intended to express a limitation of the rule to the cases of *legal* and *specific* liens, by actual or constructive levy of execution, which the defendants at bar claim as prerequisites to a title to go into equity at all; but it is evident he had reference to no such notion as that, by the order he made in the case, restraining payment of the legacy, to abide the exigencies of the suit to apply it on the plaintiff's debt.

But what he evidently did refer to, was, that "lien" or right to charge a trust fund, which every beneficiary has, in respect to

the fund which is held in trust for him; and that it was mentioned in this instance by the Lord Chancellor, because he was assenting to the statement of a general rule in these cases of administration in England, where "creditors at large" of a decedent had no lien, or right to be paid out of real estate, or its income; while creditors by *specialty* or *judgment*, were thus entitled; and the assets of a decedent were always administered accordingly. So, the Lord Chancellor, in assenting to the general statement of the rule, by counsel, was careful to restrict it within the rules of administration, and settlement of estates; as well as to guard the exercise of discretion as to allowing possessors of specific assets to be sued and put to expense and trouble, who were without fault.

And as to the use of the word "lien" by the Chancellor in this case, the same word is used in the same sense, in several cases in this court, in respect to the "lien" which all creditors, with us, have, upon the assets of a decedent, which continues good and effectual, against heirs, and purchasers till statutes of limitation of real actions shall have run against it.

See Ricard vs. Williams, 7 Wheat., 59, 115, 120.
Wilkinson vs. Leland, 2 Pet., 627, 658; 16 Pet., 25.

The same general rule, here assented to by Lord *Hardwicke* in *Vaughn* vs. *Simpson*, he again declares in *Newland* vs. *Champion*, with comments, distinguishing that case, as one of specific assets, and therefore distinguishable from the case of *debtors* of a decedent, who could not be proceeded against without special circumstances.

We should feel extreme delicacy in asserting this to be the correct construction of *Newland vs. Champion*, but for the previous and subsequent authority which we now proceed to cite, sustaining our construction; and first, we cite the authority of Mr. Justice *Story*.

In *Harvey vs. Richards*, 1 *Mason*, 381, *cited ante*, being a bill filed by one claiming to be next of kin, for distribution of the estate of *James Murray*, then late of Calcutta, in the province of Bengal, deceased, against an *ancil-*

lary administrator, appointed in Massachusetts, in possession of assets.

The case came on for hearing in the district of Massachusetts, before Mr. *Justice Story*, with whom was associated Hon. *John Davis*, District Judge; Mr. *Webster* and Mr. *Aylwin* as counsel for plaintiff.

Mr. *Aylwin* stated upon the authority of *Newland vs. Champion*, the "general rule" and its "exception" as we have claimed them, as follows: (page 391) "the rule appears "to be, *that whoever is in possession of the trust property* "*may be sued;* but where the creditor, legatee, or next of "kin seeks an account against a *debtor of the deceased*, it "cannot be done without joining the legal representative, "and charging collusion." (Citing *Newland vs. Champion.*)

Mr. Webster (p. 404,) on the sams side, says: "It is not a "matter *of favor*, in courts of equity, to compel the payment "of legacies, or decree distribution. Nor have they any "broader discretion, in such cases, than in the payment of "debts. (p. 406.) The defendant professes to be trustee for "the executors in India; and the case is such, that if the ex-"ecutors in India shall receive the money, they will be *trus-*"*tees for* the plaintiff. Then why may not the plaintiff "treat the defendant as her trustee and *claim the money di-*"*rectly* from him?"

In rendering the judgment of the court upon the foregoing points of counsel, Mr. Justice *Story* (at p. 442) says: "But it is said that the administrator, here, is a trustee for the "administrator abroad, and not for the next of kin; and "that the *cestui que trust* cannot follow the property in the "hands of a mere agent of the trustee. These positions in "the general latitude, are certainly not well founded. The "administrator, here, is not a mere agent of the administrator "abroad. He collects and receives the assets in his capacity "as administrator generally. And so far as it may be wanted "for the payment of debts and legacies, he holds it in trust "for the *creditors and legatees*, and as to the residuum, in "trust for the next of kin. And, even if he *were a mere agent* "of a trustee, the *cestui que trust* would be entitled to *claim*

"*the fund directly* from him ; for a court of equity *may fol-*
"*low a trust fund, in whosesoever hands it may be found.*"
(Citing *Newland vs. Champion, ante.*)

It is true that in this case, the bill was against the administration alone, and filed by next of kin ; but counsel on both sides, and the Court, conceded that, if the bill had been by a creditor, the jurisdiction of the court for distribution was unquestionable ; and the point discussed, and decided was, that it could *as well* be decreed on application of the next of kin, as upon that of a creditor ; and so in this court in *Payne vs. Hook*, 7 *Wal.*, 429, the jurisdiction was entertained on application of a legatee.

Millidge vs. Milligan and Wife, 3 *Cranch* 220, was a bill filed on simple contract debt. The domicil of the decedent and executors, was in South Carolina, and the creditor plaintiff, also a citizen of that state, filed his bill against heirs and distributees in Georgia. It will here be observed that the *status* of the parties was precisely analagous to the case at bar.

We call attention to the statement of the general rule in respect to this jurisdiction, by Mr. *Key* of counsel for complainant ; and the decision of the Court per *Marshall*, C. J., thereupon.

Mr. Key, *arguendo* : "As far as our bill seeks for relief "we could recover, at law, against the defendants as execu-"tors in their own wrong." "It is true that, in equity, an "executor *de son tort*, is not known ; but, whenever a person "would, at law, be executor *de son tort*, he will, in equity, "be considered trustee for the creditors."

By the Court, *Marshall*, C. J.: "The only question is, "whether it is not necessary that you should bring a suit "against the executor in South Carolina, to establish the "debt ; because, as to that, he is the proper person to defend. "After having obtained such a judgment, the complainant "would be at liberty to follow the estate in the hands of the "defendants in Georgia. It is not necessary to consider them "executors in their own wrong ; for you may proceed against "devisees, or legatees, if the executor has no assets."

It seems, that after delivering the foregoing decision, upon the argument, the Court took the case under advisement; and, on March 6th thereafter, having resolved the doubt as to whether the debt need first have been put in judgment in Georgia, sustained the bill, without even that preliminary proceeding.

To the point of the correctness of the statement, of the rule in argument, by Mr. Key, in the foregoing case we cite,

Rayner vs. Koehler, 14 *Equity Cases*, *L. Rep.*, 262, decided in 1872, where a bill, like the plaintiff's here, by one creditor, in behalf of himself, and others, charging the defendant in possession of specific assets, as administratrix *de jure*, she pleaded that she was not administratrix. It was urged in argument in behalf of the bill, that, if she was in possession of assets, it was not necessary to call her executrix *de son tort*, but only to state the fact of assets in her hands, in order to sustain the bill.

The Court (p. 265) says: "This bill alleges that she has "possessed herself of the estate of the testator; and therefore "if she is not administratrix, she is, at any rate, *executrix de* "*son tort*, and in that character the bill can be sustained."

3 *Atkins*, *Anon.*, 572. Lord Hardwicke announces the practice under this jurisdiction, as follows, viz.: "Any one bond "creditor may bring his bill, as the Court decrees only an "account, and directs the executor to pay in a course of ad-"ministration; and the executor, before the master, may set "forth * * * what debts are prior to the plaintiff's, "which he is obliged to pay as having a legal preference."

Leigh vs. *Thomas*, 2 *Ves.*, *Sr.*, 313. In Lord Hardwicke's time, *Sir John Strange*, Master of the Rolls, says:

"No doubt but a bill may be by a few of the creditors "in behalf of themselves, and the rest, and to have an ac-

"count of real and personal estate for relief of all, and then "the decree lets in all others."

Martin vs. *Martin*, 2 *Ves., Jr.*, 95. On bill filed by creditors against the heir alone, claiming sale and distribution of real estate descended, administration was decreed. So in

Green's Administratrix vs. *Creighton*, 23 *How.*, 90, long after the concession we have referred to in *Hagan* vs. *Walker*, this Court declared the same general rule as we claim it, without any such concession. The demand upon which the creditor's bill, in that case, was filed, had *not been established*. One *Whiting* had become surety, on a bond, for *Tunstal*, and *Tunstal's* liability had been fixed. *Tunstal* was insolvent, and *Whiting*, his surety, had deceased, before being sued as surety; *Creighton* was appointed administrator of *Whiting's* estate. The plaintiff's bill joined *Creighton*, the administrator of *Whiting*, with *McCaleb*, who was surety on *Creighton's* administration bond, *McCaleb* having *come into possession* of assets of *Whiting's* estate. The bill alleged these facts, and prayed discovery, and application of the assets in the hands of *Creighton* and *McCaleb*, upon the claim, *to be established* against *Whiting* as surety on *Tunstal's* bond.

It was insisted, in defence, that the Court of Chancery had no jurisdiction, either to entertain the case, or to *establish* the demand of the plaintiff against *Whiting*, as surety upon the administration bond. And these objections prevailed at the Circuit.

This Court, on appeal, per *Campbell, J.*, pp. 106-7-8, sustained both branches of the contested jurisdiction, (p. 106,) saying: "This Court has jurisdiction of the parties. In the "Court of Chancery, executors and administrators, are con-"sidered trustees; and that Court exercised original jurisdic-"tion over them, in favor of creditors, legatees, and heirs, in "reference to the proper execution of their trust."

(p. 108.) "A portion of the assets, belonging to the es-"tate, * * *is in the hands of the surety* of the ad-"ministrator. A discovery of the amount, and nature of the "assets in hand, and application to the payment of the debt, "are required." Decree of Circuit reversed. So in

Bryan vs. *McGee*, 2 *Wash. C. C. Rep.*, 337. Property, fraudulently conveyed by the decedent, was reached, by direct proceeding, on bill against the fraudulent vendee; Washington, J., saying: "The defendant, having prop-"erty, in his hands, belonging to the estate, may, in equity, "be called on for that property, in any place."

So, also, in this Court, again, the general rule is stated, as we claim it, in

Public Works vs. *Columbia College*, 17 *Wal.*, 521. The bill was by a creditor, to reach property of a deceased debtor, some of which had already been administered and distributed in the Orphan's Court, of the District of Columbia. The bill was entertained in the Court below, and distribution of the undistributed portion of the estate was decreed. But the Court refused to interfere with a portion of the estate already distributed; and, on appeal to this Court, that refusal was sustained, on the general ground of *laches*.

Mr. Justice *Field*, in delivering the judgment of the Court, distinguishes the *ancillary* jurisdiction, "in aid of legal process," from that where the suit "relates to the estate of a deceased person;" and in respect to the latter, he declares the general rule of the English Chancery, for which we contend, as follows:

"It was sufficient that a debt existed against the estate of "a decedent, and that there was property which should be "applied to its payment, to justify the interposition of the "Court."

In view of the unbroken line of authority, from which we have selected the foregoing judgments, we conceive that we

have shown the general rule to have been established, as we have stated it.

We proceed now to analyze the cases cited as authority for the concession in *Hagan* vs. *Walker*, and to show that they established only an exception to the general rule, declared and followed in the foregoing cases. We first consider

Alsager vs. *Rowley*, 6 *Ves.*, 748, (decided by Lord *Eldon*, in 1802,) because the previous opinion of Lord *Hardwicke*, to the same point, is here, for the first time, made public.

The case of *Alsager* vs. *Rowley*, sufficiently appears, by the marginal note, which we cite ; but, the opinion of Lord *Eldon*, as well as that of Lord *Hardwicke*, in *Beckley* vs. *Dorington*, which he cites, may be said to prescribe the limits of the *exception*, and confine it to the case of *debtors*, and to declare the *circumstances* necessary to exclude *debtors* from the benefit of that exception.

The marginal note of *Alsager* vs. *Rowley*, is: "The "general principle on which a debtor to the estate cannot be "made a defendant to a bill, by a creditor, or residuary leg "atee, against the executor, unless collusion, insolvency, or "some special case, applies, equally, to the case of a creditor "overpaid by the 'executors.'"

Lord *Eldon*, p. 749, delivering the opinion in *Alsager vs. Rowley* says: "The established rule of the court is, certain-"ly, as it has been argued upon *Utterson vs. Mair*, and the "other cases, that, in ordinary cases, a debtor to the estate "cannot be made a party to a bill against the executor; but "there must be, as the cases express it, collusion *or* insolven-"cy. That very principle admits that, if there is solvency, "the executor must pay; if there is collusion both are lia-"ble." Further on, Lord *Eldon* expresses doubt whether *delay* by the executor, was a sufficient circumstance, to authorize joining the debtor, as defendant, and proceeds: "If "the general principle, will not allow you to bring a bill, "against both the executor, and a debtor, in a given case; "where you bring a bill against the executor, and a creditor,

"improperly paid by the executor, that is, if there is no col-
"lusion, or special case, if the executor is not insolvent, he
"stands the middle man, responsible to the residuary legatee,
"for the property misapplied, by paying a man, as a cred-
"itor, who was not a creditor."

In looking back, for the authority, for the principle, thus enunciated, Lord *Eldon* finds and cites a Mss. opinion of Lord *Hardwicke*, in *Beckley* vs. *Dorrington*, delivered in 1737, as follows: "One, of two, residuary legatees, joined "another legatee, and a debtor, as defendants—suggesting "no fraud, nor negligence in the executor—the bill was dis-"missed at the Rolls, against the debtor." Upon appeal, the Lord Chancellor said: "There is no doubt this is an im-"proper bill, as against the debtor; it cannot be without a "special case; for there can be, regularly, no suit against the "debtor, but by the executor, who has the right, both in law "and equity. If he even releases, and is solvent, neither a "creditor of the testator, nor a residuary legatee, can bring "any bill against that debtor. There must be collusion, *or* "insolvency, or some special case; otherwise it would over-"throw all the law relating to devastavits, and the rights, and "property, of executors. The Court will interfere, if there "is such special case, as collusion, *or* insolvency; and then "the bill may be brought against both the debtor, and the "executors."

Now, these, and *Utterson* vs. *Mair*, (which was the case of a debtor, and followed *Beckley* vs. *Dorrington*,) are all the cases cited in *Hagan* vs. *Walker*, which require *special circumstances*, to be stated or proved; and the circumstances of collusion, or insolvency, of the executor, are the only circumstances mentioned, in any of these cases, as necessary to constitute an equity, to proceed directly against a debtor; the other cases cited, being rather exceptions to the exception, than otherwise; and in restriction of it, to the single particular of debtors. Those other cases are as follows:

Gedge vs. *Trail*, and *Bowsher* vs. *Watkins*, 1 *Russ. and Mylne*, 277, are both cases where surviving partners of the

decedent were made defendants, with the executor; and the bills were sustained, without special circumstances; following *Newland* vs. *Champion*.

Burroughs vs. *Elton*, 2 *Ves.*, 29, was against persons accountable, to the estate of the decedent, and invoking specific performance of contract, and involving partnership interests, where insolvency of the executor, and his unwillingness to prosecute, as well as unwillingness of the heir, (who seemed, in that case, also, to have been interested,) were alleged, and the bill was sustained.

Long vs. *Majestre*, 1, *J. Ch.*, 306, was a bill against a surviving partner, without circumstances; Chancellor *Kent* sustained the bill, following, and citing *Newland* vs. *Champion*.

Holland vs. *Prior*, 1 *My. and Keene*, 240, decided in 1834. Lord *Brougham* sustained a bill, alleging assets, in the hands of the representative of a representative, of the decedent, without special circumstances.

In the opinion of Lord *Brougham*, there is a *dictum*, giving a construction, to the opinion of Lord *Hardwicke*, in *Newland* vs. *Champion*, that includes the "possessors of specific assets of a decedent," in the same category with debtors, as requiring a showing, of special circumstances, to entitle a creditor, to make such possessor, a party defendant—and this reading, of *Newland* vs. *Champion*, would seem to have led to the "concession," to which we have adverted, in the opinion of Mr. Justice *Curtis*, in *Hagan* vs. *Walker*.

We quote the opinion, in *Newland* vs. *Champion*, in full, (with *italics*, and *parentheses*, of our own,) and insist that the construction, put upon it, by this Court, and by Mr. Justice *Story*, is the only one admissible.

Lord Chancellor: "The general rules are plain, that a "creditor of the testator, or intestate, need not make any-"body but the personal representative, a party.

"At the same time, in this court, if there are any persons "who have *possessed the estate, or* any debtors of the deceas- "ed, and any collusion between them, (the debtors,) and the "representatives, they, (the creditors,) may here, though not "at law, follow the assets, (due from the debtor,) and "make them, (the debtors,) parties, and demand an ac- "count against them ; but that is not to be done, (in respect "to the debtor,) unless there is some proof of collusion ; but "I take the case of partnership, to be different, (from that of "debtors ;) and there was no suggestion of collusion, (in the "case at bar,) yet, I do not think the bill would have been "demurrable to, (the bill was heard on pleadings, and proofs, "and no demurrer,) as has been insisted upon."

"Many bills are brought in this court, not only making "the representatives, parties, but also, *any other persons,* "who have *possessed* the *specific assets ;* and there are many "instances, where the surviving partner is made a party ; that "they, (the creditors,) may have an account, of the personal "estate, entire ; and, if this bill was dismissed, it would be to "say, that this creditor, for £1,000, should not have it in his "power, to check this account, (between the surviving part- "ner, and administratrix,) of the personal estate of his debt- "or, whose effects are in the hands of Sir *George Champion.*

"So that this is a *possession, of a specific part ; there- "fore,* though there is no proof of collusion, in this case ; "and the brother, of the wife, who is plaintiff, in the first cause, "is plaintiff in the second, which might be a presumption, "of confidence between them ; it is proper, and I shall direct "an account, between the plaintiff, in the second cause, (the "case then on hearing,) and Sir *George Champion.*"

We insist that the Lord Chancellor, in answering the objection of counsel, that the case of a partnership came within the rule of *Beckley* vs. *Dorrington,* called attention first, to the then well understood general rule, as to "any persons "who have possessed the estate," as a class.

Then he referred to *debtors,* as another class ; against whom, a creditor could not proceed at law ; nor in equity, without special circumstances ; and, answering the contention

of the counsel, that the case, of a partnership, was of the latter class; he said it constituted a "specific part," of the estate, and *for that reason*, allegation of special circumstances, was not required.

It seems evident to us that the words in this opinion, "and any collusion between them," must be restricted to the last antecedent "debtors," as we have indicated, by our parentheses. Especially so, in view of what immediately follows, that "they may here, though not at law," be made parties, and made to account; for persons who "had possessed the estate," (that is, chattels,) would not be called on, as accounting parties, and *they* could have been sued at law, as executors, or executors *de son tort*, as well as trustees, by the rules of chancery; while debtors of a decedent could never have been sued at law. So it is evident he was speaking solely of debtors, who could not be sued by the creditor at law, and not of possessors of specific assets, who could.

Furthermore, the decree rendered in *Holland* vs. *Prior*, is in direct antagonism to the principle to be deduced from Lord *Brougham's* reading of the opinion in *Newland* vs. *Champion;* and is strictly in accord with our reading of the latter case, as well as with the decree and opinion in *Vaughn* vs. *Simpson*. And as we adopted the English Chancery system, as it existed when our constitution was adopted, (see *Baldwin's Rep.*, 394,) the construction which our courts put upon antecedent English adjudications should prevail, in preference to that of subsequent English Chancellors. But we need not urge this argument, for, as we have seen in *Rayner* vs. *Koehler*, *ante*, the English Chancery jurisdiction of to day, is, as we claim it then to have been.

Now, before proceeding to our next sub-proposition, we beg leave to call attention to the jurisdictional features of the proceeding, by a creditor, against debtors to the estate of a decedent, on allegation of collusion, or insolvency. For these features are supposed, by the defendants at bar, to be exceptional, and opposed to general *principles* of equity jurisdiction.

As to the circumstance of "collusion," between the

debtor and executor, the jurisdiction and privity are plain, by reason of the debtor's joining the executor in his breach of trust, to the injury of the creditor; but the mere fact of "insolvency" of the executor confers jurisdiction upon a different basis; for the debtor is trustee for nobody, but only a mere debtor to the executor. Hence, there is nothing but the *danger of loss*, to a creditor of the estate, which payment to the insolvent executor would occasion, coupled with the inability of the creditor of the estate to sue the debtor at law, which constitutes the equity, and confers jurisdiction for proceeding directly against the debtor; so it is a simple case of garnishment of the debt due from the debtor, with a necessity for it, and an inability to reach the debt, at law!

Now, here, there is nothing of trusts in the case. Nor any thing but the more effectual, safe, and direct remedy, in chancery. The creditor was not required to obtain judgment at law, against the executor, to render "certain" his claim against the decedent's estate; nor to try a vain experiment at law, to determine the "insolvency" of the executor, or the inadequacy of law, to give him a remedy—but, upon the naked equity of the creditor to be paid his debt, the doors of the Court of Equity were open to him, for the *safer* and more effectual remedy; and instead of this being exceptional, in point of jurisdiction, we shall show, under our next sub-proposition, that it was not only not exceptional, nor confined to cases of administration, but was only the ordinary exercise of equity jurisdiction; and that the defendant's notions to the contrary originated in the New York Chancery, and not in England.

(5.) (b.) *The New York doctrine, that jurisdiction, to aid a creditor in the collection of his debt, is conferred only by the lien of an execution, or by its return "nulla," is not founded in the principles of the English Equity, and ought not to be extended.*

We make this point, because the New York doctrine, is supposed to be founded on *principle*, and, being thus found-

ed, is sought to be *extended* to the exclusion of *original* jurisdiction over the case of *trust*, at bar.

The theory of the New York doctrine is, that jurisdiction to aid a creditor, comes of the inadequacy of law in the particular case to give him any relief. Whereas, jurisdiction in equity, comes of the inadequacy of law, to give *equitable* relief.* (See *Baker* vs. *Biddle*, *Baldw.*, 394.) And the question of giving equitable relief is, therefore, never jurisdictional, but one of judicial discretion; in the exercise of which, equity determines, for itself, whether it can give a plainer, better, or more direct or effectual remedy, than law; and this, equity will determine, by taking judicial cognizance of what law can do, upon the *allegations* of a plaintiff's bill, without first requiring either a lame, or vain experiment, at law.

It is argued by the defence, upon the assumption that it has been well decided in New York, that the lien of an execution, or a return "nulla," are jurisdictional prerequisites to equity cognizance of trusts resulting from frauds, under *Stat.* 13, *Eliz.*, *Ch.* 5, that the same principle must preclude cognizance of trusts resulting from the death of a debtor.

We admit the cogency of the logic of the defendants; and, if their premises are sound, we can only insist upon the doctrine of *stare decisis* to resist their conclusion; for, we can assign no reason, except the fact that the *Stat.*, 13 *Eliz.*, has conferred a concurrent power upon law to avoid fraudulent conveyances, why the New York doctrine may not apply, as well, to one resulting trust, as another; and, for that matter, to conventional trusts, as well; but we dispute the *premis*, and insist, that this doctrine of jurisdictional prerequisites, and of exhausting remedy at law, as a condition, precedent to equity cognizance, originated in a misconception, in the New York Chancery, of the principles of original equity jurisdiction; and, that such misconception, has resulted in crippling the original equity powers of the Court, to an extent, which the New York creditor's bill statute, and garnishee statutes, in that State, and other States, following her, and acts for punishment of fraudulent debtors, have failed but partially, to compensate.

* e.g. Discovery, injunction, no great, specific performance execution, delivery, or cancellation of papers &c

It is true, the New York creditor's bill statute, has, in a measure, remedied the evil consequent upon the aforesaid misconception ; and it is supposed to have conferred, and restricted, the jurisdiction. (*McElwain* vs. *Willis*, 9, *Wen.*, 460.) But, it is hardly necessary to suggest, that no State Statute can either enlarge, or restrict the original equity jursidiction of the United States Chancery.

The origin of the error was in an opinion of Chancellor *Kent*, in *Wiggins* vs. *Armstrong*, 2 *J. Ch.*, 144, on a motion to dissolve an injunction to stay contemplated fraudulent conveyances. The learned Chancellor granted the motion, and relied on *Angell* vs. *Draper*, 1 *Vern.*, 399, and other authorities cited in the opinion, for the conclusion, substantially, that "until a creditor has obtained a specific 'legal lien,' (by "execution,) upon a debtors' property, he has no concern "with his frauds."

This conclusion of the learned Chancellor has been accepted, without serious question, as the law of the New York Chancery, and that of other States, following her adjudications, and statutes, to the present day ; modified, only, by the concession, that an execution returned "nulla," might, as evincing the fact of law's inadequacy, entitle a creditor to go into equity, without a lien, for relief against a debtor's frauds.

Now, our proposition is, that the conclusion in *Wiggins* vs. *Armstrong*, to which we have referred, as well as the conclusion that 'exhausting remedy at law' is a jurisdictional prerequisite, are not founded in the authority cited in *Wiggins* vs. *Armstrong*, and other New York cases, nor at all, in the English equity system, which was adopted in the U. S. Constitution. But to the contrary, the English equity made no distinction between creditors, and other litigants, seeking *the peculiar relief* that equity could give ; and did not require a vain experiment, by creditors, any more than by other litigants.

We will now consider *Wiggins* vs. *Armstrong*, and the English cases upon which it is founded.

In dissolving the preliminary injunction, in that case, the Chancellor says :

"My first impression was in favor of the plainliff; but "upon examination of the cases, I am satisfied that a 'credi- "tor at large,' and before judgment and execution, cannot be "entitled to the interference which has been granted in this "case. In *Angell* vs. *Draper*, 1 *Vern.*, 399, and *Shirley* vs. " *Watts*, 3 *Atk.*, 300, it was held that the creditor must have "completed his title at law, by judgment and execution, be- "fore he can question the disposition of the debtors property; "and in *Bennett* vs. *Musgrove*, 2 *Ves.*, 51; and in a case be- "fore Lord *Nottingham*, cited in *Balch* vs. *Wastell*, 1 *P.* " *Wm.*, 445, the same doctrine was declared, and so it is "understood by the elementary writers, *Mitf. Pl.*, 115; "*Coopers Eq. Pl.*, 149.

"The reason of the rule, seems to be, that, until the cred- "itor has established his title, he has no right to interfere; "and, it would lead to an unnecessary, and, perhaps, fruit- "less and oppressive interruption of the exercise of the "debtor's rights. Unless he has a certain claim upon the "property of his debtor, he has no concern with his "frauds," &c.

The first notable remark, of the Chancellor, in this opinion, is this: "I am satisfied that, 'a creditor at large,' and "before judgment, and execution, cannot be entitled to the "interference that has been granted in this case."

The learned Chancellor, evidently, here refers to a similar remark of Lord *Hardwicke*, in *Bennett* vs. *Musgrove*, cited further on, in the opinion, where that Lord Chancellor distinguished between "creditors at large" in England, and *judgment* creditors; the former of whom, could not charge real estate, while the latter could ~~not~~ That was a bill in Chancery, to aid an *elegit*, by setting aside a fraudulent conveyance. It was contended, by the defense, that there was a plain, and adequate remedy, at law, by ejectment; but Lord *Hardwicke* held, granting there might be a remedy by ejectment, yet, nevertheless, equity could relieve, where "*actual fraud*" was charged, and set aside the conveyance. Preliminarily to this, however, he says: "A plain case for relief; "which is, to be let in to the benefit of that, to which such a

"creditor is entitled, though a creditor at large, is not. But "where a judgment is obtained, *affecting it from the time*, "and execution, he is entitled, *because that* affects the "realty to the land."

Chancellor *Kent* seems to have failed to notice the point of distinction, to which Lord *Hardwicke* referred, and to have supposed the remark to have the same application, as if spoken of "creditors at large," and judgment creditors here; whereas, it is evident, the remark was made with sole reference to a distinction in England, which does not exist here. And it is, therefore, no authority, for the inference, that even a judgment is necessary, with us, to the end of relief in equity, any more than, as we have seen, it is, or was, in the cases of administration which we have cited. And this, more especially, as we shall see, that Lord *Hardwicke*, in other cases, never had in his mind this New York idea of prerequisite to jurisdiction which is enunciated in *Wiggins* vs. *Armstrong*.

The learned Chancellor *Kent* next cites *Angell* vs. *Draper*, and *Shirley* vs. *Watts*, as holding "that the creditor "must have completed his title at law, by judgment and exe-"cution, before he can question the disposition of his debt-"ors property."

This deduction from those authorities is expressed in the language of Mr. Mitford, in his work on pleadings, (p. 126,) down to and including the word "title." And the words "at law," and the succeeding words, are those of Chancellor *Kent*. It is evident that Mr, Mitford's use of the word "title," had reference to "title to relief," in equity, which is the sense in which, all through his work on Equity Pleadings, the word is used. But as used in the opinion here, it expresses the idea of a "legal title," but is intended to express the idea of a "legal lien." And in that sense, doubtless, Chancellor *Kent*, and Mr. *Mitford*, agree in the use of the word "title." Yet we insist that neither Mr. *Mitford*, nor the Chancellors who decided the cases of *Angell* vs. *Draper*, and *Shirley* vs. *Watts*, intended the conclusion that because "*a lien*" was necessary to complete the equity of the respective

plaintiffs' in those cases, such lien was a jurisdictional prerequisite in other cases, either to discovery or relief. Yet such is the conclusion of Chancellor *Kent*, from such premises—which we shall proceed to discuss—and first the case itself:

Angell vs. *Draper*, 1 *Vern.*, 399, decided in 1686, in the time of Lord *Jeffreys*, was a bill by "a judgment creditor, praying "account and discovery of goods of a debtor, alleged to have "come into the possession of the defendant, upon pretense of "a debt due to himself; and that the goods were of great val-"ue, and more than sufficient to pay the defendant's debt, (In fact, that the goods were held by the defendant, in pledge—J. P. W.,) "praying an account of the goods and debt."

"The defendant demurred, because the plaintiff had not "alleged that he had sued out *fieri facias*, * * * "for, until he had done so, the *goods were not bound* by the "judgment, nor the plaintiff *entitled to discovery or account* "thereof. (Per Cur.) Allow the demurrer. The plaintiff "ought actually to have sued out execution, before he brought "his bill."

The report of this case gives us no light upon the reason why a "lien" upon the goods, respecting which this bill sought discovery, was deemed indispensable to the right of discovery prayed. But the *fact appears* that the want of a *specific* "legal lien" was the ground of the demurrer, and of the judgment sustaining it. But it does not follow, from the fact that a "lien," or the "lien" of an execution, was necessary to the discovery there, that *no discovery*, and no *relief*, of *any kind*, was grantable to any creditor, who had not issued an execution; and it is this manifest *non sequitur*, which we controvert.

Doubtless, such a deduction from that *premis*, would have astonished no one more than the Lord Chancellor who decided *Angell* vs. *Draper*, before the echoes of his voice had fairly subsided from his decision of *Smithier* vs. *Lewis*, 1 *Vern.*, 388, where he granted *discovery* to a creditor, whose

situation at law was precisely the same as that of the plaintiff in the former case, who *had not* issued execution. And this latter case was to reach property fraudulently disposed of, and was heard on demurrer, to jurisdiction, to discovery, and to relief, and the demurrer was overruled.

Now, if the object of this discovery was to enable the plaintiff, in *Angell* vs. *Draper*, to "*redeem the pledge*" of the debtors goods, there is no doubt that a "lien" upon the goods was indispensable to "complete the plaintiff's equity" to redeem, as well as to confer *any right* of discovery to that end; for no rule is better settled than that none but a *subsequent incumbrancer*, (aside from the owner,) is entitled to redeem; and in the accidents of this case, a "lien" by execution, rather than a conventional "lien," was that which the case suggested. But if the plaintiff had been a subsequent *mortgagee* of the same goods, it seems clear that he would have been equally entitled to the discovery sought by his bill; and if, perchance, he had omitted to set forth his mortgage in his bill, and had relied merely upon his debt, or judgment even, and the Lord Chancellor had remarked that the plaintiff should have set out his mortgage; such remark would seem to have been equally cogent to the conclusion that no creditor could come into equity till he had a mortgage; as that of the Lord Chancellor is that no creditor could come into equity without an execution.

That redemption *was the object* of the discovery sought in *Angell* vs. *Draper*, or, at least, that it was so understood in the English Chancery, appears by the next case cited in support of the opinion in *Wiggins* vs. *Armstrong*, viz: *Shirley* vs. *Watts*, 3 *Atk.*, 200, which was a bill "*to redeem a mortgage*" of a leasehold estate, by a bond creditor, who had obtained judgment upon his bond, but had not issued execution to create a lien upon the equity of redemption. *Sir William Fortescue*, Master of the Rolls under *Lord Hardwicke*, adhered to the rule that none but a "*lienor*" could redeem a mortgage, and held that the plaintiff could not be admitted to redeem till he had lodged an execution; referring to *Angell* vs. *Draper*, as decisive upon that point; saying that

Angell vs. *Draper* "is a stronger case" (that a lien was indispensable,) than the one at bar, because the former case "savored of fraud."

It would seem that the counsel for plaintiff, in *Shirley* vs. *Watts*, supposed, because his *bond* entitled him to charge real estate, that it constituted such a lien upon real estate as entitled him to redeem under a judgment upon the bond; but, in fact, the law of England at that day, charged the real estate of a debtor, whether living or dead, in no different sense than does every debt with us; but only entitled the holder, as it does with us, (See *Stileman* vs. *Ashdown*, 2 *Atk.*, 608 on rehearing) to make it a "specific lien" by legal proceedings and levy; and so the Master of the Rolls, in deciding the case of *Shirley* vs. *Watts*, seems to have held, against the contention of the plaintiff; and this seems to be all there was of the case. Yet the case is cogent that discovery of data upon which to base a bill for redemption was understood to have been the object of the bill in *Angell* vs. *Draper*.

The Master of the Rolls, in his opinion, also cites *King* vs. *Marrissal*, 3 *Atk.*, 200, saying:

"There was a case of *King* vs. *Marrissal*, last term, upon "a bill, by a judgment creditor, to redeem, which came on be-"fore *Lord Hardwicke*, when he asked for the writ of execu-"tion, and upon it being produced, admitted the judgment "creditor, for this reason, to redeem."

In the case of *King* vs. *Marrissal*, (p. 192,) which was a bill to set aside a fraudulent conveyance, no reference is made to the *execution*, except as *evidence of fraud*, by reason of the proximity of the *date of the* ~~*mortgage*~~ execution to that of the conveyance which the bill sought to set aside.

The case was this—and we state it more fully, because it is cited and relied on, in *Wiggins* vs. *Armstrong*:

The plaintiff had recovered a verdict of £2000 for breach of promise. In order to defeat that verdict, *Dupin*, the defendant in the law suit, had conveyed his whole effects, by mortgage, to *Marrissal*, and, after service of subpœna upon him, and before answering, had absconded.

The defendant, *Marrissal*, answered; but only as to his

belief in respect to *Dupin's* fraudulent intent in making the mortgage.

Lord *Hardwicke* entertained and heard the case, upon the main question of fraud, without reference to the execution; but, having adjudged the point of fraud against the plaintiff, for the want of evidence of it in *Marrissal's* answer, he says: "If you wanted an answer to this part, you should have in-"terrogated him more particularly. I am clearly of the opin-"ion the plaintiff can carry it no further than to redeem the "defendant." And, it would seem, from the statement of Sir *William Fortescue*, in *Shirley* vs. *Watts*, that the Lord Chancellor here called for the execution, and on its being produced, decreed redemption.

It would seem that neither Court, nor counsel, in this case, considered the *execution* of any consequence, in respect to the *jurisdiction* for relief against fraud; but, when the *right to redeem* from a *bona fide* mortgage came to be considered, it was requisite to comply with the law on the subject of redemption; and so it would seem *Sir William Fortescue* regarded it, in his reference to the decision which we have cited; but the idea that this great jurist supposed that in his decision in *Shirley* vs *Watts*, he was laying down, or following a general jurisdictional prerequisite of relief to a creditor upon a case of fraud, or upon any other than a bill to redeem, is evidently unfounded. Especially in view of the fact that this same jurist decided the case of *Taylor* vs. *Jones*, 2 *Atk.*, 600, granting relief, upon application of creditors at large, without judgment or execution, on bill to set aside a fraudulent trust of stocks. So, also, that Lord *Hardwicke* supposed he was following or declaring any such rule, when he called for the execution in *King* vs. *Marrissal*, after hearing and deciding the case upon the point of fraud—as we shall see by other decisions of his, is equally unfounded—and as we shall also see, the case of *Taylor* vs. *Jones*, and the cases we refer to by Lord *Hardwicke*, are maintained to-day, as good law, by the authors of this New York doctrine, in *Bayard* vs. *Hoffman*, and *Hadden* vs. *Spader*, *post.*

So, also, that Lord *Redesdale*, in his deduction from

Angell vs. *Draper*, (on p. 126, of his Treatise, to which we have referred,) intended a statement of a jurisdictional prerequisite, and not merely a prerequisite, to a "title" to particular relief within the jurisdiction, becomes apparent where he again refers, (pp. 187-8, of his treatise,) to that same case; where, in treating of the nature of the "interest," which "entitles" a plaintiff to call upon a defendant, for "discovery," he classes that case with one for discovery of *evidence*, in support of a contemplated suit at law, which was dismissed because the case, (at law,) which the bill stated, "was not such as would support an action."

Thus, we perceive, what Mr. *Mitford* meant, was, that a plaintiff must proceed far enough at law to establish an "interest," which, the discovery, when made, might be available to conserve; and, as in case of discovery of evidence, the plaintiff had no *interest* because he had no case—and not because he had not yet commenced his suit at law, wherein the evidence might be available; so, without the "lien" of an execution, it seems the plaintiff, in *Angell* vs. *Draper*, had not attained that "*interest*" which entitled him to the particular discovery prayed; and not because he had not proceeded far enough, at law, to confer jurisdiction for any discovery, or relief. And this view is corroborative of that which Sir William *Fortescue* took of *Angell* vs. *Draper*, viz: that the object of the discovery there, was to redeem the pledge of the goods, and that the demurrer was sustained for the insufficiency of the plaintiffs "title" to redeem.

That there was no such notion in the English Chancery, nor intended to be expressed by Mr. *Mitford* in his treatise at p. 126, quoted by Chancellor *Kent*, that either a *lame* or *vain* experiment at law was a jurisdictional, or judicial prerequisite to any discovery or relief, is evident from the fact that Mr. *Mitford* was with Mr. *Mansfield*, as counsel for the defense, in *Dundas* vs. *Deutens*, 1 *Ves. Jr.* 196, before Lord *Thurlow*, where bill by creditors, without judgment, or execution, to set aside a marriage settlement, was heard and *decided upon the merits*, upon the point of fraud, without suggestion, by either counsel or Court, of any such prerequisites, or that thus

proceeding to adjudge the case was not a proper exercise of judicial discretion. And Mr. *John Scott*, afterwards Lord *Eldon*, was counsel for plaintiffs in that case.

It seems apparent that discovery, with a view to redemption, was the sole object of the bill in *Angell* vs. *Draper;* for there was no allegation in the bill that the goods were concealed; nor, that the legal title had been transferred, fraudulently, or otherwise; and no relief against any such transfer was prayed; but, the goods being in open view, for aught that appears, and subject to levy, only incumbered by the lien of the pledgee, it would seem that discovery, with a view to redemption, must have been the *sole* object of the bill; and it could scarcely be supposed the Lord Chancellor could have ruled that the "lien" of an execution could help the plaintiff to find the goods, if it be urged that the object of the bill was to find goods to levy upon; nor, if the latter object were that for which the bill was filed, would the fact of the "lien" of the writ tend to strengthen, or perfect, or increase the "interest" of the plaintiff to be paid his debt from the goods when found.

Nevertheless, in view of the fact, (as we shall see,) that this case of *Angell* vs. *Draper*, is the sole foundation upon which the whole fabric of the New York doctrine of the prerequisite of "lien" is based; we will examine the case, upon the supposition that the object of the bill was to find goods to levy upon; and that the demurrer was sustained for want of the "lien" of an execution to entitle the plaintiff to the discovery prayed, to that end.

It will be important, however, in seeking the principle which governed the judgment of the Court, in sustaining the demurrer, to determine first what principle did not, in order to determine what did, control the judgment. Now,

It was *not* a want of jurisdiction to entertain the bill, to grant any discovery; for the bill being one for discovery, the Court had full and exclusive jurisdiction, by reason of law's inadequacy to comepl discovery. Therefore, the judgment was one of judicial discretion, and not that there was no jurisdiction for any discovery.

It was *not* a judgment that the "interest" of the creditor in finding the goods to levy upon was not sufficient to entitle the plaintiff to any discovery ; and,

It was *not* that the plaintiff "had not proceeded far enough at law," to rebut any presumption that law could afford adequate relief without the discovery prayed.

For, in the case of *Smithier* vs. *Lewis*, decided by the same Chancellor, but a moment before, he exercised the "jurisdiction," upon the "*interest*" of a creditor who *had proceeded no farther* at law.

It was not a judgment, that a creditor, in like situation at law, was not entitled to discovery of *any* goods of his debtor, to the end of levying upon them, by an execution to be issued. For it was the law of the English Chancery, that discovery of goods of the debtor to levy upon was grantable, without execution, upon a bill specifying *particular* goods of the debtor ; although a *general* inquiry into a debtor's affairs was not deemed admissible, nor tolerable, even, upon the *mere fact* of indebtedness, without a lien upon the goods, and consequent right of investigation as broad as the lien. (See *Taylor* vs. *Hill*, *Eq. Cas. Ab.* 132, *pl.* 15.)

Therefore, the demurrer must have been sustained, (in case the object of the bill was discovery of goods to levy upon,) because the bill, without a "lien" upon all the goods enquired after, was a "fishing bill," and inquisitorial, enquiring more "broadly" into the private affairs of the citizen than the requirements of justice demanded.

Therefore, the case is an authority merely upon that point of practice, common to all litigants ; and this accounts for the judgment, and reconciles the cases. The case of

Taylor vs. *Hill*, was a bill by a judgment creditor, *without execution*, who, "supposing some *particular* effects "of the debtor to be in the defendants hands, brought his "bill to discover them, in order to subject them to his "judgment." "The Lord Keeper" seemed to agree it would not lie against the debtor himself ; nor to have *general* discovery from a third person, but only for *particular* things, as this bill was ; and overruled the demurrer.

So in *Manningham* vs. *Lord Bolingbrooke*, a like demurrer was overruled. See note to *Angell* vs. *Draper*, for these cases, 1 *Vern.*, 399.

We notice that this same exemption of a debtor from discovering his effects, to which the Lord Keeper refers in *Taylor* vs. *Hill*, was urged in *Smithier* vs. *Lewis* ; but the objection did not prevail, evidently, because the discovery prayed in that case, was *necessary to the relief* against the fraud set out in the bill ; and was no more broad than the *justice* of the case required; and this *was* the rule of the English Equity, that discovery would be compelled, so far, and no farther, than *justice demanded* discolsure.

The English Equity was very jealous of fishing bills into any one's private affairs ; and, fully to appreciate the point we make, the jealousy, wisdom, and justice displayed by the English Chancellors, in drawing the line of discovery, between the oppression of the Spanish Inquisition. and the demands of justice, needs careful observation of their decisions ; but Mr. *Wigram* in his "Points of Discovery," has examined the subject, and traced that line with wonderful clearness and ability ; and to that work we refer generally. But we now merely refer to the case of *Dos Santos* vs. *Frietas*, cited and abstracted by Mr. *Wigram pl.* 239 *p.* 166 1*st Am. Ed. from* 2*nd. English do* of his treatise, where *Alexander*, *C. B.*, in the Exchequer, says : "If the Court were to enforce this sort "of inquisition into a man's private affairs and business, the "sooner its doors were closed, the better, for it would be "a scourge to the country."

So, also, Lord *Eldon*, in *Mountfort* vs. *Taylor*, 6 *Ves.* 788, was in great doubt as to requiring answer to a general inquiry even as to an alleged fraudulent disposition of a debtors real estate, on bill by a creditor, by *elegit*, seeking discovery ; the bill not having specified the *particular* property, and the *particular* transfer inquired after ; and the doubt of this Chancellor, was only relieved, after consideration, by the fact that the defendant had already too far submitted to answer, to be allowed to stop at the point proposed by the defendants demurrer.

We have now discussed all the authority, except one case, relied on for the deduction in *Wiggins* vs. *Armstrong*, for the jurisdictional proposition that a creditor has no concern with a debtors fraud, till he has obtained the lien of an execution ; and that case is

Balch vs. *Wastall*, 1 *Peere Wm.*, 445, which is authority for nothing, but, that a plaintiff cannot go for the effects of a debtor, while they stand forfeited to the Crown. It was held, in that case, that a bill to reach assets of a debtor, which had become forfeit to the Crown by process of outlawry, was prematurely filed ; because, a grant from the Crown, of the forfeited estate, had not first been obtained according to the usual course in such cases, and that is all there is of that case, to the point of prerequisite of execution lien ; but there was a case cited by counsel, in the argument of the latter case, which goes to the point of exhausting a creditors remedy at law, by return "nulla," as a prerequisite to jurisdiction ; but it has no tendency to support the doctrine of "lien," deduced in *Wiggins* vs. *Arsmtrong*, but rather to overthrow it. Nevertheless, this case referred to in *Balch* vs. *Wastall*, is the only case upon which the New York doctrine of the prerequisite of exhaustion of remedy at law is founded. Therefore, we will consider it when we get through with that of "lien ;" but, now, we proceed to the next case to the point of "lien" where Chancellor *Kent* reaffirms the doctrine, and cites another English authority as sustaining it, to-wit :

Hendricks vs. *Robinson*, 2 *J. Ch.*, 296, where, he says : "The preliminary step, which seems to be required, is, that "the judgment creditor *should have made an experiment at* "*law*, and bound the property, by actually suing out execu- "tion ;" and cites, in addition to the cases cited in *Wiggins* vs. *Armstrong*, the case of *Stileman* vs. *Ashdown*, 2 *Atk.*, 476, (decided by Lord *Hardwicke*, in 1742,) and this was a case where relief *was* granted to a judgment creditor, who *had not issued execution ;* and is precisely parallel, in point of fact, with our case at bar, and with *Hagan* vs. *Walker*.

It was a bill by an executor, whose testator was a judgment creditor, to collect the judgment as a debt, out of real

estate fraudulently conveyed to the defendant, by his father, who had deceased. This judgment, of Lord *Hardwicke's*, would seem to have warranted this Court, in *Hagan* vs. *Walker*, in declaring the latter case within the *original* jurisdiction of the Court over frauds, as it did declare it within that of trusts; and that the case was not dependent for jurisdiction, in either aspect, upon the "lien" of a living, or dead execution; but only upon the plaintiff showing himself the beneficiary of a trust, resulting by operation of law; in the aspect of fraud, resulting as a consequence of the acts of the defendant; in the aspect of assets of a deceased debtor, resulting as a consequence of the act of God; the jurisdictional principle, of trusts, being the same, in each; and the point of *conscience* being the same, so far as "breach of trust," in not paying over the fund to the beneficiary, was concerned; but, *a fortiori*, obligatory upon the conscience of a fraudulent grantee, because of his *collusion*, in the creation of the trust, with intent to commit the breach of trust of not distributing the fund to the rightful beneficiaries; and it is this identity of principle apparently applicable, as well to this simple trust, as to trusts resulting from fraud, which the defendants here, and the Court below, urge, in the case at bar, when they say "the death of the debtor makes no difference;" insisting upon the authority of *Wiggins* vs. *Armstrong*, that a creditor *has no concern* in either resulting trust till he has obtained the "lien" of an execution. Now, as we have said, we do not question the logic of the defendants; and while we admit that the principle seems the same, in cases of trust resulting from fraud, as from the death of a debtor; we assert the *original* jurisdiction of equity over both, without the prerequisite of the lien of the execution; and we say that no question of the original jurisdiction would ever have arisen in either case, but for the fact that in cases of trust, resulting from fraud, the Stat., 13 *Eliz. Ch.*, 5, has conferred a concurrent jurisdiction upon courts of law to avoid fraudulent legal titles; but this concurrent jurisdiction of law has never been permitted to oust the original jurisdiction of equity, in such cases, in America nor England; as we have seen, by the

decision of Lord *Hardwicke* in *Bennett* vs. *Musgrove* and *Hildreth* vs. *Sands*, *ante*. +

The same point of prerequisite "lien" came again before Chancellor *Kent* in *Brinkerhoff* vs. *Brown*, 4 *J. Ch.*, 671-6; where he reaffirms the doctrine of *Wiggins* vs. *Armstrong*, upon re-examination of the authorities cited in that connection, with others to which we call attention, and adds, without citing any authority to it, that the Court could only be informed by *actual experiment*, that an execution would be ineffectual. The first new citation was,

Burdon vs. *Kennedy*, 3 *Atk.*, 739. In this case, it does not appear, by the report of the case, whether an execution had been issued, or not; but it is a fair presumption, from the reasoning of the Chancellor, that none had been issued.

For Lord *Hardwicke*, in deciding the case, first states, that where an execution is lodged in the sheriff's hands, it binds goods, and the chattel interest of a leasehold estate as well, so that, if a debtor, after execution lodged, assigned such an estate, such assignment was ineffectual against such an execution; and then, he proceeds to adjudge the case before him, saying: "In the present case *here* is only an *equity of* "*redemption*, and execution will not affect it, as the legal "estate is in the mortgagee; and consequently, by the common "equity of this Court, he may come here to redeem a subse-"quent incumbrance; and, likewise, to discover whether "there was any, and what consideration, for the assign-"ment."

This would seem to be an argument to prove that an execution, which *could* constitute no "lien" upon a mere equity, was *not* necessary; and thereby to distinguish the case of a bill against an assignee of an equity of redemption, from the case of one against a mortgagee, who held a legal title, upon which an execution *could* create a legal lien; and that is all there is of this case.

Chancellor Kent here cites, to the same point:

Scott vs. *Scholey*, 8 *East.*, 467; which was a law case; holding that a *mere equitable interest* could not be reached by execution at law; Lord *Ellenborough* declaring, at p.

+ Also 17 J.R. 358, 2 Paige 497, 2 Eqr. Ch. 486, 2 Russ. 382, 3 Sandf. S.C. 478 to 481

484, substantially, the doctrine of *Burdon* vs. *Kennedy*, *ante*, that an equitable interest, in a term of years, was not saleable upon *fi. fa.*; "but, (he says, at p. 485,) the inconvenience of "the case does not extend beyond the necessity for a judgment "creditor to file his bill in another court," saying; "In a "court of equity he might be let in to redeem such mortgage "incumbrances, that stood in the way of his common law "remedies; or he might have a decree for the sale of the "mortgage *term itself*, in satifaction of his rights as an exe-"cution creditor," citing *Shirley* vs. *Watts*, and *Burdon* vs. *Kennedy*.

Chancellor *Kent* also cites *Mountfort* vs. *Taylor*, *ante*, where Lord Eldon decreed discovery without a "lien" upon the real estate, in respect of which, discovery was sought; and that without a return "nulla" of the *elegit* as to goods of the debtor, against which such writ runs, as well as for possession of land; but, on mere *allegation* in the bill, that the plaintiff believed the debtor had no goods, Lord Eldon entertained the bill, and decreed discovery.

Chancellor *Kent* also refers to *Manningham* vs. *Bolingbroke*, *ante*, and notices that Mr. *Mitford* cites it as authority that a *return* of *fi. fa.* was not necessary: and that Mr. *Raithby*, in his notes in *Vernon*, says, that demurrer to the bill, because no *elegit* had been sued out, was overruled.

He also refers to *Taylor* vs. *Hill*, *ante*, and cites the remark of the Lord Keeper in that case, that bill for such discovery "would *not lie against the debtor himself;* nor against "a third person, to have a *general* discovery," but fails to notice why the Lord Keeper so ruled, but, seemingly, supposed it must have been upon the theory enunciated in *Wiggins* vs. *Armstrong*.

He also refers to *Leith* vs. *Pope*, *Dickens*, 575, where a judgment creditor filed such a bill, for discovery of assets; and Lord *Thurlow* overruled a demurrer to it as "too large;" but, because it appeared, by the reporters note, that an execution had been taken out, the Chancellor seems to have supposed the case to sanction the theory of *Wiggins* vs. *Armstrong*.

This ends the list of English authorities, cited anywhere, to sustain the doctrine that "a creditor has no concern with his *debtors frauds*," until he has levied or lodged an execution.

Thus, it seems the farthest that any of the cases go, in the direction supposed, is to establish that a "specific lien" upon property mortgaged, is necessary to entitle a creditor to *redeem the mortgage;* and that the affairs of a citizen are not subject to a *general* investigation, on a bill of discovery, because he happens to owe a debt; while, as to the *original jurisdiction* of the Court, over frauds, these authorities show that in *Bennett* vs. *Musgrove*, Lord *Hardwicke*, entertained the jurisdiction to make a decree in the case on the ground of actual fraud, notwithstanding there was an untried and concurrent remedy at law by ejectment; and the cases of *King* vs. *Marissal*, and *Stileman* vs. *Ashdown*, were entertained upon the jurisdictional ground of fraud, and decree granted in the latter, without any execution; and in *Taylor* vs. *Jones*, *Smithier* vs. *Lewis*, and *Dundas* vs. *Dutens*, incidentally cited by us, the bills were entertained, and decree against property fraudulently conveyed was granted in the first two and denied on the merits in the last, without any execution. And in this connection, we also refer to the case of

Partridge vs. *Gopp*, *Amb.*, 596, where bill was filed to reach a gift of money, by a deceased debtor, to his daughters, in his lifetime, upon the report of a master in Chancery, on a bill for an accounting against the decedent; and a supplemental bill was entertained on the masters report, and decree granted, *without* any *judgment* or *execution*, against the administrator or executor of the decedent, or any other proceeding against his estate. This case, together with *Taylor* vs. *Jones*, *ante*, is approved as law by Chancellor *Kent*, in *Bayard* vs. *Hoffman*, 4. *J. Ch.*, 450; and by the Court for the Correction of Errors, in New York, in *Hadden* vs. *Spader*, 20 *J. R.* 554 where a *dictum* of Lord *Thurlow* in *Dundas* vs. *Dutens*, is criticised and overruled.

Therefore, we insist, it abundantly appears in the English Chancery, that a *creditor* had the same concern with his

debtors frauds, as had any other litigant in frauds which injured him; and, without first experimenting at law to determine *its* inadequacy to relieve him.

And now we come to another branch of the New York prerequisites to equity jurisdiction, equally subversive of justice to creditors, and with even less appearance of foundation in the English equity, to-wit: that he "must exhaust his remedy at law," before he can have relief against his debtor's frauds, or subject trusts, *bona fide* or otherwise created for the debtors benefit, or his "choses in action," to the payment of his debts.

This doctrine is first announced in Equity Jurisprudence in *Brinkerhoff* vs. *Brown*, 4 *J. Ch.*, 676; where the Chancellor (p. 676) states the rule thus: "But I am sorry to say, "that the plaintiffs have not shown enough, when they only "show themselves to be judgment creditors. If they want "relief touching the personal assets of their debtor, they "must show that they have taken out *execution at law*, and "pursued it, to every available extent, against the property, "before they can resort to this Court for relief. I apprehend "this to be the settled rule in chancery; and that this Court "does not, as of course, assume jurisdiction, in taking exe-"cutions upon judgments at law into their own hands. Such "power would be oppressive to the debtor and to the Court. "The presumption is, that the Court which renders judg-"ment, is competent to enforce it; and it is only in special "cases, in which property cannot be found to satisfy it, that "this Court interferes to discover and reach the property. "But the legal remedy by execution must first be tried. This "Court is not to know, by anticipation, that it will be inef-"fectual. Upon such an allegation, it might assume the "collection of all simple contract debts, in the first instance, "without even requiring the creditor to prosecute his demand "to judgment at law."

The only English case relied on for this doctrine is that cited by counsel in *Balch* vs. *Wastall*, *ante*, and it is said by that counsel to have been decided by Lord *Nottingham;* and that is all the report we have of the case. It is a case without

a name! and counsel's statement of it is very meagre, as follows: "That one who had a judgment and had lodged a "*fieri facias* in the sheriff's hands, to which "*nulla bona*" "was returned, might afterwards bring a bill against the de- "fendant, or any other, to discover any of the goods or per- "sonal estate of the defendant, and by that means affect the "same; but he must first go as far as he can at law, by de- "livering this writ of *fieri facias*, and getting it returned."

By this statement of counsel, we perceive the case to have been one for discovery merely, and for general discovery of goods and personal estate of the debtor, and the need of discovery seems as broad as the bill; and, of course, requiring disclosure as broad as the need.

That "need" was evinced and limited by return *nulla*, of *fi. fa.*, which affected, and could affect, chattels only. So, in considering the adjudication, we ought to limit our deductions, to the case before the Court—discovery of chattels—unless that judgment of the Court is declaratory of some previously established principle; and if so, we must go back of this case for that principle; but, the New York doctrine, which we controvert, originates in this case; and relies on the concluding sentence of what counsel says was the judgment in this case; not only as declaring, but as originating a general rule, applicable, not only to all cases of discovery, but as establishing a precedent condition to *all relief* to a creditor, not only in aid of *fi. fa.*, in reaching chattels to levy upon, where the title remained in the debtor, subject to levy; but to relief against chattels, (and real estate with us,) fraudulently transferred, and "choses" not the subject of levy. And this general principle, thus supposed to have been established and declared, is deduced from the concluding sentence to which we refer, in these words: "But he must first go as far as he can, at law, "by delivering this writ of *fieri facias*, and getting it "returned."

Now our previous argument and authorities, which prove that a creditor need not go so far at law, as to issue execution to reach either choses or real estate, fraudulently trans

ferred, to-wit: *Stileman* vs. *Ashdown; Dundas* vs. *Dutens; Smithier* vs. *Lewis*; and *Partridge* vs. *Gopp*, are a *fortiori*, conclusive that such a writ need not be returned before equity can intervene; and, even if Lord *Nottingham* intended, in that case of discovery of chattels, to announce any such notion of general prerequisite to the exercise of the powers of a court of equity, these subsequent authorities, cited by us, clearly overrule that notion; and, if he intended to announce the proposition, that equity could not grant a discovery of chattels without a return, after execution lodged, the case of *Angell* vs. *Draper* impliedly overrules him. And, if he intended that a judgment creditor, without execution, was not entitled to *any* discovery of chattels, the subsequent cases of *Taylor* vs. *Hill*, and *Manningham* vs. *Bolingbroke*, overrule him as effectually as they do Lord *Jeffreys* in *Angell* vs. *Draper*, if the latter intended to announce any such notion in the latter case. So if Lord *Nottingham* intended to announce any principle affecting a creditor's right to proceed without *fi. fa.* against a debtor's "choses," the announcement was clearly *obiter* the subject before him; because, that subject was not before him. Hence, the New York doctrine is founded, if at all, upon an *obiter dictum*. But, we shall see in the sequel, as to "choses," if Lord *Nottingham* intended to embrace them in the remark, (if he made it,) the *dictum* is as effectually overruled as we have shown it, if it were intended to cover the case of property fraudulently transferred.

But if Lord *Nottingham* intended, as we think he did, merely to rule that a creditor must proceed far enough at law to show a "title," (in the sense of need,) to the general inquiry into a debtor's affairs, which the bill proposed, which, we have seen, was not admissible to a mere creditor; that is, if he meant merely to rule that justice demanded the disclosure, as broadly as it was sought; and that a return "nulla" was a sufficient compliance with that rule, and that discovery was as *necessary* to that end, as we have seen it to have been to the end of enforcing a general "lien," by execution; the remark is accounted for, and is consistent with the eminent judicial character of that great Chancellor, and within the

limits of the case before him ; and is also consistent with, instead of opposing, all the authorities we have cited.

It seems impossible that any such notion, as the jurisdictional prerequisite of exhausting a creditor's remedy at law, *could* have been in the mind of Lord *Nottingham*, in the expression respecting *fi. fa.*, to which we have alluded ; for to exhaust a creditor's remedy at law, in those days, the creditor must have issued, not only *fi. fa.*, which went against chattels only, but *ca. sa.*, which deprived a debtor of his liberty, and was as effectual, in compelling a debtor to disgorge his choses and trust property, as any remedy equity could give ; and he must have had it returned "*non est*," and he must have issued an *elegit*, which went for goods and possession of the half of a debtor's lands ; and, he must have had it returned unsatisfied, before the remedy at law, would have been exhausted. Therefore, no such notion *could* have been intended by the expression.

If any such notion had prevailed in the English equity, discovery in aid of, or relief to, a creditor by *elegit*, against lands, could not have been granted, until the sheriff had returned the writ "nulla" in respect to goods ; for the *elegit*, lodged, was no "lien" on land, as it was upon goods, but only authorized the sheriff, to enter upon lands and deliver "possession" of the half thereof, to the creditor. Yet such aid to an *elegit*, without return, or search for goods, was always granted. See *Mountfort* vs. *Taylor*, *ante*, and *Phipps* vs. *Bowater*, and *Davidson* vs. *Foley*, cited in note to *Angell* vs. *Draper*, *ante*. So, we see that equity, not only did not require all remedy to be exhausted ; but, even the power of the particular writ, need not have been exhausted, as a condition precedent to relief ; but, to the contrary, that equity would give relief in respect to the particular property of the creditor's selection, without regard to other property, or other remedy, provided only, that equity could give a *better* remedy, or one that law could not give, as to that paticular property of the creditor's selection. And this was the rule in Lord *Hardwicke's* time, as we shall see in the next case.

It is true that Lord *Hardwicke* considered the remedy

which law, ordinarily, provided, as adequate to relief against a debtor's choses in action, as any that equity could give; and that equity would take judicial cognizance of that fact: That is, that *capias ad res.*, where the debtor could be found, followed by *ca. sa.* after judgment, was as effectual as any remedy equity could give, in compelling a debtor to apply his choses, money, or anything he could control, to the payment of his debts; and, if the debtor could not be found, the process of *outlawry*, whereby all a debtor's effects and choses were forfeited to the Crown, for the benefit of the creditor, was *perfectly adequate;* but, failing these efficient remedies, a creditor, as such, and without a lien, was entitled to equitable aid to reach the "choses" of a debtor; and this, at the creditor's option, without even searching for goods; or alleging, even, that "there were no goods" which could be levied on by *fi. fa.* Indeed, the creditor had, in such case, the right to go into equity to *garnishee* a debtor's choses, paying no more attention to a debtor's other property, than we do, at law, in these days, under our statutes of garnishment. And this right, as we have here stated it, is declared and established by Lord *Hardwicke* in the cases which we now cite.

Edgell vs. *Haywood*, 3 *Atk.*, 352, decided by Lord *Hardwicke* in 1746, the eleventh year of his administration as Lord Chancellor.

It was a bill to reach and apply a legacy, to which the debtor had become entitled, since his discharge as an insolvent debtor, under the act, 10 *Geo.*, 2 *Ch.*, 26, which left the debt standing good against future effects of the debtor, but exempted him from arrest on *capias*, and consequently from process of outlawry; (leaving the debtor precisely as he is left at law with us, since imprisonment for debt was abolished.) A *fieri facias* had been issued against goods etc., but *had not been returned.* It was objected by counsel for defense that the execution, not having been returned, and the "bill not alleging that the defendant had no other effects," wherewith the *fieri facias* might have been satisfied, that hence, "it was no cause for equity." Lord Chancellor overruled the objection, holding it to be a case for equitable relief,

"because the legacy was a part of the property of the defend-"ant, upon which an *execution* could not be levied," saying, "the Court does not proceed upon the ground of a 'spe-"cific lien,' but only considers it, as a part of the property of "the debtor, which the creditor cannot come at, without the "aid of the Court."

He had previously said, that, as a general rule, the bill could not be sustained, "because the Court takes notice that "the creditor has a method, by the ordinary rules of law, "either by compelling satisfaction, by seizing the person," "or, where that cannot be taken, by proceeding to outlawry."

The Lord Chancellor, in this opinion, discourses upon the subject of "lien" by lodging execution, and of the "lien" of a "suit pending" in equity, upon the subject of the suit.

At page 357 he says: "It is objected that this is a suit "by one creditor only, and ought to be by all; but the person "who first sues has an advantage, by his legal diligence, in "all cases; and, of chattels in possession, the first suit has "the satisfaction."

"The Court does not proceed, in this case, upon the "ground of a 'specific lien,' but only considers it, as a part "of the property of the debtor, which the creditor cannot "come at, without the aid of the Court."

"If, therefore, after the judgment, or even after the *fieri* "*facias*, the debtor had assigned this" (legacy,) "*bona fide*, "and for valuable consideration, and without notice, it would "be good, and prevail against this creditor."

"But, after bill brought, and *lis pendens* created, as to "this thing, such assignment could not prevail."

The Chancellor had spoken, on page 356, of an execution, as if it could affect a "chose in action;" but there he was speaking of an execution out of the Court of Chancery, which, going against the person for contempt, affected all disobedience of the debtor alike; but here, he speaks of the *legal lien* of *fieri facias;* and referring to the *fieri facias* which had been issued at law, in the case he was considering, and to the then familiar rule, that the "lien" of such an execution "lodged," had the same effect on chattels, as one actually

levied; he states, that the debtor could make a valid assignment of this legacy, notwithstanding the lodging this writ; *i. e.*, that the *fieri facias* was no lien upon the legacy. Yet, conceding that the writ was no lien, he proceeded *without a lien*, on the "naked need" of the interference by equity, because the *fieri facias* could create no lien; and, he then declared the effect of a "suit pending" in equity, as a "lien," which the debtor could not avoid by a subsequent assignment of the subject of the suit; which latter lien is familiar to prac titioners in our State Courts, under our *statutory* "creditor's bills," but which is generally supposed, by the supporters of the defendant's contention, to be an extension or perpetuation of some imaginary lien of the writ, after its return "nulla," to enforce which, as a lien, they suppose is the only function of chancery, in aid of a creditor; whereas, the return of the writ was never more than evidence, to satisfy the Court, that a bill of discovery, which made a *general* inquiry into a debtors affairs was not inquisitorial, and a "fishing bill."

It is certain, however, that Lord *Hardwicke* did not consider the lien of *fieri facias*, dead or alive, to be a jurisdictional prerequisite; for the *fieri facias*, in the case he was deciding, had not been returned; and he declared that the "lodging" of it, created no "lien," and that he proceeded upon no ground of "lien." It follows, therefore, either that the contention of the defense here, that equity cannot aid a creditor, except upon the lien of a living or dead execution, is unfounded in the English equity, or Lord *Hardwicke's* judgment, in the principal case, is an erroneous exposition of the jurisdiction of that Court.

The objection of the defendant's counsel, in *Edgell* vs. *Haywood*, it will be noticed, assumed that if the debtor had goods, upon which the *fieri facias* could have been levied, it was necessary to "exhaust that remedy," before going for the debtor's choses in action; or, at least, to allege that an attempt to find, and levy upon goods, would prove fruitless. In overruling this objection, it was necessarily held, that a debtor *had not any option*, as to what portion of his property his creditors should proceed against for payment of their

debts; provided, only, that, in respect to the particular property of the creditor's selection, the aid of the court was necessary, and that the ordinary process, by arrest, and outlawry, were not, (for reasons *shown in the bill*,) open to the plaintiff.

Now, this doctrine of Lord *Hardwicke*, as broadly as we have shown he intended it, is strictly in accordance with the New York Chancery Law, as it is, and always has been administered; only that, in New York, these prerequisites of "lien" of a *fi. fa.*, or of its return "nulla," have been interposed, which, we here see Lord *Hardwicke* got along so well without.

So, also, the doctrine of Lord *Hardwicke*, in this regard, is in strict accord with the principles, and practice, under the State garnishment statutes; which give the debtor no right to prescribe the creditors election, as to what property he shall proceed against; and these statutes have shocked no one's sense of justice; nor would their enactment have been necessary, any more than was the creditor's bill statute of New York, if the doctrine of Lord *Hardwicke*, in the principal case, had been accepted as the correct prescription of the English equity jurisdiction; and yet, this decision of Lord *Hardwicke*, has never been overruled, nor questioned, until after our constitution was adopted; notwithstanding subsequent doubts in England, which have been solved in America, against the doubts, by the same jurists who were the authors of this New York doctrine of jurisdictional prerequisites.

In this connection we may also observe, that all debts with us, since imprisonment for debt was abolished, have been in the precise condition, as to legal remedy, for want of power to arrest, or to proceed to outlawry, as was the case before Lord *Hardwicke;* so that, with us, since imprisonment for debt was abolished, the doors of the Courts of Chancery, in the States which have adopted the English system, would always have been open to creditors, for *garnishment* of choses, and equitable assets of their debtors, had it not been for the misconception of equity power, which is involved in the defendant's contention here. And why should not the juris-

diction have been exercised? "It surely may be admitted, that the Court of Chancery, will not do wrong;" and the expense, even if it affected the principle, is not essentially greater; and costs were never chargeable upon trustees, except when they were in fault; and as for its being oppressive to the debtor, to be compelled to pay his debts, or being oppressive to the Courts. to compel it, we understand that to be a proper part of the business of the Court, and we see no reason why the same judges may not as well be employed in exercising one branch of their jurisdiction, as another.

Another case by Lord *Hardwicke*, precisely analagous in principle with *Edgell* vs. *Haywood*, is:

King vs. *Dupine*. This case we find abstracted and analyzed by Chancellor *Kent*, in his opinion, in *Bayard* vs. *Hoffman*, *ante*, where it appears that although a *fi. fa.* had been issued, it had *not been returned;* and that an attempt to levy, and enforce it against a "chose" of the debtor, had proved fruitless; the Lord Chancellor granted relief, which, as we see by his opinion in the preceding case, was not in aid of any "lien," of the writ; nor because a return of the writ, had exhausted remedy at law.

We cite and analyze the case of *Taylor* vs. *Jones*, to the same point, where neither *judgment* nor execution, were supposed to be prerequisites. But this was a case of fraud. Yet it is equally an authority against the New York doctrine, which we controvert, as if it had been entertained upon the naked equity, of a creditor, to be paid out of the stocks, which had been fraudulently transferred.

Taylor vs. *Jones*, 2 *Atk.*, 600, decided in 1743, by Sir *Wm. Fortescue*, Master of the rolls under Lord *Hardwicke*.

In this case, the bill was by simple contract creditors, in their character as such, against a *living debtor*, to set aside, as fraudulent, a secret deed of trust, of stocks; the stocks, notwithstanding the deed, remaining in the debtor's possession.

The trust which the debtor had declared, was for the benefit of the debtor for life—his wife for life—and for his

children afterwards; and was claimed in the defense, to have been a valid marriage settlement.

The bill was entertained, and decree applying the stocks to the payment of the debts of the plaintiffs. The Master of the Rolls holding, that *possession* of the stocks, was evidence of fraud against creditors, subsequent to the date of the deed, as well as existing creditors; the retention of possession, giving to the debtor a power, equivalent to the condition of revocation, which *Stat.* 27, *Eliz.*, attaches to voluntary conveyances as against *subsequent purchasers* for valuable consideration; *i. e.*, that till delivery of the stocks to the trustees, it was optional with the debtor, whether the trust should become operative; and that the retaining such option, was a secret trust for himself, of the wife and children's interest, as well as of his own life interest; and, consequently, that the deed was void, as to all creditors of the debtor.

It seems that Lord *Hardwicke*, in the preceding cases decided by him, proceeded upon the naked equity of a creditor to be paid his debt, and the "duty" of the debtor to apply his choses in payment; and because equity could give a better remedy than law could give. And this, upon the same principle, that he declared the right of a creditor to proceed directly against the debtor of a deceased debtor, upon the need of equity interference, occasioned by the executor's insolvency, as we have seen, *ante*. Yet, although we have seen Lord *Eldon* affirming Lord *Hardwicke's* declaration of the rule in the latter instance, we find the *power* of Chancery to reach stocks and "choses" of a debtor, and trusts *bona fide* created for his benefit, subsequently doubted, first, by Lord *Thurlow*, and afterwards by Lord *Eldon*.

The doubt was not, however, based upon any notion that an execution returned "nulla" would confer the power, but that Equity had no power, upon a judgment for a mere debt, in a court of law, or upon such a judgment, in its own court, to reach property which an execution at law could not reach. And while it was conceded by those who entertained this doubt, that Equity *could* reach stocks and choses, which the "equity" of a plaintiff charged with a trust; or stocks, the

title to which had been fraudulently procured, and suit was brought to affect that title; yet, it was supposed that a mere debt created no such equity; and that equity was, in such case, as powerless as law, to apply such property. And Lord *Eldon*, who had appeared for the plaintiff, in *Dundas* vs. *Dutens*, *ante*, (where Lord *Thurlow* expressed that doubt,) had conceived the idea, as a consequence of that doctrine, that "choses," &c., were not subject to process from either Court, and hence that a debtor could not, during his life, fraudulently transfer them.

This doctrine, so repugnant to justice, came up for consideration before Chancellor *Kent*, in *Bayard* vs. *Hoffman*, * *ante*, and again in *Hadden* vs. *Spader*, 5 *J. Ch.*, and, again, on appeal from the Chancellor, in the latter case, to the Court for the Correction of Errors; ° where the *dictum* of Lord *Thurlow*, and the following of it by Lord *Eldon*, were overthrown, and the authority of Lord *Hardwicke*, and *Sr. Wm. Fortescue*, in the cases we have now cited, was affirmed, as the law of equity which was adopted by our American Constitution; but in that discussion of the *power* of the English Court, the jurisdictional prerequisites, previously established in New York, were taken for granted, as having previously been well established by Chancellor *Kent*. Yet, the cases cited to overthrow the doubts of Lord's *Thurlow* and *Eldon*, seem plenary against the doctrine of the New York prerequisites, as well as against Lord *Thurlow's dictum;* and it is evident, from the case in which the *dictum* appeared, as well as by those which followed it, that no such jurisdictional prerequisites had ever entered the mind of English Equity jurists, as the cases clearly show, viz:

Dundas vs. *Dutens*, (heard in 1790,) 1 *Ves. Jr.*, 196, was a bill by creditors, who had obtained neither judgment nor execution, to set aside, as fraudulent, a provision for the children of a debtor, in a *post nuptial* marriage settlement of stocks; and to reach and apply the income of the same stocks, settled upon the debtor and his wife for their respective lives.

Upon the hearing before Lord *Thurlow*, counsel for plaintiff, were arguing that the debtor, by force of the marital

* 4. J. Ch. 450
° 20. J.R. 554

relation, was the sole beneficiary of the joint life estate of himself and wife, and hence, that the point of fraud in the settlement was not necessary to that branch of the case, when, the Lord Chancellor interrupted, with a remark, expressive of the doubt we are considering, in these words: "Is there any "case, where a man, having stock in his own name, has been "sued, for the purpose of having it applied to satisfy credi- "tors? Those things, such as stocks, debts, &c., being "choses in action, are not liable," &c.

Having heard counsel further, upon the point of fraud in the settlement of the reversion in trust for the children, after the debtor's decease, the chancellor decided, upon the merits, that the settlement was *not fraudulent*, and dismissed the bill *in toto*.

With all due deference, we look upon this "*dictum*" of Lord *Thurlow* as very strongly "shaking" Lord *Hardwicke's* decision, which we have cited; provided the former knew what the latter had decided; which it appears he did not, as in the same connection he said: "I have never heard of such "a thing." It is of little moment, however, to us, who adopted Lord *Hardwicke's* law, three years previous to this "*dictum*," whether it was shaken in England or not. The next case in which this doubt occurs, is:

Nantes vs. *Corrock*, 9 *Ves.*, 163. (Heard in 1802.) This was *not* a creditor's bill, but a bill, by daughters of decedent, to set aside a deed of settlement of stocks, by their father, upon his house-keeper, on the ground of *fraud* and *undue influence*. Another branch of the bill was, for an *accounting*, by the house-keeper, of her receipts and disbursements during her administration of the affairs of the decedent's household, wherein a balance was claimed in favor of the estate.

The Lord Chancellor—*Eldon*—seemed, on the argument of the case, to think there was no frand, or undue influence, which would entitle him to interfere with the house-keeper's *title* to the stocks; but, the question remained, as to how any *balance* upon the accounting could be collected, provided it should be found in favor of the plaintiff: the defendant being a married woman, and not liable to arrest on *mesne*,

nor final process. It was conceded that her separate property could be charged for her separate debts; and the plaintiffs insisted that *equity could* charge her stocks for that debt; and upon this point, Lord *Eldon* said: "In this case, the "property is only stocks; and there is no instance of this "Court's giving execution against stocks—*eo nomine*—upon "which there is no lien."

Nevertheless, he permitted the plaintiffs to take a reference for testimony upon the question of fraud, and undue influence; which, being declined, he dismissed the bill; but, by entertaining the bill, for proof upon the point of fraud, as affecting the *title* of the defendant, to the stocks, it is apparent that he had no doubt of the *power* of equity, to reach and transfer that title, provided the fraud should be established; and he showed very plainly, thereby, what he meant by the remark as to reaching stocks, upon which there "was no lien," where the plaintiff's case had failed to *charge the title* with the *fraud*, set out in the bill. But the supporters of the defendants' contention, in the case at bar, have been greatly mystified by that remark; (see *Bayard* vs. *Hoffman*, and *Hadden* vs. *Spader post*,) supposing it to have some reference to their notion of the "lien" of an execution issued or returned.

The next case in which the doubt occurs, is:

Rider vs. *Rider*, 10 *Ves.*, 360, (heard in 1805,) before Lord *Eldon*.

This was a bill by a widow, administratrix, of a deceased debtor, (without judgment or execution,) to set aside a settlement of stocks, in trust, for the debtor and his concubine, jointly, as a fraud against the covenant of a previous marriage settlement, in favor of the plaintiff.

It was argued by Sir *Samuel Romilly*, assuming that Lord *Eldon* held to the theory that a gift of stocks, in the debtors life time, *could* not be fraudulent. (See *arguendo*, p. 362-3.) Yet, "that a disposition of such stocks, to take effect after "the decease of the debtor, would, nevertheless, be fraud-"ulent."

It was argued by Mr. *Richards*, for the defense, (p. 364,) that "if the stock had been transferred into the name of the "defendant, (the concubine,) alone, therefore, it would have "been good. If this is not a trust, this Court can no more "give execution against stock than a Court of Law. (*Dun-*"*das* vs. *Dutens*.) It is true, this Court is said to act *in per-*"*sonam ;* but *that* is only in case of trust. This Court can "not order the identical property delivered up, or transferred, "except on the ground of trust, giving an interest to the per-"son demanding it."

And Lord *Eldon*, taking for granted the statement of law by Mr. *Richards*, as deduced from *Dundas* vs. *Dutens*, held, with Mr. *Romilly*, that if the gift had not been perfected in the life time of the debtor, the settlement would become fraudulent at his death, *because* stocks and "choses" would then come within the purview of equity powers, "in the administration of assets."

We desire to call attention to this judgment of Lord *Eldon*, as plenary against the jurisdictional prerequisites of either judgment or execution ; for the bill, in behalf of this plaintiff, did not invoke the exercise of the jurisdiction of the Court for administration, but was on the same footing as that of any executor suing to get in the assets of the estate, for the benefit of whom it might concern. We call attention, also, to the precise point of this *doubt* of Lord *Thurlow*, as understood by Lord *Eldon*, which was that nothing but an execution can ~~not~~ go out of chancery, upon a mere *debt*, even though it were established in that Court, as, for instance, for a balance of account ; or, say, as in case of decree for deficiency in a mortgage foreclosure. Yet, that, wherever the *equity* of a plaintiff's case charged *the subject of the suit* with a trust, or where it charged the party in possession of a trust fund, with a *duty, beyond that* of a simple debtor, that, then, the plastic powers of equity were considered adequate to compel the execution of that trust, or performance of that duty ; and this is evidently the point of distinction to which Lord *Eldon* refers, in *Nantes* vs. *Corrock*, where he declares the want of power to

issue execution against stocks, *eo nomine*, upon which there was no "lien."

It seems evident that Lord *Eldon* had not seen, at least, had not examined the cases decided by Lord *Hardwicke*, and Sir *Wm. Fortescue*, to which we have referred, for, he says (p. 360,) that, "if the decision is to turn upon that doc-"trine, *I should wish to look* at those authorities."

Now, as we have seen, Lord *Hardwicke* found no difficulty in charging choses in action, belonging to a debtor, with a *trust*, upon the application of a creditor, in whosesoever hands they might be held, provided the remedy by *ca. sa.* or *capias ad. res.*, and outlawry were not available; and this, upon the superior equity of a creditor, to be paid out of the fund, and the *duty* of the debtor to apply the fund, in payment. And it would seem that Lord *Eldon* considered the powers of equity ample, to reach stocks and choses, provided, they *could* be charged with a trust; but the power thus to charge them, as Lord *Hardwicke* did, was what seems to have been the matter of doubt with him, as to which, if necessary, he would have examined those decisions, made by, and under that Chancellor.

It is worthy of remark, however, that no such doubts affected Lord *Eldon* in his opinions in *Uterson* vs. *Mair*, and *Alsager* vs. *Rowley*, when considering the power of chancery, as declared by Lord *Hardwicke*, in proceeding against a debtor to the estate of a decedent, upon the *naked equity* of a creditor, coupled with the danger incident to the debtor's paying the debt to an insolvent executor; and in *Utterson* vs. *Mair* he finds, and declares a ready method of reaching such a "chose in action," due to a deceased debtor's estate.

And, as we have said, the New York Chancery, have solved the "doubts" of Lords *Thurlow* and *Eldon*, in favor of the judgments of Lord *Hardwicke;* but to put the doubts forever at rest, in New York, the aid of the Legislature was called in, which ended the doubts, by statute conferring the jurisdiction subject to the prerequisites created in *Wiggins* vs. *Armstrong*, and *Brinkerhoff* vs. *Brown;* and thenceforth in that State, and in those following New York, the power

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subject to
~~and~~ the prerequisites have been considered as conferred and restricted *by statute*. See *McElwain* vs. *Willis*, 9 *Wen.*, 548-60, per *Nelson*, J., in New York Court of Errors.

That they were not common law prerequisites, seems to have been conceded, in the opinion of *Nelson*, *J.*, in the latter case, where he concedes that, at the common law, allegation "that the debtor had no effects to levy upon," might, in the discretion of the Court, supply the want of return "nulla;" but this was, nevertheless, upon the assumption, that the fact of the inadequacy of law, in the particular case, and not the power of chancery to give equitable relief, was the source of the jurisdiction of equity; but, as we have seen, the jurisdiction of equity, comes of her own more efficient powers; and it is a fundamental principle with this Court that the U. S. Chancery can derive no jurisdiction, (in the sense of power,) from State Statutes, nor can they be restricted by State adjudications as to their common law powers.

But it is contended that this Court *has* adopted this theory of jurisdictional prerequisites as affecting and controlling that of the U. S. Courts of Chancery; and *Jones* vs. *Green*, 1 *Wal.*, 330, is relied on for such adoption. If this be so, in this single case, or in any number of cases, it is sufficient, for our case that we have shown the *principle* of *jurisdiction* which has been followed in such adoption, not only unfounded in, but opposed to, that of the English Equity; hence in opposing the defendant's contention for its extension as a principle to overturn the long line of English cases, and their following by this Court, which we have shown, we may rest satisfied with having shown the principle to be with, rather than against us; and, hence, that we are at liberty to insist that the road to uniformity of decision upon the basis of *principle* does not run in the direction of overturning the doctrine of the plaintiffs' contention in the case at bar.

But this Court has never yet sanctioned the New York doctrine, to the extent supposed, so, but that "allegation," would confer jurisdiction, as effectually as actual experiment. In *Day* vs. *Washburn*, 24 *How.*, 352, upon "allegation"

that a debtor had no other property, than that fraudulently assigned, the jurisdiction and decree were sustained.

And in *Hagan* vs. *Walker*, *ante*, allegation that the debtor had no other effects, was the most cogent *circumstance* relied on in the opinion of the Court.

Now, if the Court, in thus declaring, in *Jones* vs. *Green*, had reference to and intended to declare the New York statutory *principle* of prerequisites to "*jurisdiction*," rather than a prerequisite "incident" to the plaintiff's case of fraud, we trust we have shown the remark to have been "too broad," so far as the principle is concerned.

Yet, there is a principle inherent in all these cases, which is essential to the "action," and to the exercise of judicial discretion, which is an indispensable prerequisite to setting aside a fraudulent conveyance, viz: That to constitute such a fraud, it must be made to appear that the debtor has violated the rule requiring him "to be just before he is generous;" and this principle requires a showing, to the satisfaction of the Court, that the property fraudulently conveyed is *needed* for payment of the debtors debts—not out of respect for any supposed right of the *debtor* to dictate what part of his property shall be applied to such payment —but, because the rights of third persons, in the debtor's benefactions, ought not, and cannot be questioned, unless they violate this principle.

This principle seems to have been satisfied in *Mountfort* vs. *Taylor*, *ante*, by allegation upon information and belief that there were no goods to levy upon by the *elegit*.

So in *King* vs. *Marrissal*, *ante*, by allegation, that the debtor had fraudulently mortgaged "his whole effects;" and in *Smithier* vs. *Lewis*, that the debtor "had assigned his *estate*" to trustees, fraudulently; and so of the allegations in *Hagan* vs. *Walker*, and *Day* vs. *Washburn*, *ante*.

And we notice also that counsel in *Edgell* vs. *Haywood*, conceded "allegation" to be sufficient to show the "need" of resorting to the debtor's "choses," although, as we have also seen, there was no need of showing the "need" in that case.

Now, if this latter principle was that which rested in the mind of the Court in the expression in *Jones* vs. *Green*, to which we have referred, it was one which affects the cause of action, and not the jurisdiction!

But to declare, as a general principle, that the jurisdiction of equity is conferred only as a consequence of failure of "actual experiment" at law, or to apply such a rule to creditors, as a class, and not to other litigants, is at variance with the whole course of the Court. It would preclude jurisdiction, under all, as it has under one jurisdictional head —it precludes as well discovery of evidence—stating of accounts—foreclosure of mortgage—relief where a trust is conventional as well as where it results by operation of law—relief by injunction as well as *ne exeat*—until a creditor has first made a vain experiment to the exhaustion of the powers of law. And this, though the futility of such experiment were as well known before as after its failure—as in case of choses not leviable, or property fraudulently transferred. Yet this rule requires the experiment first to be tried, while a fraudulent debtor, and his associates in fraud, are packing up his plunder, and disposing of his choses preparatory to final departure from the jurisdiction, in the very face of his creditor, and under the eye of the Court; and to the creditor's appeal for relief, the Court is compelled to respond: you have "no concern" with your debtor's frauds, until you have a "lien;" and this crying evil has pervaded this land without redress, for the want of time to examine its source, and out of respect to the great Jurist, and eminently just Chancellor, who proved himself human by falling into the error, in the early days of his Chancellorship; this error we, however feebly, have endeavored to show—in the hope, not only that it may not be extended, but corrected, to the restoration of the plenary and necessary jurisdiction of the Court. +

+ Vid: 11. Otto. 688.

(6) *The Statutory "lien" of Whittemore's judgment, as alleged, and without execution, is a sufficient compliance with the jurisdictional prerequisites of the N. Y. doctrine.*

McElwain vs. Willis, 9 Wen., ante.
Brinkerhoff vs. Brown, 4 J. Ch., 676.

This proposition is sustained by these authoriries as broadly as here stated ; and the bill was dismissed in the former case, because the bill did not allege that the defendant had real estate to be affected by the docketing of the judgment ; and in the latter, because the judgment had not been docketed when the bill was filed.

SECOND.

THE JUDGMENT ASSIGNED BY CHESTER, TO WHITTEMORE, ENTITLED THE LATTER TO INVOKE THE EXERCISE OF THIS JURISDICTION OF ADMINISTRATION.

(*a.*) It is objected that this judgment is not a debt, at all, but a mere proceeding *in rem* against the property of a non-resident debtor, because it appears by the bill, that the suit in which it was recovered was commenced by attachment. We answer to this objection :

(1.) Enough appears, nevertheless, to show the judgment to have been a judgment *in personam*, for, the bill first sets forth one judgment, concededly sufficient as one *in personam*, and then alleges that *Chester* recovered a "like judgment as last aforesaid," which was assigned to Whittemore ; and refers to the judgment roll, filed in the Clerk's office in New York, where the suit was commenced, for greater certainty and particularity ; and certified copy of this judgment roll, of record, of which this Court will take cognizance, is here produced, showing the judgment to have been rendered after appearance, and plea to the action, by the defendant.

Furthermore, the bill alleges, (Record, p. 3,) "that a tran-"script of the judgment was docketed in Monroe County,

"(where this land lies,) as required by the New York statutes, "to bind the real estate of the defendant;" also "that notice of "*lis pendens* in the attachment suit, was duly filed in pursu-"ance with those statutes;" so that, even if the judgment upon attachment, were without personal service, or appearance, it became a "lien" upon the assets of the decedent in question in this suit, and is enforceable as a debt against these assets. (See *Wait's* New York Code, S 132.) But,

(2.) It appears (p. 2 of the record,) that this judgment was audited and allowed as a debt by the Probate Court of Michigan; hence, it was established *as a debt*, by force of such domiciliary judgment binding the "succession" of the decedent's estate wherever the estate might be found.

This latter judgment is *in rem*, against the estate; it is more than a judgment against an administrator, which is a mere judgment *in personam*, against the individual, with no extra territorial effect, except against the individual; this binds the heir, the administrator, creditors, and whoever is interested in the estate; it is judicial, and appealable by all persons interested, who are entitled to a trial by jury; it is the only mode of establishing the debt, and is entitled to the same faith and credit in New York, against assets of a decedent, to which it is entitled at home.

The Probate Court is a Court of Record. 2 Mich. Comp. Law of 1871, § 5193.

That Court is authorized to appoint Commissioners to audit claims against the estate. id. § 4420.

The Commissioners are directed to advertise for all claims to be presented. id. § 4426.

The Probate Judge may also allow claims. id. § 4436.

The Commissioners and Probate Judge have full power to adjudge and determine claims. id. § 4431.

No action is allowed against the estate, pending the Probate proceedings. id. § 4431.

Any person interested, may appeal to the Circuit Court and have a jury trial. id. §§ 4439, 4450.

The action of the Commissioners, or Probate Judge, is judicial action. 32 Mich. Rep., 154.

This Michigan Court is the proper forum to bind the "succession."

Dawes vs. Head, 3 Pick., 443 to 448, and cases cited.
Harvey vs, Richards, ante,
In re. Broderick's Will, 21 Wal., 503.

(*b.*) The U. S. Statute, (Laws of 1874-5, *ch.* 137, p. 370,) which enacts that "No Circuit Court shall have cognizance "of any suit founded on contract, in favor of an assignee, "unless a suit might have been prosecuted in such Court, to "recover thereon, if no assignment had been made, except in "cases of negotiable promissory notes," is insisted on as precluding Whittemore's right of action, set forth in his bill, against these defendants; because *Chester*, the assignor, a citizen of New York, could not sue them in U. S. Court. To this we answer:

This suit of the plaintiff's is upon an "equity" which is not founded on "contract," but upon a *duty* arising out of "trust;" and the "trust" does not spring from *contract* obligation of the defendants, but from *their tortious* action; and hence, is not included in the prohibition of this statute.

That such an "equity" is assignable, is shown in *Hildreth* vs. *Sands*, *ante.*

The "trust," and the *duty* to execute it, constitute the "cause of action," or "*ground*" of the plaintiff's suit; or "title to relief;" and this assigned contract is a mere "incident" of the plaintiff's "title" or "equity."

An analogous case is:

Fergus vs. *Gore*, 1 *Schoale and LaFroy*, 109-110, where it was insisted, before Lord *Redesdale*, that a *debt* charged by a decedent upon real estate devised, was outlawed, at law; but the Chancellor said: "At law you have the advantage "of the statute, because the proceeding was *on the judgment* "only: but, in this Court, it is *upon the trust;* and I never "will hold that, because the trustee neglects *to do his duty*, "the creditors, who have a right to have the trusts of the will "carried into execution, shall be barred." So in—

Bean vs. *Smith*, 2 *Mason*, 252. The same identical point involved in the case at bar, was raised and decided, as we insist the law to be here.

This was a bill to set aside a fraudulent conveyance; and Judge *Story* held, that the "fraud" constituted the "cause of action," or "equity," and that the debt, which the fraud had affected, was but an "incident" of that "equity."

And Mr. Justice *Baldwin*, in—

Baker vs. *Biddle*, *Baldwin's Rep.*, *p.* 409, discoursing upon this general subject of equity jurisdiction, (after mentioning "fraud," "discovery," &c., as constituting the "causes of action," says:) "The *principal question* in the "cause, is *the cause* itself; a Court of equity, once having "cognizance of it, would not send the party back to law, to "settle its incidents; nor, if the "incidents" only, are before "them, would they take the *substance* of the controversy "from law."

Thus, we perceive it to be the matter which "affects the conscience" of the defendants, in equity, which constitutes the "cause of action," and, at the same time, confers the jurisdiction. So in—

Penn vs. *Baltimore*, 1 *Ves.*, 444. Lord *Hardwicke*, sitting in Westminster Hall, settled the boundaries between Pennsylvania and Maryland, as an "incident" to the "equity," which sprang from the facts which affected the conscience of the defendant, who was personally before him.

And so Mr. Cheif Justice *Marshall*, in—

Massie vs. *Watts*, 6 *Cranch*, 146, held the "fraud" to be the "cause of action;" and, having the defendant before him, sitting in Pennsylvania, he settled the title to lands in Ohio, as an "incident" to the regulation of the defendant's conscience, in conformity with the conscience of the Court.

So in the case at bar, the facts which affect the defendants' conscience, constitute "the cause of action," and the sole subject of the suit, so far as the defendants are concerned.

The defence seems to have supposed, and the Circuit Judge to have agreed with them, that Whittemore's suit

against the defendants, was *upon* Stewart's debt; but it is a suit for administration; as to which the defendants have no personal interest as debtors, nor as custodians of the fund in their hands—for their demurrer admits the fraud charged, with the consequent resulting naked trust upon which they hold the fund; and Whittemore's suit, so far as they are concerned, is merely upon their *duty* to deliver the fund to the Court for administration—performance of *that* duty will discharge all these obligations of the defendants upon which this suit is "founded." And Whittemore's suit is no more a suit against them, upon the assigned debt, than his application to the Court would be founded upon a contract obligation of the Court, after the funds should come in *custodia legis*—for the decree we seek against the defendants, not only does not establish the debt against them, but not even against the assets in their hands; and is only a decree that administration shall be granted, wherein Whittemore may establish his debt, before the Master, against the assets, as he may be advised.

See Pr. *Wigram*, Vice Chancellor, *Whittaker* vs. *Wright*, 2 *Hare*, 310, as follows: "With respect to the form of the decree in a creditor's suit, the Court will not treat a decree as "conclusive proof of the debt. It is clear that it is not so "treated for all purposes, for any other creditor may challenge the debt; and it is equally clear, that in practice the "executor is allowed to impeach it. If it is objected, at the "hearing, that the debt is not well proved, the Court tries the "question only whether there is sufficient proof upon which "to found a decree; and however clearly the debt may be "proved in the cause, the *decree* decides nothing more than "that the debt is sufficiently proved to entitle the plaintiff to "go into the Master's office; and a *new case may be made* in "the Master's office, and new evidence may be tendered."

(*c.*) It is objected that Whittemore did not issue execution upon this *Chester* judgment, and that hence he is not entitled to relief upon it.

This point we have already answered in our discussion of Whittemore's rights under his own judgment; but we may add that the "lien" of the notice of the *lis pendens*, and attachment, are as effectual, within the New York rule of prerequisites, as that of the lien of a judgment *in personam*.

IV. (*b.*)

THE PLAINTIFF WALKER IS ENTITLED, AS CREDITOR, TO INVOKE THE JURISDICTION FOR ADMINISTRATION.

(*a.*) It is insisted that Walker's debt must have been, but was not, established by "*judgment.*"

To this we answer—as we have, as to Whittemore's *Chester* judgment, that the debt was put in judgment, in the only manner possible in the domiciliary jurisdiction—it having been allowed by judgment of Michigan Probate Court, (Record p. 2,) but no judgment at home, even, was necessary.

Milledge vs. Milligan, ante.
Telfair vs. Stead's Ex'rs, and other cases cited, ante.

(*b.*) It is also insisted that this debt of Walker's, is outlawed, as against these defendants.

To which we answer—

(1.) That the Michigan Probate Judgment is conclusive that it is an existing debt, and not outlawed in that State. And it is only upon Walker's equities, as a Michigan Judgment creditor, upon which we insist.

(2.) But, Walker's debt was not, in fact, outlawed in Michigan, as is insisted; for the running of the Michigan Statute of limitation of debts is suspended by the death of the debtor, till two years after administrator is appointed. (2, Compiled Laws of 1871, § 6157, p. 1979.) And Walker's debt is alleged to have occurred prior to 1860, and the death of the decedent occurred in May, 1863, (Record pp.1, 2.) And the allegation of the bill is, that the estate "*is*" indebted to Walker, and that his claim was audited according to the Statutes of Michigan. But—

(3.) *Walker's* "equity" in this case, does not depend upon whether the statutes of limitation in Michigan, or New York, have run against *his debt*, but upon whether the New York statutes of repose, protect the defendant's fraudulent title from attack.

The latter limitation, is 20 years, as we shall see in the sequel, but whether either Michigan, or N. Y. statutes have run against Walker's "*debt*," does not affect his "equity" against the defendants, which is founded on *their duty*, as naked trustees to execute their trust.

Fergus vs. Gore, and other cases cited, ante.

The principle which *Walker* evokes to this point, is the same as that ordinarily applied to foreclosure of mortgage securities for debts, notwithstanding the debts, secured by the mortgages, had outlawed—which is too common to require references. If *Walker* made any personal claim, against the defendants, *upon his debt*, his case might come within the N. Y. Statute, and require his debt to be established as an existing debt there; but the defendants will have *absolved themselves* from all *Walker's* claims *in this suit*, when they shall have shifted their *trust* obligation from their own shoulders, and shall have thereby, imposed it upon the Court, by delivery of the assets, in which they admit themselves to have no *personal* interest, for administration.

V.

THE NEW YORK STATUTE OF LIMITATION AND REPOSE HAS NOT RUN TO THE PROTECTION OF THE TITLE OF THE DEFENDANTS FROM ATTACK.

(*a.*) Sections 78, 79, of the New York Code, published by *Wait* in 1871, are the sections which govern this subject, as follow:

"§ 78. *Seisin within twenty years, when necessary, in actions for real property.*"

"No action for the recovery of real property, or for the

"recovery of the possession thereof, shall be maintained, un-
"less it appear that the plaintiff, his ancestor, predecessor,
"or grantor, was seized or possessed of the premises in ques-
"tion, within twenty years before the commencement of such
"action."

"§ 79. *Seisin within twenty years, when necessary in action or defense, founded on title to or rents of real property.*"

"No cause of action or defense, to an action founded
"upon the title to real property, or to rents or services out
"of the same, shall be effectual, unless it appear that the
"person prosecuting the action, or making the defense, or
"under whose title the action is prosecuted, or the defense is
"made, or the ancestor, predecessor, or grantor of such
"person, was seized or possessed of the premises in question,
"within twenty years before the committing of the act, in
"respect to which, such action is prosecuted or defense made."

These sections apply to all civil actions, whether at law, or in equity, § 73, but it is as necessary, nevertheless, as before the code, to classify actions in equity, to determine the equivalency of any given "action" in equity, to the corresponding legal action, which the present statute is intended to limit. And the Courts of New York have pursued the course, which Courts of Equity had previously adopted, of applying the statute in equity to actions involving the same "subject matter" as that involved in the corresponding action, ~~which the old statute limits~~ at law; i. e., as that which limited the "concurrent" remedy at law.

Foot vs. Farrington, 41 N. Y., 164, 170.
Clark vs. Ford, 3 Keyes, 370-372.

The concurrent remedy at law in the case at bar, is ejectment; and the action of the plaintiff here, involves the title to, and possession of, real estate; and is within both the words and meaning of these sections 78, 79, (see 7, *J. Ch.*, 89, 124,) and as we have seen, the statute 13 *Eliz.*, *Ch.*, 5, as adopted in N. Y., gives a concurrent remedy at law; conse-

quently, sub. 6, of § 91, of ch. 3, of the code referred to in *Foot* vs. *Farrington*, does not apply. That statute is as follows:

"CHAPTER III.

"*The time of commencing actions other than for the re-*
"*covery of real property.*

"§ 91. Within six years.

"Sub. 6. An action for relief on the ground of fraud, in "cases which heretofore were solely cognizable by the Court "of Chancery; the cause of action in such cases not to be "deemed to have accrued, until the discovery by the aggrieved "party of the facts constituting the fraud."

There was a limitation by the revised statutes, of all actions founded on fraud, if concurrently cognizable at law, to six years after the fraud was discovered, which would seem, formerly, to have applied in that State, to real, as well as to personal actions; which was abolished by the code—*Foot* vs. *Farrington*, *ante*—So that the limitation in cases where fraud is involved, as well as others, is now governed by the limitation of the concurrent legal remedy, involving the same subject, at law. (S. C., last cited.)

It would seem that Mr. Justice *Grover*, in *Gates* vs. *Andrews*, 37 *N. Y*, 657, did not notice that the former six years limitation after discovery of the fraud, had been repealed, for he decided that case on the assumption that it was still in force, by operation of Sub. 6, § 91, of the Code; and although the bill sought to reach both real and personal assets—he held, merely, that the six years limitation did not begin to run until after the plaintiff had got out execution, and had it levied, or returned "nulla." So that this is not a decision that the old rule was applicable to a creditor's bill charging fraud, upon conveyance of real estate; nor does that point seem to have been discussed or considered—nor was any point raised or decided as to any different limitation governing actions involving real or personal property—but the only point decided was, that the statute had not begun to run six years before the right of action accrued; and this, upon a ground which is plenary to Whittemore's right in the present case,

even if the six years limitation were applicable, and the fraud had been fully known for more than six years. But—

(*b.*) *Even if Sub.* 6, *of* § 91, *of the code, were applicable, the plainliffs are not precluded by its provisions.*

(1.) The plaintiffs did not discover the frauds, till within six years before the action was commenced, (see record, p. 3.)

The bill was filed Sept. 20, 1876. The trial of the *Ten Eyck* case, wherein *Craig's* complicity in the "design" of *Stewart, Benedict* and *Powers*, was disclosed, commenced July 14, 1871. (Record, p. 20.) Up to the latter period *Craig* was in possession, claiming to hold as a *bona fide* purchaser, for value, from *Powers*, the fraudulent grantee of "Congress Hall." This claim appears by *Craig's* answer, under oath, in the *Ten Eyck* suit. (See his answer, Exhibit 7, at p. 61, of Record.) And *Craig* testified on that trial that when he received his deed he had no knowledge "upon the subject "of the transaction between *Benedict* and *Stewart* in refer-"ence to the judgment, in favor of *Powers* vs. *Stewart*," nor "as to the circumstances under which the judgment was "reassigned by Mr. *Benedict* to Mr. *Powers*," but "sup-"posed the redemption was upon another judgment, that "*Powers* held." (P. 82 of Record.)

It was not till Sept. 13, A. D., 1873, when the trial Judge filed his finding, (see record, p. 21,) that Whittemore was reliably advised of the falsity of the foregoing sworn statements, by the decision of that Judge, and that *Craig* had notice of the trust, under which *Powers* held the title aforesaid. (See finding, Exhibit 9, p. 82 of Record, at p. 85.)

This finding of fact has never been reversed nor questioned. And Whittemore proceeded, immediately after the trial aforesaid, to procure execution on his judgment, to lay the ground for a bill for relief against the fraud, in case the suit of *Ten Eyck* should, by any fortuity, prove unsuccessful; and he filed this bill within six years after the trial.

Now this point of the demurrer rests upon the assumption that Whittemore was bound to find out the facts,

as fully as this demurrer admits them, and to assume the falsity of these sworn statements of *Craig*, upon the "suspicions" he must have entertained, of the falsity of the statement in the answer, before the trial in the *Ten Eyck* case; and that the case of *trust*, resulting from the fiduciary obligation of *Benedict*, upon which the *Ten Eyck* case was based must have been known by Whittemore to have been a *corrupt* trust, as well before, as after it was held so to be by the N. Y. Court of appeals.

Yet we presume this Court will not hold Whittemore to so stringent a rule as the defendants insist upon; but will excuse his reliance upon the sworn statements of the defendants' predecessor, until he had, at least, heard his explanation, at the trial, in respect to what Whittemore suspected in regard to the truth of his sworn answer; and if so, Whittemore's delay is excused; and the facts which show his means of knowledge, and how he acquired the knowledge upon which this bill is based, are sufficiently stated in the bill; but even if these allegations of excuse for delay are unsufficiently stated, the bill is amenable in that respect, so that it is no ground for unconditional dismissal of the bill; and the bill below was not dismissed upon any such ground.

(2.) The six years limitation did not preclude *Chester*, whose judgment was assigned to Whittemore in March, 1872, (Record, p. 3,) nor Walker, nor other creditors; for neither of them knew anything of the frauds charged in the bill, till about the time plaintiffs' bill was filed. (Record, p. 4.)

The allegations as to the want of knowledge in all these persons stands admitted as charged. And it is apparent, as to these parties, the one resident in N. Y. city, the others in Michigan, that the frauds alleged, were of a secret nature, and such as "concealed themselves;" and their excuse sufficiently appears in the bill.

11 Wal., 458. 21 id., 342. 1. Cart. 238. Carr v.
3 Paige, 246. 4 id., 374.
3 Sandf., 463. 47 N. Y., 410. Hilton

VI.

THE PARTIES TO THE PLAINTIFFS' BILL ARE PROPER AND SUFFICIENT.

1. The Plaintiffs.

We trust we have heretofore shown the plaintiffs who are now before the Court to be proper parties, and with sufficient interest to initiate the administration prayed. And these represent and file the bill for all Michigan parties who are interested—whether administrator, heirs, widow, or creditors. And a judgment in favor of the plaintiffs, or either of them, initiates the *administration* for all—this being a proceeding *in rem*, (2 *Paige*, 22,) and the decree, so far as all distributees are concerned, being, merely, that administration shall be initiated. *Whittaker* vs. *Wright*, *ante*.

2. The Defendants.

As against the defendants now in Court, in possession of admitted assets, it cannot be denied that they are *proper* parties. And being parties to a joint demurrer, they assume all or none to be improperly made defendants.

It may be objected that all who ought to be made defendants are not joined—and it is urged that an ancillary administrator should have been appointed in New York, and made defendant.

To this, we answer, that all New York creditors are made defendants to this bill, as all Michigan creditors are made plaintiffs—and their rights will be protected in the administration which shall follow the decree prayed. (*Yonley* vs. *Lavender*, *ante*.) And so far as the appointment of an administrator in State Probate Court is concerned; if one had been appointed, it would have been *proper* to have joined him; but so far as his duties and responsibilities are concerned, the Master of the Court, and the primary administrator, will assume the responsibilities, and discharge his duties as well, and probably better, than the State Probate administrator would do.

And if any additional party defendant should seem to be needed, the proper course is not to dismiss the bill, uncon-

ditionally, but to hold it till all are made defendants who ought to be, or can be joined without ousting the jurisdiction.† —but the bill was not dismissed on any such ground.

† 2. Atk. 15. anon.

VII.

THIS BILL IS NOT MULTIFARIOUS.

See, to this point, cases cited under point 4, p. 6, of this brief.

VIII.

THE TEN EYCK SUIT IS NOT *res judicata* OF THE SUBJECT MATTER OF PLAINTIFFS' BILL.

The suit of Ten Eyck was brought in the character of "*grantee*" of the decedent debtor—who could not avoid the adverse frauduleut title—nor the equitable title of Congress Hall, represented in the Sheriff's certificate to Craig. And the suit was not brought for that purpose, but was merely a bill to redeem a mortgage. (See complaint, Exhibit 6, p. 54, of Record.) But the defence of an adverse legal title was met in the *proofs* by charging it with a trust resulting from payment of the purchase money, and Benedict's fiduciary relation, and notice of the trust to the defendant Craig. And the point that such resulting trust was corrupt as well as fiduciary, was first suggested in the opinion of the Court of Appeals; and was there suggested as precluding *Ten Eyck* from that relief which was solely available to a creditor.

And even though Whittemore were seeking payment of his debt through *Ten Eyck's* suit, the judgment was merely that he should have sued in his own right, as creditor, as he has done here, and was not a judgment that he had no rights as creditor.

IX.

THE TITLE OF TEN EYCK IS NO BAR TO RELIEF TO THE PLAINTIFFS.

1. It never was more than a fraudulent mortgage. (Record, pp. 8 and 9.)

2. There is no legal objection, nor inconsistency, in Whittemore's attacking it as such.

It was urged, below, that Whittemore's seeking payment of his debt under that deed, was inconsistent with the present bill, wherein he seeks such payment, notwithstanding the deed—but this is a misconception, both of law and morals.

For to *Ten Eyck*, standing in the shoes of his fraudulent grantor, there was a *locus penitentiæ* permitting him to pay the debts, which the deed was intended to defraud—and validate his deed.

Hutchings vs. Sprague, 3 N. H., 469.
Oriental Bank vs. Haskins, 3 Met., 332.
Thomas vs. Goodwin, 12 Mass., 140.
Sumner vs. Hicks, 2 Black., 532.

It would seem to be a perversion of both law and morals, to preclude a second attempt in the direction of purging the fraud of the deed, because one attempt in that direction had failed on account of a technicality.

And thus we close our case, in the hope that we have shown ourselves entitled to that relief against the frauds set forth in our bill, which *justice* so clearly demands.

J. P. WHITTEMORE, *in Pro. Per.*,
Of Counsel for Plaintiffs.

OFFICE SUPREME COURT U. S.
FILED
OCT 26 1881
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

No. 104.

HENRY N. WALKER AND JOSEPH P. WHITTEMORE,
Appellants,

VS.

DANIEL W. POWERS AND OSCAR CRAIG, EXECUTORS OF JOHN CRAIG, DECEASED; DANIEL W. POWERS, PERSONALLY; HELEN MARIA POWERS, SOLE DEVISEE OF JOHN CRAIG, DECEASED, IMPLEADED WITH HENRY TEN EYCK,
Appellees.

BRIEF FOR APPELLEES.

IN THE

SUPREME COURT
of the United States.

HENRY N. WALKER AND JOSEPH P. WHITTEMORE

Appellants,

ag'st

DANIEL W. POWERS AND OSCAR CRAIG, EXECUTORS OF JOHN CRAIG, DECEASED; DANIEL W. POWERS, PERSONALLY; HELEN MARIA POWERS, SOLE DEVISEE OF JOHN CRAIG, DECEASED, IMPLEADED WITH HENRY TEN EYCK,

Respondents.

RESPONDENTS' BRIEF.

This is an appeal by the plaintiffs from a decree dismissing their bill upon the defendants' demurrer thereto. The bill is the most remarkable one that has ever fallen under the observation of defendants' counsel. It seems to him to have none of the elements of a good pleading, and is filled with irrelevant and impertinent matter. I suppose the reason why the then counsel for the defendants did not expunge these matters by exception was

because it would take more of his own time and that of the Court than would be spent in disposing of it by demurrer. I shall endeavor to analyze the ~~the~~ same, and, as far as in me lies, to aid the Court in arriving at what seems to have been in the mind of the person who drew it—who, I need not say, was neither the solicitor nor the counsel who signed it. The plaintiffs are both of them citizens of Michigan. The defendants who have appeared are citizens of New York. The defendants demurred upon ten different grounds, which will be found in the Demurrer on page 86 of the Record.

PLAINTIFFS' TITLES.

The plaintiffs' titles are as follows: Walker is a creditor at large of Nelson P. Stewart, whose death occurred prior to January 1st, 1860, the claim never having been even put in suit (page 2). The plaintiff Whittemore is the assignee of a judgment against Nelson P. Stewart recovered by one Chester ("who resides in the City of New York"), June 7th, 1862. No execution is alleged to have been issued upon this judgment. The same was obtained by attachment in pursuance of the provisions of the Statutes of New York (page 3). He also recovered a judgment against Stewart on the 20th of August, 1862 (bottom of page 2). On the 6th of July, 1872, he recovered a judgment in the nature of a judgment of *scire facias* against Frederick S. Stewart, Adeline M. Johnson and Helen M. McConnell, the only heirs and devisees of Nelson P. Stewart (page 3, near bottom), whereby it was adjudged that his judgment of 1862 be revived against certain property, of which a description is given, and which will be referred to hereafter as the "Congress Hall Property." On the 24th of August, 1872, the Sheriff sold to Whittemore, for a sum more than sufficient to satisfy his judgment, the Congress Hall property, and on the 26th of November, 1873, the time for redemption having elapsed, deeded the same to him. Whittemore has brought ejectment upon such title

against the lessee of Mrs. Powers, which ejectment at the time of filing the bill was still pending.

Stewart, the judgment debtor, in his lifetime resided in Michigan, and died in that state May 11th, 1863, leaving a widow, heirs and a will—which will devised and bequeathed his property to his wife and heirs. This will was never admitted to probate, but on the 20th day of April, 1874, letters of administration were issued to one George K. Johnson, a citizen of the state of Michigan (bottom of page 1 and top of page 2). The widow, heirs, devisees and executors of the will of Stewart, as well as his administrator, are each and all living, and citizens of the state of Michigan (page 2 and page 3 of the Record, near bottom). None of them are parties to this bill.

SUBJECTS-MATTER.

I will now proceed to state the subjects-matter which are sought to be affected by this bill, premising that if I do not state them accurately, it will not be because I have not examined the bill carefully. There are a great many transactions and many different parcels of property set out in the bill of complaint with which neither of the defendants seem to be in any way connected. It is possible that I may have overlooked some allegation which brings the defendants in relation to some of these pieces of property, but I think not. If I have, it will be owing to the peculiar structure of the pleading. Those with which the defendants, or some one of them, are supposed to be connected are:

1st. The "Congress Hall Property," situated on the corner of Mill Street and Railroad Avenue, in the city of Rochester.

2d. The "Congress Hall Barn."

3d. A farm of about 77 acres in Irondequoit, known as the "Farley Farm."

4th. The "Washington Street Property."

The relation of the parties to those several pieces of property is as follows:

1st. The Congress Hall Property. This was purchased by Stewart—when, is not stated (top of page 5). On the 27th of May, 1860, he and his wife conveyed the same to Henry K. Sanger (page 8). In 1864 Sanger died, leaving all his property to his wife, Caroline Sanger, and she executed a written declaration that the deed to her husband was intended as a mortgage (top of page 9). In January, 1867, she conveyed this property to Henry Ten Eyck in trust for E. E. Litchfield (top of page 9). The property was at this time encumbered by mortgages held by Mr. John Craig to the amount of $18,000 (middle of page 8).

On the 25th of October, 1859, the Madison County Bank recovered a judgment against Stewart, which was docketed in Monroe County, and became a lien upon this property (page 7, bottom). On the 17th day of December, 1860, the Sheriff of Monroe County, upon an execution issued on this judgment, sold the Congress Hall with other property to Mr. Craig, and issued to him the usual certificate of sale (bottom of page 11). [According to the statutes of the state of New York, a purchaser upon an execution sale is entitled to a deed from the Sheriff, unless the same is redeemed by the judgment debtor within twelve months, or by some other judgment creditor within fifteen months after the sale—2 Revised Statutes, pages 370, 371, secs. 45, 651]. In January, 1860, Mr. Powers obtained a judgment against Stewart on a promissory note for $1300 (middle of page 6), and, as judgment creditor by virtue of such judgment, on the 21st day of March, 1862, redeemed Congress Hall from Mr. Craig, and received the Sheriff's deed therefor (page 13). On the 7th of May, 1864, Mr. Powers conveyed the same to Mr. Craig. In July 1867 Ten Eyck brought an action in the Supreme Court of the State of New York to reach the said Congress Hall Property (page 20). In this suit the plaintiff Whittemore was a party in interest, though not of record, and

the same was brought under an arrangement that his (Whittemore's) debt should be paid out of the avails of the recovery (bottom of page 21). The Supreme Court and the Court of Appeals dismissed the plaintiff's complaint in that action. The case is reported in the Court of Appeals in 62 N.Y., p. 406, and in the Supreme Court in 2 Hun, p. 452. The decision in those cases will be referred to hereafter.

2d. The "Congress Hall Barn." This was purchased by Stewart—time not given (page 5). It was subject to two mortgages—one to the Rochester Savings Bank, and the other to Mr. Powers (page 6, near top). Mr. Powers foreclosed his mortgage, and took a decree on the 2d of March, 1860. After decree he arranged with Mr. Stewart that the same might rest so long as interest was kept up on that decree and the prior mortgage to the Savings Bank (page 6). September 6th, 1860, Stewart and wife conveyed the Congress Hall Barn Property to Mr. Oliver M. Benedict (page 9, bottom). January 12th, 1861, the Congress Hall Barn Property was sold upon Mr. Powers' foreclosure decree (top of page 10), and he became the purchaser thereof, leaving a deficiency on the sale of $1438.25 (top of page 10). November 15th, 1861, Mr. Craig purchased the Congress Hall Barn Property from Mr. Powers for the amount of his (Powers') judgment and the Savings Bank mortgage (page 11, middle).

3d. The "Farley Farm," Irondequoit. This was purchased by Stewart of Mr. Farley—time not given. December 17th, 1860, the same was sold to one Wendell for $1615 by virtue of the Madison County Bank judgment referred to (page 11, bottom). March 21st, 1862, the same was redeemed by Mr. Powers, and conveyed to him by the Sheriff (page 13). April 24th, 1863, the same was conveyed by Mr. Powers to Mortimer F. Reynolds (bottom of page 19).

4th. The "Washington Street Property." This was purchased by Mr. Stewart October 25th, 1856 (page 5), deeded by him to Mr. Benedict October 18th, 1860 (page

10), sold by virtue of the Madison County Bank judgment to Wendell for $1700, December 17th, 1860 (bottom of page 11), redeemed by Mr. Powers March 21st, 1862 (page 13), conveyed by him to Mr. Benedict and Mr. Craig on the 24th of March, 1862 (page 13, near the bottom), and sold by them to Eaton & Marsh March 10th, 1864, who are admitted to be *bona fide* purchasers for the sum of $2100 (page 17, bottom).

FIRST.

THE BILL STATES NO GROUND FOR EQUITABLE JURISDICTION.

The plaintiffs' counsel has sought to sustain the jurisdiction of a court of equity to entertain this bill in many different ways, but I think that an examination will show that in none can he succeed.

It cannot be sustained as a creditor's suit to reach property fraudulently disposed of by the creditor.

As to the plaintiff Walker:

It is sufficient to say that he is a creditor at large, without judgment or execution. That such a creditor cannot bring such a bill is well settled, not only in the courts of the state of New York but also in the Federal courts.

It was so in New York before the Revised Statutes.

Wiggins vs. Armstrong, 2 John. Chy. Rep., 144,
Hendricks vs. Robinson, Do. do. 283,

both decided in 1817. I copy the head notes of these cases. The first at page 144: "A creditor at large before judgment is not entitled to the interference of this court by injunction to prevent the creditor from disposing of his property in fraud of such creditor." The second at

page 283: "This court lends its aid to a judgment creditor by compelling a discovery and account against a debtor or third person who has possession of the debtor's property, and placed beyond the reach of legal process, *but the creditor before he is entitled to such aid must have sued out execution at law.*"

Many other cases to the same effect might be cited, but the rule is elementary.

It was incorporated into the Revised Statutes which took effect January 1st, 1830.

2 N. Y. Rev. Stat., 174, sec. 38,

by which the *issuing and returning of an execution* against the property of the judgment debtor is made a prerequisite to the filing of a bill to reach assets alleged to be fraudulently disposed of.

Since that in many cases this rule has been inflexibly adhered to.

Ocean Bank vs. Olcott,	46	N. Y.,	12.
Alleyn vs. Thurston,	53	"	622.
Estes vs. Wilcox,	67	"	264.
Adee vs. Bigler,	81	"	349.

The rule is the same in the Federal courts—

Jones vs. Green, 1 Wallace, 330,

the head note of which is: "A bill in equity will not lie on behalf of judgment creditors to subject real property of their debtor held by a third party upon a secret trust for him to the satisfaction of their judgment, until a fruitless attempt has been made for its collection by execution at law."

By the foregoing cases it is abundantly established that in order that a creditor may sustain an action to reach the property of his debtor in the hands of another, and held by him in trust for the debtor, three things must exist:

He must have a debt; that debt must have been established by judgment; and there must have been an un-

successful effort to collect that judgment by the issuing and return of an execution.

As to Whittemore:

First, as to his claim under the judgment assigned to him by Chester. All that has been said as to the necessity of the issuing and return of an execution in reference to the claim of Walker, is applicable to this claim, because, although a judgment has been recovered, no execution has been issued.

There is another reason why this action cannot be maintained upon this claim in the Federal court, viz., the disability of the plaintiff, growing out of the citizenship of his assignor.

The judgment is a contract of record. Under the Act of March 3d, 1875, the Circuit Court has not cognizance of a suit founded on contract in favor of an assignee, unless an action might have been brought in such court if no assignment had so been made.

U. S. Rev. Statutes, sec. 629
18 Statutes at Large, page 470.

The same is true under the statute of 1789.

It appears by the bill (page 3) that Chester "resides in the City of New York." In order that the Court might have jurisdiction ~~it must be averred that~~ where plaintiff claims through an assignor, he must aver the citizenship of such assignor, and bring himself within the statute.

Morgan's Ex'rs vs. Gay, 19 Wallace, 81.

As to the judgment recovered by Whittemore himself:

The first and obvious answer to that part of the case

is that such judgment is extinguished: the plaintiff has enforced the same by a sale of property August 24th, 1872, for an amount more than sufficient to pay the judgment, and has received his deed for the premises so sold (page 4 of the Record). He has collected that judgment; and from the time of his deed he must stand thereon—what his standing thereon is will be considered hereafter.

It would be supposed that a proposition so manifestly true as this would never have been disputed, and therefore there would be no authority to sustain it. But it so happens that there is just this case reported.

The case of Forsyth vs. Clark and Stewart, decided in Court of Errors (in Equity), on appeal from the Chancellor, 3 Wendell, page 637, is quite like the case which Whittemore presents before this Court.

Forsyth had sold on execution against Stewart certain real estate in Albany, known as the Tontine Coffee House, and, on the Sheriff's sale, became the purchaser, at a price equal to the amount of the judgment. He then filed his bill in Chancery against Stewart, the judgment debtor, and one Clark, "to obtain a decree directing the defendant Clark to release and convey to him this real estate, which he alleged was held *in trust* by Clark for Stewart." It appears from the report that the complainant's ground of action was, in brief, that the transaction by which Clark became invested with title was claimed by the complainant to have been in fraud of creditors.

It is apparent then that the case is on all fours with Whittemore's case in this Court. The Chancellor dismissed the bill, and the Court of Errors affirmed the decision of the Chancellor. Marcy, J., delivering an elaborate opinion (p. 640), after disposing of the case on various grounds, and considering the claim of the complainant to have the property conveyed to him, says: "But the bill in this case extends to objects beyond those I have considered, and seeks relief for the appel-

lant as a creditor of Stewart. Does he sustain that relation? His judgment which was recovered in October, 1819, amounted to $447.73, and the sum levied by virtue of the execution was $550. It nowhere appears (and indeed a calculation shows that it could not be) that any balance remained due on that judgment after the sale. When the appellant's judgment was satisfied, his character as a creditor was thereby annihilated; and without that character he can have no right to investigate the frauds alleged to have been practiced by the respondents."

The facts and the law of this case seem to cover that of Mr. Whittemore. To the same effect and equally conclusive is the case of

Weaver vs. Toogood, (in equity), 1 Barbour's Supreme Court Reports, p. 238.

The bill cannot be sustained as brought for a discovery in aid of his action of ejectment. It does not contain a single essential of a bill of discovery.

It does not contain an averment that the plaintiffs have not sufficient evidence to sustain their action at law.

Story's Equity Pleading, secs. 313, 317.

It does not state that discovery is sought of any matter of which the complainant is ignorant.

Cardale vs. Walkins, 5 Mad., 18.

Nor set forth the facts as to which a discovery is sought.

Newkirk vs. Willett, 2 Caines, Cases in Error, 296.

Nor that the complainant is ignorant of any matter.

Farley vs. Farley, 1 McCord, Ch'y Rep., 517.

Nor that the matters lie only in the knowledge of the defendant.

2 A. K. Marshall Reps., 223.

Nor is the defendant in the ejectment a party to this bill (page 22 of the Record).

Nor that his claim in the ejectment suit cannot be established by the testimony of witnesses.

Leggett vs. Postley, 2 Paige, 601.

All the parties to the bill can be examined as witnesses.

Nor can the bill be sustained as a bill by a purchaser to impeach and remove the obstruction of a prior fraudulent conveyance. This, of course, relates to the case of Whittemore alone, and upon his case so far as it affects the Congress Hall property only.

As such it is nothing more nor less than an action of ejectment. If the defendant's (Mrs. Powers) title is invalid for any of the reasons suggested in the bill, and the plaintiff's (Whittemore) title is good, he will prevail; otherwise, not; but it is sufficient to say that ejectment, either in form or substance, cannot be brought on the equity side of the court.

Lewis vs. Cocks, 23 Wallace, 466.

It is not necessary now, whatever may have been the fact in the past, to bring an action on the equity side of the court to remove any alleged fraudulent obstacle to the plaintiff's recovery. The plaintiff in the action of ejectment can present any legal or equitable matter to overcome any defence which may be set up.

Crary vs. Goodman, 22 N. Y., 176.
Phillips vs. Gorham, 17 N. Y., 270.

The latter was a case where a deed set up by the defendant was attacked and overcome as fraudulent.

I have endeavored to show that this bill cannot be sustained as a creditor's bill, as a bill of discovery, or as a bill to impeach a fraudulent title.

The plaintiffs' claim to sustain it as a bill to administer the estate of Stewart, is preposterous.

No doubt there is such a head of Equity Jurisdiction as Administration of Assets, and its discussion occupies an entire chapter (Chap. IX.) of Judge Story's Equity Jurisprudence, a glance at which will show how entirely inapplicable that head is to such a state of facts as is presented by this bill. That jurisdiction is quite analogous to that of a bill for an account. The bill is filed by the executor or administrator, or by a creditor in behalf of himself and all others, for an account of the assets. Having got jurisdiction for this purpose, the Court may go on to decree distribution.

It is true that when the administrator admits assets a single creditor's suit may be sustained (Story, Equity Juris., sec. 548a), and that a creditor may file his own bill to have his debt established and adjudged to be paid out of the estate in due course of administration (Story, sec. 546).

To apply the law of such a proceeding to the case before the Court is to confound things as dissimilar as two things well can be.

SECOND.

SO FAR AS THE CONGRESS HALL PROPERTY IS CONCERNED, THE PLAINTIFF WHITTEMORE (WALKER HAS NO INTEREST IN THAT QUESTION) SHOWS NO RIGHT, LEGAL OR EQUITABLE.

Stripped of the verbiage in which that transaction is obscured, the facts alleged in reference thereto are that property was purchased by Craig upon the sale on a valid judgment. The twelve months expired in which the owner had the right to redeem, and no redemption was made. All rights of every one except judgment creditors were gone. Then Powers redeemed.

It is claimed that the judgment upon which he redeemed had been paid, and his redemption was a nullity. Concede it for the sake of the argument. It does not help the plaintiff Whittemore. If he is regarded as standing as Stewart's or Sanger's assignee, all their interest in the property expired three months before. If he is regarded as a junior judgment creditor, he has failed to redeem, and that is all there is of it. If Powers had not attempted to redeem, his interest would have been gone. He certainly gained nothing by Powers' ineffectual attempt to redeem. The only person who could challenge the validity of Powers' redemption was Craig. If the redemption was invalid, he could assert its invalidity, and compel the surrender of the Sheriff's deed to Powers, and a deed to himself. He had a right to take the course he did, and take a deed from Powers. He and he alone, I repeat, was in any condition to question Powers' redemption.

But it is insisted that Craig was in such a relation to Stewart, or the property, or both, that he could not bid upon the property upon the execution sale. That contention was the whole burden of this plaintiff in his suit in the name of Ten Eyck in the State Court, and is so thoroughly answered by the opinions of the Supreme Court and the Court of Appeals, that I shall merely refer to them.

Ten Eyck vs. Craig, 2 Hun, 452.
Same vs. same, 62 N. Y., 406.

THIRD.

THE BILL IS MULTIFARIOUS.

It is so 1st, as to parties plaintiff; 2d, as to parties defendant; 3d, as to subject matter—thus offending in this behalf against good pleading in every respect in which it is possible for a bill to offend.

Multifariousness is defined by Story (Equity Pleading, sec. 271) as the uniting in one bill of several matters

distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent nature against several defendants. And again (sec. 279) the like principle equally applies to an improper joinder of plaiutiffs who claim no common interest, but assert distinct and several claims against the same defendant. *A fortiori*, of course, when several plaintiffs assert several and distinct claims against several defendants.

This defect is assigned to the 10th ground of demurrer, but even if it were not assigned, the Court would take notice of it, and dismiss the bill of its own accord (Story, Equity Pl., sec. 271).

The bill is multifarious as to parties plaintiff.

Walker has no interest in the claim of Whittemore as to the Congress Hall property. That property has been sold by Whittemore on his judgment, and he has brought this bill to remove the title of the defendant Mrs. Powers, under the will of her father. In case he does not succeed in that, then he asks to have his judgment established as a lien, to be paid according to priority of lien with respect to other judgment creditors. In that contention, in either aspect, Walker certainly has no concern. If Whittemore prevails upon his title, he is in no way benefitted; nor if he prevails upon his judgment, since Walker has no judgment and no lien.

The bill is multifarious as to parties defendant.

1st. Powers has no interest in the Congress Hall or the Congress Hall Barn property. Mrs. Powers is alone concerned with that.

2d. None of the defendants but Mr. Powers have had any connection with what is known as the Irondequoit property. The allegations in respect to that property are, that it was sold upon the Madison County Bank judgment, the validity of which is not questioned, to

one Wendell, redeemed by Mr. Powers, and conveyed by him to one Reynolds, the *bona fides* of whose purchase is not disputed.

3d. Mrs. Powers has no concern with the Washington Street property.

4th. The executors of Mr. Craig have no concern with any of the property except the Congress Hall property.

If there ever was a case of the jumbling of different claims by different parties, and against different parties, it is submitted that this is that one.

FOURTH.

THE CLAIM MADE BY THE BILL IS BARRED BY THE STATUTE OF LIMITATIONS.

The groundwork of the bill is the fraud of Stewart, either singly or in coöperation with others. Such action is barred by the 6th subdivision of the 91 sec. of the N. Y. Code of Procedure, which bars "an action for relief on the ground of fraud in cases which heretofore were solely cognizable by the Court of Chancery, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;" or by sec. 97, which reads: "An action for relief not hereinbefore provided for must be brought within ten years after the cause of action shall have accrued."

Walker, as has already been said, has no standing in Court, being merely a creditor at large. Whittemore knew all that he now alleges at least as early as July, 1867, when he instituted the suit of Ten Eyck vs. Craig.

But it is not for the defendant to charge the plaintiff with notice of his cause of action. If the plaintiff seeks to avoid the effect of the Statute of Limitations, by

showing that he did not discover the fraud, he must bring himself within the saving clause of the Statute by very different allegations from those contained in this bill.

McQuiddy vs. Ware, 20 Wallace, 14 :

"Allegations of ignorance of things a knowledge of which is readily ascertainable, are insufficient to set into action the remedies of equity." See also

Wood vs. Carpenter, 11 Otto, 135,

especially what is said from page 139 onwards.

In re Broderick's Will, 21 Wallace, 508.

That advantage of this defence may be taken by demurrer,

See National Bank vs. Carpenter, 11 Otto, 567.

The case is controlled by the Statute of Limitations of the state of New York.

Story's Conflict of Laws, sec. 577.

FIFTH.

STALENESS OF THE DEMAND.

Without regard to the Statute, a court of equity will refuse relief in this case by reason of the lapse of time, the death of parties, and the absence of excuse for the delay.

Wagner vs. Baird, 7 How., 234,

and cases cited.

THE DECREE SHOULD BE AFFIRMED.

WILLIAM F. COGSWELL,

Of Counsel for Defendants,

Rochester, N. Y.

14-202

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No ~~312.~~ 67

RUTH ELIZA THOMPSON, PLAINTIFF IN ERROR,

vs.

THE KNICKERBOCKER LIFE INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

FILED OCTOBER 22, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 312.

RUTH ELIZA THOMPSON, PLAINTIFF IN ERROR,

vs.

THE KNICKERBOCKER LIFE INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

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1 *Petition for writ of error.*

Circuit court of the United States, southern district of Alabama.

RUTH ELIZA THOMPSON
vs.
THE KNICKERBOCKER LIFE INS. CO. } Judgment. June, 1876.

The plaintiff in the above-entitled cause comes by her attorneys and claims and applies for a writ of error, returnable to the next term of the Supreme Court of the United States, in due form, to review the judgment and proceedings had in the cause, and tenders bond with sufficient security therefor, according to law.

TAYLOR & MACARTNEYS,
Attys' for Plaintiff.

FEB'Y 5TH, 1878.

(Indorsed:) Ruth Eliza Thompson vs. Knickerbocker Life Insurance Co. Petition for writ of error. Filed in clerk's office, February 11th, A. D. 1878. N. W. Trimble, clerk.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the southern district of Alabama, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Ruth Eliza Thompson, plaintiff, and The Knickerbocker Life Insurance Company, defendant, a manifest error hath happened to the great damage of the said plaintiff, Ruth Eliza Thompson, as by said complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R Waite, Chief Justice of the said Supreme Court, the 30th day of March, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] N. W. TRIMBLE,
Clerk of the Circuit Court of the United States,
Southern District of Alabama.

Allowed by—

W. B. WOODS,
U. S. Judge.

(Indorsed:) Filed May 4th, 1878. N. W. Trimble, clerk.

REC. 312—1

3 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the Knickerbocker Life Insurance Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Alabama, wherein Ruth Eliza Thompson is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 17th day of April, A. D. one thousand eight hundred and seventy-eight.

W. B. WOODS,
U. S. Judge.

4 (Indorsed:) Ruth E. Thompson vs. The Knickerbocker Life Insurance Company. Citation.

On this 4th day of May, A. D. 1878, personally appeared before me, the subscriber, George Cottin, and makes oath that he delivered a true copy of the within citation to John Little Smith, esq'r, on the 3rd day of May, 1878, and to John H. Tindall, agent of the Knickerbocker Ins. Co.

GEO. COTTIN.

Sworn to and subscribed the 4th day of May, A. D. 1878.

HENRY S. SKAATS,
U. S. Commissioner.

Service, 2 copies, $4.00.

5 *Bond.*

Know all men by these presents that we, Ruth Eliza Thompson, Rob't W. Fort, and Isaac C. Moses, are held and firmly bound unto the Knickerbocker Life Insurance Company in the full and just sum of three hundred dollars, to be paid to the said Knickerbocker Life Insurance Company, its certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this thirtieth day of March, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas, lately, at a term of the circuit court of the United States, for the southern district of Alabama, in a suit depending in said court, between Ruth Eliza Thompson and the Knickerbocker Life Insurance Company, judgment was rendered against the said Ruth Eliza Thompson, and the said Ruth Eliza Thompson having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the
6 said Knickerbocker Life Insurance Company citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next.

Now, the condition of the above obligation is such that if the said Ruth Eliza Thompson shall prosecute said writ of error to effect, and

answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) RUTH E. THOMPSON. [SEAL.]
(Signed) ROB'T W. FORT. [SEAL.]
(Signed) ISAAC C. MOSES. [SEAL.]

Sealed and delivered in presence of—
THOS. N. MACARTNEY.

Approved by—
(Signed) W. B. WOODS,
U. S. Judge.

Filed May 4th, 1878.

N. W. TRIMBLE, *Clerk.*

7 Transcript of the record and proceedings had in a certain cause, lately pending in the city court of Mobile, wherein Ruth Eliza Thompson was plaintiff, and the Knickerbocker Life Insurance Company, of the city of New York, were defendants.

Complaint.

City court of Mobile.

THE STATE OF ALABAMA,
Mobile County:

RUTH ELIZA THOMPSON, PL'IFF,
vs.
THE KNICKERBOCKER LIFE INSURACNE COMPANY of the city of New York, def'ts. } No. 516.

The plaintiff, who was the wife of John Y. Thompson, now deceased, claims of the defendant, who is an incorporated body under and by virtue of the laws of the State of New York, and doing business in the State of Alabama, under the laws thereof, the sum of five thousand dollars,
8 for that heretofore, to wit, on the 24th day of January, 1870, the said defendant, by its certain policy of insurance in writing, bearing date the day aforesaid, in consideration of the sum of four hundred and ten dollars and twenty cents, and a like premium annually during the continuance of said policy, did assure the life of said John Y. Thompson, of Mobile, in the State of Alabama, in the amount of five thousand dollars, for the term of his natural life, for the benefit of his wife, the said plaintiff, by which said policy of insurance the defendant then and there promised and agreed well and truly to pay, or cause to be paid at their office, the said sum insured to the party to whose benefit said insurance should lawfully insure, whenever the same became due, within three months after notice, and satisfactory proof of the death of said Thompson during the continuance and before the termination of said policy, and the plaintiff avers that the said John G. Thompson died in the city of Mobile on the 3rd day of November, 1874, during the continuance and before the termination of said policy, the same be-
9 ing then in full force and virtue, of all which said defendant had notice and proof more than ninety days before the bringing of this suit; that this plaintiff is the party to whose benefit said insurance lawfully insures; that all the terms and conditions of said policy, on the part of said assured and the plaintiff, have been performed; yet the

said defendant has failed and refuses to pay said sum of money or any part thereof, and to recover which, and interest thereon, this suit is brought.

TAYLOR AND MACARTNEY,
Att'ys for Plaintiff.

Summons.

City court of Mobile.

STATE OF ALABAMA,
Mobile County:

To any sheriff of the State of Alabama, greeting:

You are hereby commanded to summon the Knickerbocker Life Insurance Company, of New York, to appear before the city court
10 of Mobile, at the place of holding the same, on the first Monday of May, A. D. 1875, then and there to answer to the complaint of Ruth Eliza Thompson.

Witness J. P. Kenny, clerk of the said court, at office, this 2nd day of April, in the year of our Lord one thousand eight hundred and seventy-five.

Attest:

J. P. KENNY,
Clerk.

Sheriff's return.

Rec'd April 2nd, 1875, and on the 3rd day of April, 1875, I served a copy of the within summons and complaint on J. H. Tindall, agent of the Knickerbocker Life Insurance Company of the city of New York.

D. T. PARKER,
Sheriff Mobile Co.,
By J. W. MOORE, *D. S.*

11 *Petition for removal.*

To the honorable Oliver J. Semmes, judge of the city court of Mobile.

Your petitioner, The Knickerbocker Life Insurance Company of the of New York, respectfully shows to your honor that there is now pending in the city court of Mobile, in the State of Alabama, a suit, wherein Ruth Eliza Thompson is plaintiff, and your petitioner is defendant, in which the matter in dispute exceeds five hundred dollars, exclusive of costs; that at the time of the commencement of said suit and now the said plaintiff was and is a citizen of the State of Alabama, and your petitioner was and is a corporation created such by the laws of the State of New York, of the United States of America; that its principal place of business and its location is in the State of New York, and that it is a citizen of the said State of New York. Your petitioner offers to give good and sufficient security for the entering in the circuit court of the United States for the southern district of Alabama, on the first day of its next session and term, copies of all process, plead-
12 ings, depositions, testimony, and other proceedings in said suit.

Your petitioner, the defendant in said suit, respectfully petitions for the removal of said suit into the next circuit court of the United States, to be held in the southern district of Alabama, at Mobile, on

the first Monday in June, A. D. 1875, and your petitioner, as in duty bound, will ever pray.

THE KNICKERBOCKER LIFE INSURANCE COMPANY
OF THE CITY OF NEW YORK,
By D. CLARKE,
Acting Agent.

Affidavit.

STATE OF ALABAMA,
Mobile County:

Before me, James P. Kenny, clerk of the city court of Mobile, in said State, personally appeared David Clarke, agent of the Knickerbocker Life Insurance Company of the city of New York, who, being sworn by me in due form of law, deposes and says that the matters and things set forth in the foregoing petition are true in substance and in fact.

13 D. CLARKE.

Sworn to and subscribed before me this the 26th day of May, 1875.

JAMES P. KENNY,
Clerk.

Filed May 26th, 1875.

JAMES P. KENNY,
Clerk.

Attorney' sappearance.

City court of Mobile, State of Alabama.

RUTH E. THOMPSON
vs.
THE KNICKERBOCKER LIFE INSURANCE COMPANY of the city of New York.

We appear for the defendant in the above-stated cause for the purpose of removing said cause to the circuit court of the United States for the southern district of Alabama.

HERNDON & SMITH,
Def'ts' Att'ys.

Order.

RUTH E. THOMPSON
vs.
KNICKERBOCKER LIFE INSURANCE COMPANY.

14 The defendant having petitioned to have this cause transfer'ed to the circuit court of the United States, and it appearing from the petition that the said defendant is a citizen of the State of New York, and the plaintiff a citizen of the State of Alabama, and it appearing that the said defendant has not appeared and pleaded except for the purpose of transfer, it is ordered that copies of all process, pleadings, depositions, testimony, and other proceedings in this cause had be made by the clerk and this cause be removed into the circuit court of the United States for the southern district of Alabama on the defendants

giving bond, with security as required by law, in the sum of five hundred dollars.

Mobile, May 31st, 1875.

O. J. SEMMES,
Judge of the City Court of Mobile.

15 *Bond.*

Know all men by these presents that the Knickerbocker Life Insurance Company of the city of New York as principal, and David Clarke as surety, are held firmly bound to Ruth E. Thompson in the penal sum of five hundred dollars, in testimony whereof we, the undersigned, hereto set our hands and seals this the first day of June, A. D. 1875. The foregoing bond is subject to the following condition, namely: Whereas there was pending in the city court of Mobile a suit in which Ruth E. Thompson, of the city of Mobile, in the State of Alabama, is plaintiff, and the said Knickerbocker Life Insurance Company of the city of New York is defendant; and the said defendant has petitioned said court that said cause be removed into the circuit court of the United States for the southern district of Alabama, and has obtained an order to that effect, on condition that said defendant give a bond in the sum of five hundred dollars, conditional that a transcript of said
16 cause, including all process and proceedings therein, be filed in said circuit court of the United States by the first day of its next term to commence on the first Monday of June, 1875.

Now, if said defendants shall file such transcript by the time named, and cause an appearance to be entered in said circuit court of the United States as is required by law for the removal of causes from the State into the said United States court, and gives the requisite security or bail, then this obligation shall be null and void, otherwise it shall remain in full force and effect.

June 2nd, 1875.

THE KNICKERBOCKER LIFE INSURANCE COMPANY
OF THE CITY OF NEW YORK,
By JNO. H. TINDALL,
Agent.

D. CLARKE.

Approved:

O. J. SEMMES,
Judge of the City Court of Mobile.

Filed June the 2nd, 1875.

JAMES P. KENNY, *Clerk.*

17 STATE OF ALABAMA,
Mobile County:

I, James P. Kenny, clerk of the city court of Mobile, hereby certify that the foregoing is a full and complete transcript of *of* the record and proceedings in a certain cause wherein Ruth E. Thompson was plaintiff and the Knickerbocker Life Insurance Company of the city of New York was defendants, and removed by petition to the circuit court of the United States for the southern district of Alabama.

In witness whereof I hereunto set my hand and the seal of the court this first day of June, 1875.

[SEAL OF CITY COURT.] (Signed) JAMES P. KENNY,
Clerk.

Filed June 7th, 1875.
(Signed) N. W. TRIMBLE, *Clerk.*

18 *Plea.*

In the circuit court of the United States.

RUTH E. THOMPSON
vs.
THE KNICKERBOCKER LIFE INSURANCE COMPANY.

We appear for defendant, and plead the general issue in short, by consent, with leave to file special pleas.

HERNDON & SMITH,
Att'ys for Def't.

Filed June 10th, 1875.

N. W. TRIMBLE,
Clerk.

Special plea.

Circuit court of the United States, southern district of Alabama.

RUTH E. THOMPSON, PLAINTIFF,
vs.
THE KNICKERBOCKER LIFE INSURANCE COMPANY of the city of New York.

Special pleas of defendants.

And for a further plea and answer to the complaint in said cause, the defendant by leave of the court comes and says, actio non, &c., because he says the policy sued on was issued, and by its terms was to be
19 kept in force during the lifetime of John Y. Thompson, the assured, upon the condition of four hundred and ten dollars and twenty cents paid to the defendant on the 24th day of January, 1870, and of the payment of the sum to the defendant as the premium of the policy on or before the 24th day of January of each succeeding year during the lifetime of said John Y. Thompson, as a condition precedent to the continuance in force of said policy of insurance from and after the date when each of said annual premiums became due and payable. Under said policy an annual credit or loan of a portion of said premium was provided for, and said policy also contained a condition or proviso that the omission to pay the said annual premium on or before twelve o'clock noon on the day or days above designated for the payment thereof, or that the failure to pay at maturity any note, obligation or indebtedness (other than the annual credit or loan) for premium or interest due under said policy or contract, shall then and thereafter cause said policy
20 to be void without notice to any party or parties interested therein.

The defendant further says that the said annual premium was not paid on or before the 24th day of January, A. D. 1874, and thereupon the defendant did give time for the payment of said premium upon the condition named in the note hereinafter mentioned, and for the payment of said premium did take certain promis'ary notes of said Thompson, one of which was as follows :

$109.] NEW YORK, *Jan'y 24th*, 1874.

Nine months after date, without grace, I promise to pay to the Knick-

erbocker Life Insurance Company one hundred and nine dollars, at Mobile, Alabama, value received, in premium on policy No. 2334 which policy is to be void in case this note is not paid at maturity, according to contract in said policy.

No. 2334 was an error, No. 2331 being intended.

The terms and conditions of said note formed a part of the contract for the extension of time given for the payment of said annual
21 premium; yet the same was not paid at maturity, nor in the lifetime of said assured, nor has it been paid since; and said policy of insurance became and was null and void from and after the 24th day of October, A. D. 1874; and the said John Y. Thompson died after said last-named date, to wit, on the fifth day of November, 1874, and not during the continuance of said policy, but after its termination.

And for a further plea and answer to said complaint the defendant says that the premium due on the policy sued on, on the 24th day of January, 1874, was not paid, but an extension of time for such payment was given, among other things, on condition that if the note of John Y. Thompson of that date for one hundred and nine dollars, payable nine months thereafter to the defendants' order, and given in part for said premium was not paid at its maturity, then and thereafter said policy should thereby be void and terminate. Said note was not paid at maturity, nor was any part of it, and the said John Y. Thompson
22 did not die until after the 24th day of October, 1874, the day when said note matured, and after the termination of said policy, and therefore the defendant avers that the life of said John Y. Thompson was not assured under said policy by the defendant at the time of his death.

And for a further plea the defendant says that it holds a promis'ary note of John Y. Thompson, whose life was assured by the policy sued on for four hundred and eight dollars, with interest at seven per cent. per annum, payable in advance on the 24th day of January in each year during the life of said policy, dated January the 24th, 1872, being the amount received as a loan on paid policy; and also another note of said John Y. Thompson, dated January the 24th, 1874, for one hundred and nine dollars, payable nine months after said date without grace, at Mobile, Alabama, which said sums of money were not paid, and which said general sums are a proper off set or counterclaim against any sum
23 that may be found due the plaintiff (should any be found) on said policy, and which sums with the interest thereon the defendant offers to deduct from or set off against any such claim of the plaintiff that may be established.

HERNDON & SMITH,
Def't's Att'ys.

Filed December 13th, 1875.

N. W. TRIMBLE, *Clerk.*

24 *Replication.*

U. S. circuit court, Mobile.

RUTH ELIZA THOMPSON
vs.
KNICKERBOCKER LIFE INS. CO.

And the plaintiff comes, and for reply to the first and second special pleas, says, in short, by consent:

1. That the allegations therein are not true.
2. That the said policy of insurance was renewed by said defendant

on the 24th day of January, 1874, and continued in force until January 24th, 1875. That the payment of said note at maturity was not a condition precedent as alleged. That the said Thompson had the money in hand, was ready and willing and intended to pay said note, but that before the maturity thereof he was taken violently ill, and before and at the time the same fell due was in bed, prostrated by a fatal disease, and in this condition remained until he died on the 3rd day of Nov., 1874; that during all this time he was mentally and physically incapable of attending to his business or knowing of and performing his obligations, and was non compus mentus; that the existance of said note was
25 not known to the plaintiff.

3rd. That it was and had been for many years before and on the day said note fell due the uniform usage and custom of said defendant in such cases to give notice of the day of payment to its policy holders; such is and was the uniform usage and custom with all insurance companies, and the said defendant had in all cases adopted and acted on said usage, and in all its dealings with said Thompson had adheared to said usage, and gave notice of the day when such payments fell due; yet said defendant in this case failed to give any notice of the day of payment of said note, notwithstanding they knew said Thompson was in the city of Mobile, and was sick, and plaintiff avers that said Thompson was ready and willing to pay, had said notice been served as in previous cases, but acting on said usage & was deceived by want of said notice, and that this plaintiff had no notice of the existance of said note, or when the same fell due, wherefore & whereby said note was not paid.

4th. That on the 24 day of January, 1874, said policy was re-
26 newed and entered in full force for one year, to wit, until January 24, 1875 That said note was for the balance of the premium of that year, which defendant agreed should be deferred and paid as set out on said note; that by said agreement said policy was not to become void on the non-payment of the note alone at maturity as alleged in said plea, but was to become void at the instance and election of said defendant, and plaintiff avers that said defendant did not elect to cancel said policy or take any steps to avoid it or give any notice of such intention during the life of said John Y. Thompson or since, and still holds said note against said estate of said Thompson; wherefore, &c.

Jan'y 12, 1876.

TAYLOR & MACARTNEY,
For Pl'ff.

5th. And for further replication to the first and second special pleas by said defendant pleaded, plaintiff says that it was the general usage and custom adopted by said defendants, and practiced by them before and after the making of said note, not to demand punctual payment of such premium notes on the days they fell due, but to give days of grace thereon, to wit, for thirty days thereafter, and the said
27 defendants had repeatedly so done with said Thompson and others, and they led said Thompson to believe and rely on such leniency in this case, and thereby said Thompson was deceived, and said note not paid, and he did rely on them for such notice.

TAYLOR & MACARTNEY,
For Pl'ff.

Filed February 23rd, 1876.

N. W. TRIMBLE, *Clerk.*

Demurrer to replication.

United States circuit court, Mobile, Alabama.

RUTH E. THOMPSON
vs.
THE KNICKERBOCKER LIFE INSURANCE COMPANY.

The defendant demurs to the 2nd alleged replication of the plaintiff to the several pleas by the defendant pleaded, and says the same is insufficient in law, and for specification of causes says:

1st. That said so-called replication neither traverses nor confesses, and avoids the matters of defense by the defendant pleaded.

2nd. It presents no new issuable question, or matter in avoidance of the matters pleaded by the defendant in its defence, but, on the contrary, traverses the defendant's plea in part, and then, without confessing, but traversing said matter as stated, sets up matters in avoid-
28 ance of the very facts which are not confessed, but denied, thus making two distinct and contrary issues in the same plea.

3rd. Because the matters pleaded in said so-called replication are immaterial, and present no valid or sufficient answer or reply to the defendant's pleas, because the sickness alleged does not excuse the failure to perform, and a party is bound to know the terms of his own contract, which the plaintiff, by his failure to demur thereto, admits, present a good legal defence to the action.

4th. Because said replication is double.

5th. Because the matters pleaded in said so-called replication present no legal and sufficient reply to the matters of defense by the defendant.

The defendant also demurs, severally and separately, to each of the plaintiff's other so-called replications, and numbered respectively 3, 4, and 5, and for causes of demurrer to each it severally and respectively assigns the same causes of demurrer as are assigned as cause of demurrer to replication number 2.

HERNDON & SMITH,
Def't's Att'ys.

29 Also to the 3rd, because the custom alleged as to giving a notice was no waiver of the contract, but was a mere matter of accommodation and convenience.

Also to the 4th, because the alleged agreement contradicts the terms of the written contract & note.

Also to 5th, because the pleadings show that assured died within the thirty days and before payment.

HERNDON & SMITH,
Def't's Atty's.

Filed March 7, 1876.

N. W. TRIMBLE, *Clerk.*

30 *Order sustaining demurrers.*

RUTH E. THOMPSON
vs.
THE KNICKERBOCKER LIFE INSURANCE COMPANY of New York.

This cause comes on to be heard on the demurrers of the defendant

to the second, third, fourth, and fifth replications of the plaintiff to the first and second special pleas pleaded by the defendant. Counsel on both sides have been heard, and the matters submitted have been duly considered; and now it is adjudged and ordered that the said several demurrers of the defendant be and the same are hereby sustained.

June 10th, 1876.

31 *Judgment.*

Circuit court of the United States, fifth judicial circuit and southern district of Alabama.

WEDNESDAY MORNING, *June* 28, 1876.

Court met pursuant to adjournment. Present, honorable John Bruce, United States district judge for the State of Alabama, sitting as circuit judge.

RUTH E. THOMPSON
vs.
KNICKERBOCKER LIFE INS. CO.

This day comes the parties, by their attorneys, and also to try the issues joined, comes a jury of good and lawful men, to wit, A. B. and eleven others, who being duly elected, tried, and sworn, upon their oaths do say: We, the jury, find for the defendant.

It is, therefore, considered by the court that the defendant have and recover of the plaintiff its costs in this behalf expended, for which let execution issue.

32 *Bill of exceptions.*

Circuit court U. S., June term, 1876.

RUTH THOMPSON
vs.
KNICKERBOCKER LIFE INSURANCE COMPANY.

Be it remembered that on the trial of this cause the plaintiff, having introduced in evidence the policy of insurance sued on, and the several renewals and the proof of loss made thereunder, then offered evidence to the jury under the issues joined, tending to prove the matters of fact and things set forth in his several replications to the several pleas of the defendant, and the same being objected to by the defendant as irrelevant & immaterial, the objection was sustained by the court, and the evidence so offered was excluded from the jury, to which the plaintiff excepted.

The defendant then produced and read in evidence the notes of John Y. Thompson, mentioned in the pleadings and offered to surrender them to the plaintiff and tendered the same to him.

And plaintiff now tenders this her bill of exceptions and prays
33 that the same be signed, sealed, and made a part of the record which is accordingly done in term time this 28 day of ~~April~~ June, 1876.

(Signed) JOHN BRUCE, [SEAL.]
Judge.

Filed June 28th, 1876.

N. W. TRIMBLE. *Clerk.*

34 Premium, $410.20. Insurance, $5,000.

No. 2331.] SOUTHERN BRANCH. [Age 60.

This policy of insurance witnesseth, that the Knickerbocker Life Insurance Company of the city of New York, in consideration of the premium of four hundred and ten dollars and seventy cents, to them in hand paid by John Y. Thompson, and of the annual premium of a like sum, to be paid on or before the twenty-fourth day of January, in every year during the continuance of this policy, do assure the life of John Y. Thompson, of Mobile, in the State of Alabama, in the amount of five thousand dollars for the term of his natural life, for the benefit of Ruth Eliza Thompson, his wife, provided, however, that in case an annual credit or loan of a portion of said premium shall be allowed thereon
35 (interest upon which is payable in advance) such credit or loan is acknowledged by all the parties hereto as a just counter claim against this policy until paid or cancelled by profits or otherwise.

It being understood and agreed that if, after the receipt by this company of not less than three annual premiums, this policy should cease in consequence of the nonpayment of premium, then, upon the surrender of the same within thirty (30) days after such unpaid premium shall have been due, the company will, in exchange, issue a paid-up policy (subject to the loans or credits outstanding against this policy) for such an amount as the surrender value of the premiums received hereon would purchase as a single premium.

And the said company do hereby promise and agree, well and truly to pay, or cause to be paid, at their office, the said sum insured to the party to whose benefit this insurance shall lawfully enure, whenever the
36 same becomes due within three months after due notice and satisfactory proof of the death—during the continuance and before the termination of the policy of the said party whose life is hereby insured. And in case of the death of the said party for whose benefit this insurance is made before the decease of the said party whose life is hereby insured, the amount of this insurance shall be payable, after the death of the latter, to her children by him, or to their guardian, if under age, for their sole use. The balance of the year's premium (if any) or either indebtedness, obligation, or counterclaim standing against this policy at the time when the sum hereby insured becomes due, shall, however, in all cases be first deducted therefrom.

Provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted upon the following conditions: and in case the said party whose life is hereby in-
37 sured, shall, without the written consent of this company previously obtained, travel upon the seas (except in voyages between coastwise ports of the United States), or shall pass beyond the civilized settlements in the United States (except into the settled limits of the British provinces, of the two Canadas, Nova Scotia, or New Brunswick), or shall, without such previous consent thus obtained, enter into any military or naval service whatever (the militia not in active service excepted), or shall personally engage in blasting, mining, submarine operations, or the production of dangerously inflammable or explosive substances, or in any other extra hazardous occupation, or die in consequence of a duel, or by the hand of justice, or in the known violation of any law of this State, or of the United States, or of the said Provinces, or of any State, country, or territory in which he may be, or shall become so far intemperate as to induce delirium tremens, or

38 shall die in consequence thereof, then this policy shall be null and void.

And also, this policy of insurance is made upon the express condition that application 2331, now on file in the office of said company, is an express warranty of the truth of the answers contained in said application, and in the statements and documents annexed to or accompanying the same; and the said application, statements, and documents shall be deemed to form a part and parcel of this policy. And if the said application, statements, or documents are in any respect untrue, then this policy is void and of no effect, either to the insured or any party whatsover interested herein. And the omission to pay the said annual premium on or before twelve o'clock, noon, on the day or days above designated for the payment thereof, or failure to pay at maturity any note, obligation, or indebtedness (other than the annual credit or
39 loan), for premium or interest hereon, shall then and thereafter cause this policy to be void, without notice to any party or parties interested herein.

And it is further provided that in case said company shall, at any time, accept a payment of premium upon this policy after the day when the same shall, by the terms hereof, become due and payable, such acceptance shall not in any respect be deemed to enlarge the time for the payment of the annual premiums thereafter to become due upon this policy, or be deemed any evidence of a usage of said company to receive payments of premium after the same become due and payable by the terms of this policy.

All policies, renewals of policies, permits, consents and contracts, in any way relating to insurance, and all other contracts, endorse-
40 ments, instruments, or writings of what kind soever, in the name of the Knickerbocker Life Insurance Company, or undertaking or importing any act to be done, or liability to be incurred by the said company, must be signed by the president and secretary thereof, and whenever not so signed, are hereby repudiated and declared void, and will in no case be recognized by the said company.

Neither this policy of insurance or renewal receipts of the same will be valid until the actual payment of the premium.

Free permits will be granted upon application at the office of the company to the holder of this policy to reside in Europe and to make voyages between the United States and Europe in steamships or first class sailing vessels only.

For a voyage by any other vessel, or to any other foreign country, except as above stated, a special permit must be applied for
41 and obtained from the company.

This policy is not assignable.

In witness whereof the said Knickerbocker Life Insurance Company have caused this contract to be signed by their president and secretary, at the city of New York, this twenty-fourth day of January, one thousand eight hundred and seventy.

Not valid until countersigned by the manager of the Southern branch office, Savannah, Ga.

ERASTUS LYMAN,
President.

GEO. T. GRIFFIN, *Secretary,*

Countersigned at Savannah, Ga., this twenty-fourth day of January, 1870.

F. W. SIMS.
A. WILBUR,
Manager.

[Two 50 cent stamps.]

42 *Receipt No.* 1.

Renewal No. 141029. Premium 410\frac{20}{100}$.

KNICKERBOCKER LIFE INSURANCE CO.,
No. 239 *Broadway, New York,* 24 *January,* 1874.

Policy No. 2331–42937, issued in favor of Ruth E. Thompson, is hereby continued in force for twelve months from this date, to wit, until the twenty-fourth day of January, 1875, at noon, subject to and upon the express condition that if any note or other obligation given for any portion of the premium due this day upon said policy, together with the interest on any loan, note, or other obligation for premium thereon, shall not be paid on the day when the same shall become due and payable, then, and from thenceforth, said policy and this continuation thereof shall immediately cease and become void, without notice to the insured or insurer, or any party or parties interested therein.

C. STANTON,
President.

GEO. P. GRIFFIN, *Secretary.*

S. B. O. TARDY.

43 *Receipt No.* 2.

Renewal No. 123460. Premium, $410.20.

KNICKERBOCKER LIFE INSURANCE COMPANY,
No. 239 *Broadway, New York, January* 24, 1873.

Police N'. 2331, issued in favor of Ruth E. Thompson, is hereby continued in force for twelve months from this date, to wit, until the twenty-fourth day of January, 1874, at noon, subject to and upon the express condition that if any note or other obligation given for any portion of the premium due this day upon said policy, together with the interest on any loan, note, or other obligation for premium thereon, shall not be paid on the day when the same shall become due and payable, then and from thenceforth said policy and this continuation thereof shall immediately cease and become void, without notice to the insured or insurer, or any party or parties interested therein.

C. STANTON,
President.

GEO. F. GRIFFIN,
Secretary.

S. B. O. TARDY,
Mobile, Ala.

(On the margin:) Knickerbocker Life Insurance Comp'y of the city of New York.

44 *Receipt No.* 3.

[Knickerbocker Life Insurance Company, principal office, 161 Broadway, N. Y.]

Policy No. 2331.

DR.

Premium	410 20
Int. on annual loan	28 56
	$438 76

CR.

1st payment, cash		76 76
2nd 3 mos. note		76
3rd 6 " "		75
4th 9 " "		75
These notes bear the same date as this receipt, and are without grace.		
Annual loan this year	$408	
Less last year	$2½	136
		$438 76

Renewal No. 104908.

NEW YORK, *January* 24, 1872.

Received of Ruth E. Thompson four hundred & ten $\frac{20}{100}$ dollars, in cash and notes (exclusive of interest), as stated in the margin hereof, which amount, if said notes are duly paid on or before the maturity thereof, will complete the payment of the premium necessary to continue policy No. 2331, in force until the twenty-fourth day of January, 1873, at noon; and in case said notes, or either of them, shall not be paid on or before the maturity thereof, said policy shall at once become void without notice to the insured or the person for whose benefit said policy
45 is issued, or whomsoever shall then be the lawful holder or owner thereof.

ERASTUS LYMAN,
President.

GEO. F. GRIFFIN,
Secretary.

42927.

Receipt No. 4.

[Southern branch office of the Knickerbocker Life Insurance Company, at Savannah, Georgia; principal, 161 Broadway, N. Y. General No. 84596.]

Policy No. 2331.

DR.

Premium	410 20
Int. on annual loan, 272	19 04
	$429 24

CR.

1st payment, cash		89 24
2 3 mos. note		68
3 6 " "		68
4 9 " "		68
These notes bear the same date as this receipt, and are without grace.		
Annual loan this year	272	
Less last year		$136
		$429 24

NEW YORK, *January* 24, 1871.

Received of Ruth E. Thompson four hundred & ten $\frac{20}{100}$ dollars in cash and notes (exclusive of interest), as stated in the margin hereof, which amount, if said notes are duly paid on or before the maturity thereof, will complete the payment of the premium necessary to continue police No. 2331 in force until the 24 day of January, 1872, at noon. And in case said notes, or either of them, shall not be paid on or before
46 the maturity thereof, said policy shall at once become void without notice to the insured or the person for whose benefit said policy is issued, or whomsoever shall then be the lawful holder or owner thereof.

Not valid until countersigned by the manager at the southern branch office at Savannah, Georgia.

ERASTUS LYMAN,
President.

GEORGE F. GRIFFIN,
Secretary.

Countersigned at Savannah this 24 day of January, 1871.

WM. R. BOYD,
Manager.

42937.
47 42,933.

$408—16c. NEW YORK, *Jan.* 24, 1872.
16 370
392

Received from the Knickerbocker Life Insurance Company of New York the sum of four hundred and eighty dollars, as a loan on policy No. 2331, on the life of John Y. Thompson, interest upon which, at rate of seven per cent. per annum, I promise to pay, in advance, on the 24th day of January in each year during the life of said policy. The amount of said loan is a proper offset or counter-claim against any amounts which may become due or payable upon said policy, and the said company may deduct the same therefrom, and payment thereof shall first be made to either the holder to exchange said policy according to the terms thereof; and *is* is hereby stipulated and agreed that the failure to pay said interest, at the time above specified, shall cause said policy to cease and determine.

(Signed) JOHN Y. THOMPSON.

73726.
272
16
256

48 $109¼. 4341—6, 12–14. NEW YORK, *Jan'ry* 24, 1874.

Nine months after date, without grace, I promise to pay to the order of the Knickerbocker Life Insurance Company one hundred and nine dollars, at Mobile, Alabama, value received, in premium on policy No. 2334–42937, which policy is to be void in case this note is not paid at maturity, according to contract in said policy.

(S'g'd) JOHN Y. THOMPSON.

Oct. 24, '74. Residence.

(Across the face:) Tardy, 12877.

49 In the circuit court of the United States for the fifth judicial circuit and southern district of Alabama.

I, N. W. Trimble, clerk of the circuit court of the United States for the fifth judicial circuit and southern district of Alabama, do hereby certify that the foregoing pages numbered from 1 to 42 inclusive is a true transcript of the record and proceedings had in a certain cause wherein Ruth Eliza Thompson is plaintiff and the Knickerbocker Life Insurance Company of New York is defendant, as the same remain of record and on file in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said court this fourteenth day of September, A. D. 1878.

[SEAL.] N. W. TRIMBLE, *Clerk.*

(Indorsement on cover:) No. 312. Ruth Eliza Thompson, pl'ff in error, vs. The Knickerbocker Life Insurance Company. S. Alabama, C. C. U. S. Filed 22nd October, 1878.

REC. 312—2

OFFICE SUPREME COURT, U. S.
FILED
OCT 5 1881
JAMES H. McKENNEY, CLERK

Supreme Court of the United States

OCTOBER TERM, 1881.

No. 67.

RUTH ELIZA THOMPSON, Plaintiff in Error,

vs.

THE KNICKERBOCKER LIFE INSURANCE COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of Alabama.

BRIEF OF PLAINTIFF IN ERROR.

J. HUBLEY ASHTON,
THOS. N. MACARTNEY,
Of Counsel for Plaintiff in Error.

Thomas McGill & Co., Law Printers, Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1881.

No. 67.

RUTH ELIZA THOMPSON, PLAINTIFF IN ERROR,

vs.

THE KNICKERBOCKER LIFE INSURANCE CO., DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the Southern District of Alabama.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to the judgment of the Circuit Court of the United States for the Southern District of Alabama, in a suit instituted by Ruth Eliza Thompson, the plaintiff in error, against the Knickerbocker Life Insurance Company of New York, the defendant in error, to recover the amount insured, for her benefit, by a policy of that company, on the life of her husband, John Y. Thompson. The suit was instituted April 2, 1875, by Mrs. Thompson in the City Court of Mobile, and removed on the application of the Insurance Company into the Court below. (Rec., p. 5.) Judgment was rendered by the Circuit Court

for the Insurance Company, defendant; and the plaintiff thereupon sued out this writ of error.

John Y. Thompson, deceased, was the husband of Ruth Eliza Thompson, plaintiff in error; and on the 24th of January, 1870, the defendant, the Knickerbocker Life Insurance Company, issued a policy of life insurance on the life of Mr. Thompson for the sum of five thousand dollars, payable to and for the benefit of his wife. Under the terms of the policy an annual premium of $410.20 was required to be paid in advance on the 24th of January in every year during the continuance of the policy. These annual premiums were regularly paid or arranged for to the satisfaction of the company, until the 24th of January, 1874, when the company issued its renewal receipt, continuing the policy in force for twelve months from that date, to wit, until January 24, 1875. (Rec., p. 14.) Mr. Thompson did not pay in cash the whole of the premium for which this renewal was given, but paid part of it in cash, and for the balance gave his notes at three, six, and nine months, all of which were paid except the last for $109, which matured on the 24th of October, 1874. (Rec., p. 17.)

A short time before this note fell due, Mr. Thompson was taken violently ill, and on the day when it matured was in bed prostrated by a fatal disease. He remained in this condition until he died, on the 3d day of November, 1874. During all this time he was mentally and physically incapable of attending to his business, or knowing of or performing his obligations, and was in fact *non compos mentis*. The existence of the note was not known to his wife, the plaintiff in error. These facts are admitted, for they are set up specifically and in detail in the plaintiff's replications to defendant's pleas, and demurred to by the defendant. (Rec., p. 10.) The company having refused to pay the insurance, the present suit was instituted by

Mrs. Thompson on April 2, 1875, to recover the amount of the policy and interest.

The complaint averred the death of John Y. Thompson on November 3, 1874, while the policy was in force; that proof of death had been made to the company; and that all the terms and conditions of the policy had been complied with; and prayed judgment for the insurance money and interest. (Complaint, Rec., p. 3.)

The defendant pleaded the general issue, and two *special pleas*, which set up in substance the same defense, as follows: That the payment of the premium of $410.20 was a condition precedent to the continuance of the policy. That by the terms of the policy an annual credit or loan of a portion of the premium was provided for, and the policy contained a condition or proviso that the omission to pay the annual premium on or before noon of the 24th day of January of each year, or the failure to pay at maturity any note, obligation, or indebtedness (other than the annual credit or loan) for premium or interest due under the policy, should then and thereafter cause the policy to be void without notice to any party or parties interested therein. That the annual premium was not paid on or before January 24, 1874, and thereupon the defendant gave time for the payment of the premium upon the condition named in the following note, and for the payment of said premium did take certain promissory notes of said Thompson, one of which was as follows: "$109. *New York, January* 24, 1874. *Nine months after date, without grace, I promise to pay to the Knickerbocker Life Insurance Company one hundred and nine dollars, at Mobile, Alabama, value received, in premium on policy No.* 2,334, *which policy is to be void in case this note is not paid at maturity, according to the contract in said policy.*" That the terms and conditions of said note formed a part of the contract for the extension of the time given for the payment of said annual premium. That the said note was not paid

at maturity, nor in the lifetime of said John Y. Thompson, nor had it been paid since. That said policy became null and void from and after the 24th day of October, 1874, when said note fell due. That John Y. Thompson died after that date, to wit, on the 5th of November, 1874, and not during the continuance of the said policy, but after its termination. (See first and second special pleas, Record, pp. 7, 8.)

The plaintiff, under the authority of sections 3002 and 3003 of the Revised Code of Alabama, filed five replications to the above special pleas, as follows:

1. That the allegations therein are not true.

2. *That the said policy of insurance was renewed by the defendant on the 24th day of January*, 1874, *and continued in force until January* 24, 1875; that the payment of said note at maturity was not a *condition precedent* as alleged; that Thompson had the money in hand, was ready and willing, and intended to pay said note, but before the maturity thereof he was taken violently ill, and before and at the time the same fell due was in bed, prostrated by a fatal disease, and in this condition remained until he died, on the 3d day of November, 1874; that during all this time he was mentally and physically incapable of attending to his business, or knowing of and performing his obligations, and was *non compos mentis;* and that the existence of said note was not known to the plaintiff.

3. That before said note fell due it had long been the custom of the defendant, in like cases, to give notice of the day of payment to policy holders, and such was the uniform custom of insurance companies, and defendant had, in all its dealings with Thompson, complied with such custom, and given notice of the day when such payments fell due. Yet the defendant, in this instance, failed to give any notice of the day of payment of said note, notwithstanding they knew said Thompson was in the city of Mobile, and was sick. That Thompson was ready and

willing to pay the note, had notice been served as in previous cases, but acting on said usage was deceived by want of said notice. That the plaintiff had no notice of the existence of said note, or when the same fell due; wherefore and whereby said note was not paid.

4. That on the 24th of January, 1874, said policy was renewed and entered in full force for one year, to wit, until January 24, 1875. That said note was for the balance of the premium of that year, which defendant agreed should be deferred and paid as set out in said note. That by said agreement the policy was not to become void on the non-payment alone of the note at maturity, but was to become void at the instance and election of the defendant, and defendant did not elect to cancel said policy, or take any steps to avoid it, or give any notice of such intention during the life of said John Y. Thompson, or since, and still holds said note against the estate of said Thompson.

5. That it was the general usage and custom of the defendant not to demand punctual payment of said premium notes at maturity, but to give thirty days' grace, and the defendant had repeatedly so done with said Thompson and others, and this led said Thompson to rely on such leniency, and he was thereby deceived, and the note was not paid. (See the Replications, Rec., pp. 8, 9.)

The defendant filed a demurrer, which put in issue the sufficiency of the second, third, fourth, and fifth replications as answers to the first and second special pleas. (Demurrer to Replication, Rec., p. 10.)

The Court below by its judgment sustained the demurrer of the defendant to the second, third, fourth, and fifth replications of the plaintiff to the first and second special pleas of defendant. (Judgment on the Demurrer, Rec., pp. 10, 11.)

The cause was then tried before a jury; and on the trial the plaintiff introduced in evidence the policy of insurance

sued on and the several renewal receipts, and the proof of loss made thereunder, and then offered evidence to the jury, under the issues joined, tending to prove the matters of fact and things set forth in her several replications to the several pleas of the defendant. The same being objected to by the defendant as irrelevant and immaterial, the objection was sustained by the Court, and the evidence so offered was excluded from the jury; to which the plaintiff excepted. (Bill of Exceptions, Rec., p. 11.)

The jury rendered a verdict for the defendant, on which judgment was entered by the Court below. (Judgment, Rec., p. 11.)

Assignment of Errors.

The Court below erred as follows:

1. In sustaining, and failing to overrule, the demurrer of the defendant to the second replication of the plaintiff to the first and second special pleas of the defendant.

2. In sustaining, and failing to overrule, the demurrer of the defendant to the third replication of the plaintiff to the first and second special pleas of the defendant.

3. In sustaining, and failing to overrule, the demurrer of the defendant to the fourth replication of the plaintiff to the first and second special pleas of the defendant.

4. In sustaining, and failing to overrule, the demurrer of the defendant to the fifth replication of the plaintiff to the first and second special pleas of the defendant.

5. In sustaining, and failing to overrule, on the trial of the issues joined before the jury, the objection of the defendant to the evidence offered by the plaintiff, tending to prove the matters of fact and things set forth and alleged in the several replications of the plaintiff to the first and second special pleas of defendant, and in excluding the said evidence from the jury.

ARGUMENT.

I.

The First Assignment of Error.

The question presented for the decision of the Court by the first assignment of error, is whether the payment of the note given by the assured to secure a portion of the premium for the year ending January 24, 1875, was an absolute condition precedent to the continued liability of the company under the policy, or a condition subsequent, the performance of which was legally excused by the facts alleged in the second replication of the plaintiff to the first and second special pleas of the defendant.

It must be conceded, upon the facts disclosed by these pleadings, that the case is one of extreme hardship, if this widow, Mrs. Thompson, is to lose the benefit of the provision intended to be made for her by this policy; and the Court will no doubt save her from the attempted forfeiture, if it can be done consistently with sound principles of legal justice.

Mr. Thompson had been insured in this company, at an annual premium of $410, since 1870, or, in other words, nearly five years at the time of his death in November, 1874. The company had received from him, before that time, in addition to the premiums for previous years, three-fourths of the premium for the year in which he died, leaving, at the time of his death, only $109 to be paid on account of the premium for that year; and for that amount the company had taken his note, which it may have sold or hypothecated, or used in various ways for its own benefit. Mr. Thompson had received his renewal receipt on the 24th of January, 1874, and thereby, under the seal of the

company, his policy had been expressly continued in force for twelve months from that date, to wit, until the 24th day of January, 1875. (See Renewal Receipt, Rec., p. 14.) He meant and intended, and had the money in hand, to pay the small balance of premium secured by his note; but when the paper matured he was prostrated upon a bed of sickness, from which he was carried to his grave. It was impossible for him to attend to the business of this note or any other business; and his wife, this plaintiff, had no knowledge of the existence of the obligation. The company did nothing to enforce or assert a forfeiture of the policy; and the note is first heard of when the widow asks payment of the insurance money, which is refused upon the bare ground that the simple non-payment of the sole outstanding note *ad diem* released the company from all obligation under the policy, although it had previously received in premiums nearly one-half of the amount insured by that instrument.

Certainly the Court will save the plaintiff from the consequence sought to be inflicted by this company if it can do so consistently with sound principles of law. And we respectfully submit that it can, upon the ground that by the true construction and effect of the contract of these parties, the policy having been expressly continued in full force for the year in which the death occurred, the payment of the last premium note is to be deemed, *not* a condition precedent, as claimed by the defense, but merely a condition subsequent, operating by way of defeasance, and that in the case of such a condition inevitable accident, or the act of God, may excuse performance and prevent a forfeiture, or the Court may grant relief upon equitable terms.

First. The policy having been renewed and continued in force by the company for a year on the 24th of January, 1874, when the note in question was given, the pay-

ment of that note, if a condition at all, was a condition subsequent operating by way of defeasance, and mere non-payment *ad diem* was not alone sufficient to effect an absolute forfeiture of the insurance.

This question, we think, has been adjudged since the decision of this case by the Circuit Court, by the Supreme Court of Ohio, in the case of *Insurance Company* v. *French*, (30 Ohio State Reps., 243,) decided December Term, 1876.

That was a suit upon a policy on the life of Maynard French for the benefit of his wife, executed July 6, 1864. The annual premium of $725 was payable on or before 12 o'clock M. on the 6th of July in every year during the continuance of the policy. On July 6, 1867, French being unable to pay the cash part of the premium, gave his check for one-half, payable July 25, his note at six months, and the usual premium note, when the agent of the company gave him the usual renewal receipt for $725, for renewing the policy for one year from that date. Neither check nor note was paid. The note contained a clause that "*if not paid at maturity said policy is to be null and void.*" On July 6, 1868, the premium was duly tendered for the ensuing year, and refused. French died in April, 1869. The defense was that the policy had been forfeited by the failure to pay the note given for half the premium payable July 6, 1867.

The Supreme Court of Ohio decided that the mere fact that the note was not paid at maturity did not, of itself, avoid the policy. It gave the company the *option* of declaring a forfeiture, but this option, it was held, must be asserted by clear and unequivocal acts.

The Court said:

"It is not insisted that the non-payment of the check alone forfeited the policy, but it is claimed that failure to pay the note does work out this result. It will be seen that the note stipulates in terms that '*if it is not paid at*

maturity said policy is to be null and void.' It cannot be successfully maintained that this clause makes the policy *absolutely void upon non-payment of the note. Under the authorities, such a clause being introduced for the benefit of the Insurance Company, means that the policy shall be void if the company insist upon it, but it is their option to say whether this result shall follow or not.* . . . As we have before said, the mere non-payment of the note is not alone sufficient to avoid the policy. *Such payment was not a condition precedent to the attaching or continuing of the risk. It was rather a note with a condition of defeasance that might be operative if desired.* The delivery of the renewal receipt shows *prima facie* that the risk had attached.

"And again, the contract of life insurance is said to be *sui generis.* The payment of any premium after the first, is not a condition precedent to the vesting of all rights, though these are liable to forfeiture. The payment of the first premium and delivery of the policy covers the whole lifetime, and makes a complete vested right to the sum insured, if there is death before another premium is payable; if not, further premiums must be paid or forfeiture may ensue. But rights arise upon the payment of the first premium; they become vested then, and so remain, until forfeiture. (Mutual Benefit Life Ins. Co. *v.* Hillyard, 37 N. J. L. R., 469.)

"We, therefore, cannot consider payment of this note as absolutely necessary before the renewal attached. It may not, perhaps, be necessary to hold, as did the Court below, that demand of payment the day the note was due was necessary to work a forfeiture; *but certainly something must be done between the day the note was due and the end of the year to establish and proclaim the forfeiture, or it must be held to be waived.*"

The principles of this opinion, if correct, seem to determine the nature and character of the condition under consideration, and are decisive of the present case.

The doctrine is, that where a policy has been duly renewed for a year upon the receipt of a note for the premium, or part of it, a provision for the forfeiture of the insurance in case of non-payment of the note, operates

strictly by way of *condition subsequent*, or as a clause of defeasance, and the company is required to establish and proclaim a forfeiture, or otherwise it will be deemed to have been waived.

It is to be observed that we are dealing, in the present case, with a *perfect and complete contract* of insurance, and not an inchoate contract, for the year in which death occurred, though subject to forfeiture by an event *subsequent* to the vesting of that contract.

The company received in cash a part of the consideration for that insurance, and security for the balance. No doubt exists that if the assured had died previous to the maturity of his note, the insurance would have been payable, and the note would have been good against his estate. Nor can there be any doubt, we suppose, that the company might have sued and recovered upon the note. *The note is not declared to be void upon non-payment at maturity.* It expressed an absolute and unconditional promise to pay, and that contract was undoubtedly enforceable by the company.

The whole contract evidenced by the policy and the note, taken together, must mean, after the giving of the renewal receipt, that the policy was *voidable* at the option of the company, and unless a forfeiture should be asserted and declared, at the proper time, the insurance remained.

The case is essentially different from a purely *unilateral* contract, where the risk has not fully attached for the particular year in which the death occurred. There the assured makes no promise at all, and is bound by no agreement to pay, or to do anything, and the company has no remedy against him. But where the policy has attached, and there is a *complete* contract of insurance for a year, and the assured has paid part of the premium and given his obligation as security for the balance, the condition of payment is in its very nature a condition subsequent, as it

goes to defeat a perfect insurance, and divest the rights already vested under the policy.

The case is like a release which is subject to be avoided by the happening of a condition subsequent, as, for example, the non-payment of a composition. The release is good and operative unless itself subsequently avoided. In *Newington* v. *Levy*, (5 Law Reps., Common Pleas, 611,) Wills, J., said:

"We see no difficulty in upholding a release with a *condition subsequent*, in accordance with the suggestion of Maule, J., in *Gibbons* v. *Vouillou*, (8 C. B., 487.) It must have happened often that a voluntary payment, good at the time as extinguishing the debt, has been rendered void by matter subsequent, as in the event of the bankruptcy of the debtor and an election by his assignee to treat the payment as a fraudulent preference; and it has never been successfully contended that the debt did not thereby revive. Indeed the contrary is involved in the decision of *Pritchard* v. *Hitchcock*, (6 M. & G., 151.) We can see no substantial distinction between the case of a payment avoided by subsequent events, and a release so avoided."

Conditions precedent are those which are to be performed before the estate vests, the *obligation commences*, or the bequest takes effect.

Conditions subsequent are those whose effect is not produced until *after* the vesting of the estate or bequest, or the commencement of the obligation. (1 Bouvier L. D., *Condition;* 2 Story's Eq. Jur., sec. 1309; 4 Kent, 125, 126.)

The distinction between the two kinds of conditions is as well marked in cases of contract as in conveyances and devises; (2 Langdell Cases on Contracts, p. 1009;) and in the contract of life insurance as in other species of contracts.. (Giddings *v.* Insurance Co., 102 U. S. R., 111.)

There are no technical words by which to distinguish between conditions precedent and subsequent. The governing rule is the fair intention of the parties to be col-

lected from the transaction. (Porter *v.* Shepard, 6 T. R., 668; Finlay *v.* King's Lessee, 3 Pet., 375; Nicoll *v.* N. Y. & E. R. R., 12 N. Y., 130.)

In the present case it cannot be supposed that it was intended that the mere non-payment of a fractional part of the premium *ad diem* should operate as the non-performance of a condition precedent; and it would be unconscionable and oppressive to give the contract that effect.

In the notes to the leading case of *Pordage* v. *Cole*, (1 Wms. Saund., 320*b*,) one of the rules for determining whether covenants are *dependent* on each other, according to the intention of the parties, is, that where a covenant goes only to *part* of the consideration on both sides, that is, forms a part of the consideration on the plaintiff's side for the defendant's covenant on the other, and *a breach of such covenant may be paid for in damages, and the whole of the remaining consideration has been had, by the defendant*, the covenant is *independent*, and the performance of it is *not* a condition precedent. (See Campbell *v.* Jones, 6 T. R., 570; Boone *v.* Eyre, 1 H. Bl., 273, *n.*; 2 W. Bl., 1312, 1315.)

The learned Editor observes that "the reason of the decision in these cases is, that where a person has received a *part* of the consideration for which he entered into the agreement, it would be *unjust* because he had not the whole, he should therefore be permitted to enjoy that part without either paying or doing anything for it. Therefore the law obliges him to perform the agreement on his part, and *leaves him to his remedy to recover any damages he may have sustained in not having received the whole consideration.*"

When the consideration was thus executed in part, it is no longer competent for the defendant to insist upon the non-performance of that which was *originally* a condition precedent, and this is more correctly expressed than to say it was not a condition precedent at all. (Graves *v.* Legg, 9 Exch., 717; Ellen *v.* Topp, 6 Exch., 441.)

Pollock, C. B., in *Ellen* v. *Topp*, said: "It is remarkable that, according to this rule, the construction of the instrument may be varied by matter *ex post facto;* and that which is a condition precedent, when the deed is executed, *may cease to be so by the subsequent conduct of the covenantee in accepting less.* But this is no objection to the soundness of the rule, which has been much acted on."

Under these settled principles of law, it is not competent for this Insurance Company, having received nearly the whole of the consideration for this insurance, to insist that the payment of this last note is a condition precedent; and the Court will hold the agreement to pay to be an *independent* contract, the breach of which may be compensated for in damages, or at most a condition subsequent.

Second. The condition in question being at most a condition subsequent operating by way of defeasance, its performance was excused by the inevitable accident alleged in the plaintiff's pleas, and the liability of the company became absolute, in accordance with settled principles of jurisprudence.

By inevitable accident, commonly called the act of God, is meant any accident produced by any physical cause which is irresistible; such as sudden death, or illness. (Story on Bailments, sec. 25.)

In *Shep. Touchst.*, "Condition," 157, it is said: "If a condition be possible in its creation, and after become impossible by the act of God, the condition is discharged and gone forever, and the estate is absolute." So in *Co. Litt.*, 206*a*, it is said: "In all cases where a condition of a bond, recognizance, &c., is possible at the time of making of the condition, and before the same can be performed the condition becomes impossible by the act of God, there the obligation is saved." The law is stated, in similar terms, in *Roll. Abr.*, "Conditions" (G): "*Quid voilt excuser le per-*

formans dun condition." And is so declared by Story, 2 Equity Jurisprudence, sec. 1307.

Nelson, Ch. J., in *People* v. *Bartlett*, (3 Hill, 570,) states broadly that it is "a general principle of law that where the performance of the condition of a bond or recognizance has been rendered impossible by the act of God, or of the law, or of the obligee, the default is excused."

See, also, *People* v. *Manning*, (8 Cowen, 297,) *Carpenter* v. *Stevens*, (12 Wend., 587,) and *Wolfe* v. *Howes*, (20 N.Y., 197.)

The case of *Balduin* v. *N. Y. Life Ins. Co.* (3 Bosworth, 530) was upon a life policy; and Hoffman, J., in a very elaborate opinion, reviewing the authorities, held that "inability, short of absolute impossibility, may exempt a party from liability under a contract, if this inability results from the act of God."

This Court, in *Davis* v. *Gray*, (16 Wall., 230,) said:

"The rule of law is, that if a condition subsequent be possible at the time of making it, and becomes afterwards impossible to be complied with by the act of God, or the law, or the grantor, the estate having once vested, is not thereby divested, but becomes absolute."

Third. The Court may give relief upon equitable terms, which would be that the amount of the outstanding premium note be deducted from the insurance money.

The Court said in *Giddings* v. *Insurance Co.* (102 U. S. R., 111): "Where a condition is subsequent, and it is broken, relief may be given upon equitable terms." And in *Davis* v. *Gray* (16 Wall., 230) this doctrine was applied, and equitable relief was given by the Court, in the case of a condition subsequent the performance of which had become impossible.

II.

The Second Assignment of Error.

This involves the correctness of the decision of the Court below sustaining the demurrer to the third replication to the first and second special pleas of the defendant.

That replication sets up as an answer to those pleas the facts, that at the time the note matured, and for many years before, it had been the uniform usage and custom of the defendant to give notice of the day of payment, and in all its dealings with Thompson previously had adhered to the usage and custom, and had given him notice of the day when the notes fell due; but that on this particular occasion the defendant failed to give any notice, although it was known to the defendant that Thompson was sick; that Thompson was ready and willing to pay, had such notice been served as in previous cases, but that acting on said usage was deceived by want of such notice; and that the plaintiff in error had no notice of the existence of the said note, or when the same fell due, wherefore and whereby said note was not paid at maturity. (Record, p. 9.)

We respectfully submit that these facts constitute a good and sufficient answer to the defense founded on the non-payment of the note, and estop the defendant from insisting upon the forfeiture, if it could be claimed under the express letter of the contract, upon the principles lately affirmed by this Court in the case of *Insurance Company* v. *Eggleston*, (96 U. S. R., 577–580.)

It is not pretended, in this case, that the usage and custom set out in the replication was not truly stated; nor was it pretended that the agent had no authority to create such a custom, nor that the plaintiff had not relied upon the custom, or what this Court, in the case above cited, denom-

inates the "*course of action*," on the part of the Insurance Company.

By demurring to the replication, the defendant admitted all of its averments, and every logical legitimate inference to be deduced therefrom; and the Court below, it is submitted, should have allowed the facts averred in the replication to be proved before the jury in discharge of the forfeiture unjustly attempted to be insisted on by the defendant.

The facts set up in the replication amount to a charge of fraud upon the defendant; and we submit, under the principles adjudged by this Court in the recent case of *Insurance Co.* v. *Eggleston*, and decisions of State Courts of the highest respectability, hereafter cited, that it was not even necessary to aver in the replication that the omission to give notice to Thompson of the falling due of this note, was with fraudulent intent; and that it was sufficient to aver, as it is substantially averred, that the failure to pay the note was caused by a deception practiced by the defendant upon the assured.

If Thompson was deceived by the course of action of the company in notifying him of the maturity of the notes, and did not pay this note for want of the notice, and if the defendant knew that Thompson was sick, and did not give him notice for that reason, there was what Chief Justice Thompson calls "*cast of management or trickery to entrap the party into a forfeiture*," of which the company will not be permitted to reap the benefit. (Helme *v.* Phil. Life Ins. Co., 61 Penn. S. R., 107.)

It is a legitimate inference from the facts averred in this case that defendant's agent did not act with that fairness and candor which devolved upon him.

If he did not, it was a practical fraud upon the plaintiff, whether deliberately intended as such or not. (Insurance Co. *v.* French, 30 Ohio S. R., at page 252.)

The doctrine of the Supreme Court of Iowa in the case of *Mayer* v. *Mutual Life Ins. Co.*, (38 Iowa, 305,) has been since substantially approved by this Court in *Insurance Co.* v. *Eggleston.*

In the former case, from Iowa, it was held that if it was the custom of the defendant's agent to advise parties insured when their premiums became due, and such had been the custom, in reference to the plaintiff, and if there was a failure to pay the premium at the proper time, by reason of want of such notice, the company remained liable, notwithstanding a provision declaring the policy void in the event of non-payment of premium when due.

The observations of Daly, J., in that case, are in harmony with the views recently expressed by this Court. He said:

"The vast increase in the business of insurance, and the many interests it involves, have demonstrated that many of the decisions heretofore made respecting it are unwise, and have created a necessity for innovation. Every law should be reasonable, and it is reasonable only when adapted to human conduct. Courts should not so administer the law as to require of individuals a course of conduct which to a majority of reasonable and right-minded men is unusual and unnatural. Indeed it would be impossible long to maintain a law which is at variance with the judgment and sense of justice of a majority of those on whom it operates.

"Now, it must strike every reasonable mind that a majority of ordinarily prudent persons, who had been customarily notified of the time when premiums on their policies became due, and who had received no notice of an intention to abandon the customary course, would, in a particular case, expect and await a like notice. And if such is the reasonable and natural result of the previous dealing of the company, *it must govern its future conduct so as to accord with the reasonable expectation thus created.* That is, having furnished a policy holder reasonable ground for expecting that he will be advised when his premium be-

came due, the *company must continue to give such notice, until it furnishes the assured notice that he need no longer expect it.* Any other construction would make the law a trap to ensnare the unwary. For a person thus accustomed to notice, and not to charge his memory with the day when his premium became due, would be very likely, in the absence of notice, to allow the day for making payment to pass by in utter forgetfulness of the premium, or to suppose that the local office had received no instruction from the general office of the amount due, and hence was not ready to receive it."

The decision of the Supreme Court of Pennsylvania in *Helme* v. *Philadelphia Life Insurance Company* (61 Penn. S. R., 107) proceeds upon similar reasoning.

The policy there was forfeited for non-payment of the premium *ad diem*, and the money was subsequently refused, and suit was brought to recover back the premiums.

It was proved that on former occasions notice had been given to the plaintiff before the premiums became due, but that they had not done so with regard to the premium in question.

Plaintiff offered also to prove that "it is the custom among Insurance Companies to receive premiums, if tendered, at any time within thirty days of the time they fell due, provided the insured is in good health."

The Court below overruled this offer, and *directed a non-suit.*

The Supreme Court reversed the judgment. Thompson, Ch. J., said:

"*If it was the practice of the company to notify the plaintiff of the times her premiums were due and payable, and omitted on the occasion of the default;* or if they so dealt with her as to induce a belief that the clause of forfeiture would not be insisted on in her case, in case of a dereliction of payment at the day, and it was declared that the only risk she ran in not paying at the precise time was death occurring in the interval of non-payment of over-due premiums, and

thus put her off her guard, they ought not to be permitted to take advantage of a default which they may themselves have encouraged.

"That was an aspect of the case in proof upon which the jury should have been allowed to pass. In transactions of this nature, it is easy to mislead by pretense of liberality, if followed by entire strictness in practice, and *the only cure for this is the inquiry by the jury whether the party has been misled by the former.* If so, it is a fraud on the party's rights, which ought to be condemned and redressed. In this manner a waiver of strictness may take place, and it is not to be doubted that the company may waive defective compliance with the rules of insurance. Forfeitures are odious in law, and are enforced only where there is the clearest evidence that that was what was meant by the stipulation of the parties. *There must be no cast of management or trickery to entrap the party into a forfeiture.*"

The recent decision of the Supreme Court of Missouri, in *Hanley* v. *Life Association of America*, (69 Mo., 380,) is founded on the same principles. It was there held, "if a Life Insurance Company by its *course of dealing* with a policy holder *leads him to believe* that the strict terms of the policy touching prompt payment of premiums will not be insisted on, and he dies without having paid the premium, and before any forfeiture or commutation has been declared, the company cannot afterward treat the policy as forfeited or commuted."

The Court decided that literal compliance with the condition as to punctual payment might be found by the jury to have been *waived*, upon evidence showing it had not been the *practice* of the company to exact prompt payment of premiums.

It will be clearly seen, as has been said, that the decision of this court in the case of Insurance Co. *v.* Eggleston (96 U. S. R., 577) is in the spirit of these adjudications.

Mr. Justice Bradley, in that case, said:

"Any agreement, declaration, or *course of action*, on the

part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to *estop* the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract. The company is thereby estopped from enforcing the forfeiture.'

In that case the company had been in the habit of notifying the insured where and to whom to pay his premiums, but had omitted to give such notice prior to the maturity of the last instalment, and the failure to pay that premium was due to the want of such notice.

The Court held that there was a *general understanding produced by the previous course of business pursued by the company*, and that the party had a reasonable cause to rely on having the notice, in accordance with that understanding.

There was no fraud charged upon the company, and no intended deception was practiced or imputed.

The non-payment was simply caused by the failure of the company to give the customary notice, which was not *intended* to mislead the insured, though it had the *effect* of misleading him, and he had the right to say, under the circumstances, that he had been misled.

The present case seems to be a much stronger one for the application of the doctrine laid down by this Court in *Eggleston's case.* For here the company *knew* that the insured was sick, and might possibly die with the premium in default, and it was, therefore, especially bound in honesty and good faith, knowing that he was relying on the general understanding that notice would be given, to comply with that understanding in this particular instance. And if Thompson was ready and willing, as the pleas allege he was, to pay had the usual notice been given him, the failure to pay was solely due to this deliberate omission of the company; and certainly, under these circum-

stances, it should be held estopped from taking advantage of its own wrong, which in fact and law produced the very forfeiture attempted to be asserted.

The New York Court of Appeals, in *Leslie* v. *Knickerbocker Life Ins. Co.*, (63 N. Y., p. 27,) say:

"One who by the terms of a contract is entitled to a forfeiture thereof to his own benefit, on the occurrence of a certain fact or omission, which may be prevented by action taken in time, by the other party to the contract, may not intentionally so act as to put the other off his guard, and induce him to refrain from preventive action. A forfeiture so induced will not prevail, if the party in technical default, with reasonable speed, performs or offers to perform the omitted act. It is a fraud and deceit upon the party thus to put him off his guard, which may not prevail to destroy his rights."

The plaintiff in her replication, in this case, averred that her husband was deceived by a failure to give the notice; and he was consequently put off his guard, and, therefore, the note was not paid; and the demurrer to the third replication should have been overruled, and it should have been left to the jury to say whether or not such fraud and deceit had been practiced, by the defendant, as threw Thompson off his guard, and induced the forfeiture.

III.

The Third Assignment of Error.

This relates to the ruling of the Court below sustaining the demurrer to the fourth replication to the pleas, which sets up "that on the 24th day of January, 1874, the policy was renewed and entered in full force for one year, to wit, until January 24, 1875; that said note was for the balance of the premium for that year, which defendant agreed should be deferred, and paid as set out in said note; that

by said agreement said policy was not to become void on the non-payment of the note alone at maturity, as alleged in said plea, but was to become void at the instance and election of said defendant; and that the defendant *did not elect to cancel said policy, or take any steps to avoid it, or give any notice of such intention, during the life of said John Y. Thompson, or since, and still holds said note against said estate of said Thompson.*" (Rec., p. 9.)

The demurrer interposed to this replication involves the question discussed at length in the previous argument on the first assignment of error, as to the nature and character of the condition in the policy in reference to the payment of the note at maturity; whether, under the whole contract of the parties, and the circumstances of the case, it is to be deemed a condition precedent, forfeiting and extinguishing the policy absolutely on non-performance, or a condition subsequent operating by way of defeasance, the breach of which worked no forfeiture unless the defendant chose to take advantage of it.

The principle is clear, that a mere failure to perform a condition subsequent does not divest the estate, or affect the obligation to which it is annexed. The grantor or promisor may not choose to take advantage of the breach, and until he does so, there is no forfeiture of the estate or the contract. The estate is absolute, the contract subsists in full force, and is operative, unless itself, at the proper time, subsequently avoided. (4 Kent, 126; Nicoll *v.* N. Y. & E. R. R. Co., 12 N. Y., 130; Newington *v.* Levy, *supra*, 5 L. R. C. P., 611.)

The fourth replication alleged that the payment of the note was not a condition precedent, as averred by defendant, but that the policy was to become void at the instance and election of defendant, who did *not elect* to cancel the policy, or take any steps to avoid it, or give any notice of an intention to avoid it, during the lifetime of the assured, or after his death, but still held the note against his estate.

If the true construction and effect of the contract are such as we claim, the replication shows that the policy was in full force and effect at the time of the decease, and at the time the suit was brought, and the plea was pleaded; and the demurrer should have been overruled.

In his opinion, on this branch of the case, the only authority cited by the learned Circuit Judge was the decision of the lower court in the case of *The Mutual Benefit Life Ins. Co.* v. *French*, (4 Bigelow Life and Accident Ins. Reps., 319.) But that case was afterward appealed to the Supreme Court of Ohio, and the rulings of the lower court were departed from to a considerable extent, although the same conclusion was reached. (Ins. Co. *v.* French, 30 Ohio St. Reps., 240.)

In the previous argument under the *first assignment of error*, we have quoted at length from the opinion of the Supreme Court of Ohio, in that case, which holds that a clause like that introduced into the note, in the present case, is not to be deemed a condition precedent, but a clause of defeasance, which was intended to be operative only if a forfeiture should be, in the proper time, established and proclaimed by the insurer.

The Court, in the case of *Insurance Company* v. *French*, adverted to the fact that the policy there did not contain a clause of avoidance for the non-payment of notes given for premiums, but except in that one particular that case and the case at bar are identical; and we are unable to see that the distinction referred to constitutes any difference between the cases.

The policy, in the case from Ohio, required punctual payment of the premium at the beginning of each year during its continuance; and the note there in question expressly stipulated that the *policy should be null and void* on non-payment of the note at maturity; and this was the contract of the parties, whether made in the note, or the policy, or in both. The fact that the clause was not ex-

pressly inserted in the policy, cannot make the slightest difference in the result. It in fact became a part of the policy after being inserted in the note, with the same effect as if it had been originally there.

We submit that the decision in the case from Ohio establishes the character of the condition in the policy, in the present case, as a condition subsequent, and not precedent, which was required to be taken advantage of by the defendant at the proper time, before any forfeiture could ensue.

The note here in question was for the last fractional part of premium for the year for which the policy was continued by the company. Even if the payment of that note was originally a condition precedent, it has been seen, from the authorities cited under the *first assignment of error*, (*supra*,) that the consideration for the renewal having been in part executed, it would be no longer competent for defendant to insist upon the non-payment of that note *ad diem* as the breach of a condition *precedent*, as the *breach can be compensated in damages*. The utmost right of defendant would be to claim that the condition was a *condition subsequent*, which it might elect to take advantage of or not. And this, we submit, must be deemed to have been originally the true intention of the parties in giving and receiving a promissory note for the portion of the premium.

We suppose, as has been observed, that the defendant had the *right*, if it chose, to sue upon that note, and was not bound to treat the policy as void; and if so, the policy was merely *voidable*—not void—and defendant was bound to avoid it before the death occurred, or before the end of the year, in order to claim a forfeiture of the policy.

It is submitted that the *whole* contract, as evidenced both by the note and policy, which was expressly continued in full force for a year, must be considered in determining the nature of any condition for forfeiture; that if the payment of the note can be held to be a *condition* at all,

and not merely an independent agreement, it must be deemed to have been intended as a condition subsequent, which required the defendant to elect to assert a forfeiture, in some unmistakable manner, before the death of the assured; and it must be held that, not having done so, it chose in effect to waive any forfeiture, and the obligation, under the policy, became absolute.

The Supreme Court of Illinois, in the case of *Teutonia Life Ins. Co.* v. *Anderson*, (77 Ill., 384,) held, in effect, that where the company takes a security for the premium, it must *declare a forfeiture*, or it will be presumed to rely on the security.

In that case the premiums were payable quarterly, and the payment was guaranteed by the "Bismark Bund." The Court said that, "on the failure to pay the premium due January 9, it was the *privilege* of the company to declare the contract of insurance forfeited, but *this it did not do.* We may presume it chose to carry the risk on the responsibility of the Bund under its contract. It could do so, if it chose; and, having adopted this course, after the death of the assured it was not in the power of the company to avoid its responsibility."

The fourth replication, therefore, which alleged that defendant did not elect to avoid the policy, or take any steps to avoid it, during the life of Mr. Thompson, or after his death, and still held said note against his estate, was a sufficient answer to the pleas, and should have been so adjudged by the Court below.

IV.

The Fourth Assignment of Error.

The fifth replication sets up that it was the general usage and custom adopted by the company, and practiced by it before and after making of said note, not to demand

punctual payment of such premium notes on the days they fell due, but to give days of grace thereon, to wit, for thirty days thereafter, and the said defendant had repeatedly so done with said Thompson and others; and it led said Thompson to believe and rely on such leniency in this case, and thereby said Thompson was deceived and said note not paid, and he did rely on it for such notice. (Record, p. 9.)

If it was the general usage and custom of the company to give days of grace—say thirty days—and by that "course of action" on the part of the company Thompson was deceived and did not pay his premium at maturity, the company could not declare a forfeiture on that ground alone. (Ins. Co. *v.* Eggleston, 96 U. S. R., p. 572; Hanley *v.* Life Association of America, 69 Mo., 382, *supra;* Howell *v.* Knickerbocker Life Ins. Co., 44 N. Y., 276.)

Before the thirty days of grace expired Thompson was dead. The course of action on the part of the company, in allowing days of grace, had prevented the payment of the note at maturity, and the act of God prevented the payment after maturity and within the thirty days. Was the payment of the premium within the thirty days of grace a condition precedent to the continuance of the policy, or was it a condition subsequent? The right had already vested, and it was the duty of the company to promptly elect whether it would claim its right of forfeiture and cancellation; and having failed to do so, it was liable. (Ins. Co. *v.* Eggleston, *supra;* Mutual Benefit Ins. Co. *v.* French, 30 Ohio, p. 247; Mutual Benefit Ins. Co. *v.* Hillyard, 37 N. J., 444.)

Thompson had paid his premium for the year, three-fourths of it in cash, and had given his note for the balance, and had his renewal receipt in his pocket, and died before the thirty days of grace allowed by the company for the payment of his note had expired. We submit that his right had so firmly vested under the policy that it could not

be taken away unless his administrator had been called upon to pay the note at the expiration of the thirty days of grace, and had refused. (Martine *v.* Ins. Co., 53 N. Y., at page 344.)

V.

The Fifth Assignment of Error.

The only other error assigned is the exclusion from the jury of evidence, under the issues joined, tending to prove the matters of facts set forth in plaintiff's several replications to the several pleas of the defendant, to which ruling of the Court the plaintiff duly excepted. (Rec., p. 11.)

The first replication to the first and second special pleas of the defendant was in effect a general replication, and was a joinder of issue on those pleas. (Code of Alabama, sec. 3001.)

Evidence of the character set forth in the special replications might have been sufficient to have satisfied the jury that the note given by plaintiff, maturing 24th October, 1874, was not intended by the parties, either the company or Thompson, to have been paid *ad diem*, and that it was not in fact such a note as was set up in the pleas; and if that were so, under the rules laid down in the authorities hereinbefore cited the mere non-payment of the note at maturity did not forfeit the policy.

It is respectfully submitted that the Court below erred in excluding from the jury the evidence offered by the plaintiff; and that the judgment should be reversed, and a *venire facias de novo* awarded.

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THOS. N. MACARTNEY,
Of Counsel for Plaintiff in Error.

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IN THE

Supreme Court of the United States.

No. 312.

RUTH ELIZA THOMPSON, Plaintiff in Error.

vs.

THE KNICKERBOCKER LIFE INSURANCE COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of Alabama.

Reported in 2d Wood's C. C. Rep., p. 547.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

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IN THE

Supreme Court of the United States.

No. 312.

RUTH ELIZA THOMPSON, Plaintiff in Error.

vs.

THE KNICKERBOCKER LIFE INSURANCE COMPANY, Defendant in Error.

The Plaintiff in Error, Ruth E. Thompson, is the widow of John Y. Thompson, who, on the 24th day of January, 1870, obtained from the Defendant in Error a policy of insurance upon his life, for the term of his natural life, for the benefit of his wife, the said Ruth E. Thompson.

Said policy contains a stipulation as follows:

"And the omission to pay the said annual premium on or before twelve o'clock, noon, on the day or days above designated for the payment thereof, or failure to pay at maturity any note, obligation, or indebtedness (other than the annual credit or loan) for premium or interest thereon, shall then and thereafter cause this policy to be void, without notice to any party or parties interested herein."

The policy also contains the following stipulation:

"And it is further provided that in case said company shall, at any time, accept a payment of premium upon this policy after the day when the same shall, by the terms

hereof, become due and payable, such acceptance shall not in any respect be deemed to enlarge the time for the payment of the annual premiums thereafter to become due upon this policy, or be deemed any evidence of a usage of said company to receive payments of premium after the same become due and payable by the terms of this policy."

On the 24th day of January, 1874, a note was given by said John Y. Thompson to the said company for a portion of the premium on said policy, which said note was as follows, viz:

"$109¼. 4341-6, 12-14. New York, Jan'y 24, 1874.

"Nine months after date, without grace, I promise to pay to the order of the Knickerbocker Life Insurance Company, One Hundred and Nine Dollars, at Mobile, Alabama, value received, in premium on policy No. 2331—42937, which policy is to be void in case this note is not paid at maturity, according to contract in said policy."

Said note was not paid at maturity, October 24th, 1874, and the said John Y. Thompson died on the 3d day of November, 1874, and before any tender was made to pay said note. The company refused to pay said policy, and hence this suit.

The Defendant in Error filed several special pleas, and the Plaintiff in Error filed several replications thereto, to which replications demurrers were interposed by Defendant in Error, and sustained by the Court.

All the questions in the case were presented by the pleadings. The bill of exceptions raises the same questions only.

The only exception taken was to the ruling of the Court in excluding evidence "tending to prove the matters of fact and things set forth in the several replications to the several pleas of defendant." The Court having held on demurrer these replications to be bad, their allegations constituted no part of the issue to be tried by the jury, and, therefore, no evidence to sustain them was admissible, and the Court properly excluded that offered by the plaintiff.

Upon these pleadings and the bill of exceptions the following questions arose.

The Plaintiff in Error claims that the company is liable:

1. Because the acceptance of said note by it was a *payment* or *settlement* of the premium and continued the policy in force until January 24th, 1875, and the payment of said note was consequently a *condition subsequent.*

2. That the said John Y. Thompson was, before and at the time said note fell due, prostrated by a fatal disease and was mentally and physically incapable of attending to business, and the Plaintiff in Error did not know of the existence of the note.

3. That it was the custom of said company to give notice to policy-holders of the day of payment of the annual premium, premium notes, &c., and failed to do so in this case.

4. That the agreement in the policy concerning forfeiture upon failure to pay premium notes, when due, does not mean that the policy was to be thereby absolutely void, but only voidable at the election of the company, and it did not elect to cancel the policy in question.

5. That it was the custom of the company not to demand punctual payment of premiums, premium notes, &c., but to give thirty days of grace thereon.

The Defendant in Error contends that it is not liable upon said policy, because:

1. Said policy contains an express provision that the failure to pay the premium, or note obligation, &c., for premiums, or interest thereon, when due, should cause the policy to be void, "without notice to any party or parties interested herein," and the note itself contains an express provision that if not paid when due the policy should be void, "according to contract in said policy," and, consequently, the payment of the premium or note, when due, is a *condition precedent* to a continuation of the policy, by the very express terms of the contract between the parties thereto.

2. That the illness and incapability of said John Y. Thompson, and the want of knowledge on part of Plaintiff in Error of the existence of said note was no excuse for non-payment, when due, and the policy expressly provides that it shall be void in such cases, "without notice to any party or parties interested herein," and the note refers to such stipulation in the policy by the words "according to contract in said policy."

3. That it is expressly provided in said policy that the acceptance by the company of a payment of premium upon the policy after the day when due, such acceptance shall not be deemed to enlarge the time for the payment thereof, or be deemed any evidence of a usage of the company to receive such payments after they become due.

4. That the replication does not aver that the custom of giving notice to policy-holders when payments would be due, and the failure to give notice in this case were fraudnently intended to throw those interested in the policy off their guard.

5. That the replication does not aver that it was the custom of the Defendant in Error to consider itself bound for thirty days after default in payment of premium, even in case of the death of the assured within that time.

6. That the replication does not aver that the assured paid the premium within thirty days after it become due and payable, and before his death.

ARGUMENT.

The prompt payment of premiums is the very *essence* of contracts of Life Insurance, and the company has a right to insist upon the performance of this covenant upon the day named as a *condition precedent* to the continued existence of the policy.—

May on Ins., 406.

Bliss on Life Insurance, 253 to 274.
Robert vs. New England Mutual Life Ins. Co., 2 Disney, 106. (2 Bigelow, 141.)
S. C. 1 Disney, 355. (1 Bigelow, 134.)
Pitt vs. Berkshire Life Ins Co., 100 Mass. 500 (1 Bigelow, 284.)
Patch vs. The Phœnix Mutual Life Ins Co., 44 Vt., 481. (3 Bigelow, 777.)
Russum vs. St. Louis Mutual Life Ins. Co., 3 Central L. J., 275. (5 Bigelow, 243.)
Want vs. Blunt, 12 East., 183. (2 Bigelow, 201)
Beadle vs. Chenango Ins. Co., 3 Hill, 161.
Phœnix Life Ins. Co. vs. Sheridan, 8 H. L. Cas., 745. (2 Bigelow, 583.)
Caton vs. The American Life Ins. and Trust Co., 4 Vrbom, 487. (1 Bigelow, 336.)
Anderson vs. St. Louis Mutual Life Ins. Co., 3 Central L. J., 354. (5 Bigelow, 527.)
Howell vs. Knickerbocker Life Ins. Co., 3 Robertson (N. Y.) 232. (1 Bigelow, 578.)
Roehmer vs. Knickerbocker Life Ins. Co., 4 Daly (N. Y.,) 512. (4 Bigelow, 278.)

If an Insurance Company elect to accept a note for part of premium, and insists upon its prompt payment, or upon prompt payment of interest in advance, this does not change the situation of the parties to the contract, and the payment of the premium note at maturity, or the interest in advance, is as much a *condition precedent* as the payment of a cash premium where no arrangement is made about giving notes for part of premium. It is a proviso for the *benefit* of the insured.—

Patch vs. Phœnix Mutual Life Ins. Co., *supra.*
Wall vs. Home Ins. Co., 36 N. Y. 157.
Robert vs. New E. Mutual Life Ins. Co., *supra.*
Pitt vs. Berkshire Life Ins. Co., *supra.*
Williams vs. Republic Ins. Co., 19 Mich., 469.
Russum vs. St. Louis Mutual Life Ins. Co., *supra.*
Anderson vs. St. Louis Mutual Life Ins. Co., *supra.*

The fact that the assured, John Y. Thompson, was prostrated by fatal illness, and was mentally and physically incapable of attending to business, or of knowing of the existence of said note, is no excuse for not making prompt payment of it; nor were any party or parties interested in the policy entitled to any notice of the day of payment.—

Howell vs. Knickerbocker Life Ins. Co., *supra.*
Robert vs. New E. Mutual Life Ins. Co., *supra.*
Roehmer vs. Knickerbocker Life Ins. Co., *supra.*

The parties should be held strictly to the contract they have made.—

Sparks vs. Liverpool Water Works Co., 14 Ves., 428.
Robert vs. New E. Mut. Life Ins. Co , *supra.*
Pitt vs. Berkshire Life Ins. Co., *supra.*
Howell vs. Knickerbocker Life Ins. Co., *supra.*

And the contract made by the parties thereto should be construed according to its plain meaning as expressly set forth upon the face of the contract itself, without searching for an intent not expressed, and wholly different from the plain express meaning. Nor can a contract which the parties intended to make but did not make be set up in the place of one which they did make but did not intend to make.—

Chitty on Con. p. 74, N. 1.
Sanford vs. Howard, 29 Ala., 684.

The parties to the contract in the case at bar have expressly stipulated that upon the failure to pay any premium or premium note, when due, the policy shall be void, without notice to any party interested therein. It is also expressly stipulated that the acceptance by the company of a payment of premium upon the policy after the day when due, such acceptance shall not be deemed to enlarge the time for the payment thereof, or be deemed any evidence of a *usage* of the company to receive such payments after they become due. Shall these *express* stipulations of the contract be entirely disregarded in its construction? There is no rule of law better settled than that a contract must be construed

as a whole, and that every part thereof must be *considered* in its construction.

Even if there was a custom or usage of the company to allow thirty days of grace within which to pay premiums, this would be but a mere matter of convenience to the policy-holder—a usage for his benefit. If the assured were to die after the day when the premium or premium note become due before it was paid, and within thirty days from the day of such default, the company is not liable on the policy, although a tender of payment was made within the thirty days but after the death of the party whose life is insured. There is no contract in existence after failure to pay the premium, or premium note, and a tender after death can not *revive* or *make* one between the company and the dead person.—

The Mut. Benefit Life Ins. Co. vs. Ruse, 8 Ga., 534 (1 Bigelow, 83.)

Want vs. Blunt, *supra.*

Simpson vs. The Accidental Death Ins. Co., 2 Com. B. (N. S.), 257 (2 Bigelow, 497).

Pritchard vs. Merchant's and Tradesman's Mut. Life Assur. So., 3 Com. B. (N. S.), 622 (2 Bigelow, 544).

Acey vs. Femie, 7 Mees. and Wels., 151 (2 Bigelow, 266).

In the case of Roehmer vs. Knickerbocker Life Ins. Co., *supra*, where the contract between the parties was very much like the one in the case at bar, it was held that a tender the very next day after the note fell due, and during the life of the assured, was unavailing and did not save the policy from forfeiture.

In the above case, the Court only did what we insist upon in the case at bar; and that is to give effect to the express contract entered into by the parties thereto.

The replication does not aver that it was the custom of Defendant in Error to consider itself bound for thirty days after default of payment of premium or premium note, even in case of the death of the assured within that time; nor does it aver that the premium or premium note was paid within

thirty days after the time when due and payable and before the death of the assured. This renders it bad in that respect, under the authorities just above cited.

Even if it should be held that notice of the day of payment of premium or premium note ought to have been given to those interested in the policy, still we insist that it should have been averred in the replication that the custom to give notice and the omission were fraudulent and for the purpose of throwing the party off his guard.—

Leslie vs. Knickerbocker Life Ins. Co., 5 Thomp. & C., (N. Y.) 193. (5 Bigelow, 300.)
Roehmer vs. Knickerbocker Life Ins. Co., *supra.*
Appleman vs. Fisher, 34 Md., 563.

An admission in the policy that the premium has been paid, or the giving of a receipt acknowledging the payment of premium, will not change the rights and duties of the parties or preclude inquiry into the real facts.—

McCrea vs. Purmart, 16 Wend , 460.
Robert vs. New E. Mutual Life Ins. Co., *supra.*
Slaughter vs. Hamm, 2 Ohio, 271.
1 Gen'l Ev., § 26.

The rule of strict construction of the contract made by the parties was carried further in the case of Robert vs. N. E. Mutual Life Ins. Co., *supra*, than is asked by the Defendant in Error in the case at bar.

In that case it does not appear that there was any stipulation on the face of the note that the policy should be void if it were not paid when due, while in the case at bar there is such a stipulation set forth in the note, with the additional words, "according to contract in said policy." And further, it does not appear that the policy in that case contained any stipulation to the effect that the policy should be void upon the failure to make prompt payments "without notice to any party or parties interested herein."

The case of Mutual Benefit Life Ins. Co. vs. French, 2 Cincinnati Superior Court Rep., 321 (4 Bigelow, 369) also reported, on appeal, in 30 Ohio, 240, and relied on by Plaintiff's Counsel, does not militate against our position that the pay-

ment of the note when due is a *condition precedent* to the continuance of the policy. In that case, as reported in the Cincinnati Superior Court, it is said by the Court that "had this note been taken in pursuance of any stipulation of the policy, or rules or laws of the company authorizing it as a method of paying the annual premium, it would then have been a *condition precedent* to the continuance of the policy, and, upon non-payment when due, the policy would have ceased and determined."

This case is affirmed by the Supreme Court Commission of Ohio, and in the opinion of the Court, 30 Ohio, at the top of page 247, it is said that "in most of the cases which have been cited in argument the policy contained a clause, that it should be void upon non-payment of the premium, or any note given for such premium. This policy, however, contains no clause of avoidance for the non-payment of notes given for premium." Thus it appears from the very language of the Court, both in the lower Court and in the Supreme Court, that, while the company was held liable in that particular case, they fully recognized the principle for which we contend.

The contracts between the parties, the facts and circumstances of that case, are very different from the case at bar. There the terms of the policy provided that, when the annual premium was over $50, only one-half should be paid in cash each year, and a note taken for the other half at six per cent. interest, the interest payable annually. The note was to be a basis for assessments to pay losses, it being a mutual company. The note, which was not paid at maturity, was given for a part of that portion of the premium which was required by the policy to be paid in *cash*. This credit was given to the insured on the *cash* part of the payment of the premium by the agent of the company, and at a rate of seven per cent. interest, a rate different from that provided for in the case of the regular credit notes.

The real question in the case was, whether the agent had authority to *settle* for the premium in this manner, or whether the company had ratified such *settlement*. If either of these facts existed there was, in effect, a new contract, and the

policy took effect notwithstanding the stipulations with regard to the manner of paying premiums set forth in the policy, or the stipulations about forfeiture set forth in the note. In other words, the policy became *vested* for the time covered by such *settlement* of premium, and, having *vested*, the payment of the note in question become and was a *condition subsequent.* Now, in the case at bar, the note was taken as a *method* of *paying* a part of the *annual premium.* The consequences of a failure to pay it when due are set forth, both in the policy and in the note. There is and can be no question of authority of agent or of ratification by the company. There is no room for construction, and the only duty which the Court has to perform is, to give effect to the plain express contract into which the parties have entered.

It will be seen, upon a careful examination of the cases growing out of the contract of life insurance, that the Courts have felt bound to give effect to the contract of the parties, and have not allowed themselves to be carried outside of the plain express meaning of the contract in search of abstract ideas of justice, or of imaginary theories of equity. They have construed each contract according to its *own terms*, and the facts and circumstances attending it. Now there are cases where there was room for construction. Such was the case in the cases of McAllister vs. New England Mut. Life Ins. Co., 101 Mass., 558 (1 Bigelow, 293), and of New England Mut. Life Ins. Co., vs. Hasbrook, 33 Ind., 447 (2 Bigelow, 27). In these cases, neither the first note (the one which matured first), nor the policy contained any stipulation about forfeiture of policy upon failure to pay note when due. The other note, however, contained such a stipulation. With this state of things before the Court, they might with some reason conclude that, as to the first note, the parties to the contract had intended that it should be a *payment* on account of premium within the terms of the policy. The difference in the notes themselves was a strong circumstance to look at in arriving at the intention of the parties. But, in such cases as Roehmer vs. Knickerboker Life Ins. Co., *supra*; Howell vs. Knickerbocker Life Ins. Co., *supra*; Robert vs. New E. Mut. Life Ins. Co., *supra*; and Pitt vs. Berk-

shire Life Ins. Co., *supra*, the Courts, in every instance, have held the parties up to the plain meaning of the contract entered into by them as expressly set forth therein.

In the case at bar, the contract between the parties is set forth as fully, completely and as clearly as it is possible to make it by means of human language. There is an express provision in the policy to meet every question raised by the Plaintiff in Error, and to destroy every theory advanced by her, upon which she bases her rights to recover. The note itself contains stipulations which can not be ignored, and it also refers to the policy. Both the note and the policy contain a stipulation that the policy shall be void in case the note is not paid at maturity, and the policy stipulates that the failure to make such payments, when due, shall cause the policy to be void "Without notice to any party or parties interested herein." There is no stipulation in the policy or note with regard to allowing thirty days of grace, or any days of grace; nor is there any language used therein which can be distorted into such a provision. But it is expressly set forth in the policy that the acceptance, by the company, of a payment of premium upon the policy after the day when due shall not be deemed to *enlarge* the *time* for the payment of premiums, or be deemed any *evidence* of a *usage* of the company to receive payments of premium after the same have become due and payable by the terms of the policy. In the face of such stipulations it cannot be maintained with any show of reason, that the payment of the note was a *condition subsequent;* that the Plaintiff in Error was entitled to notice of the day when the note became due and payable; that she ought to be allowed thirty days after maturity of the note in which to make payment thereof; that the prostrate condition of the assured, on the day the note became due and payable, was or could be any excuse for its non-payment; nor that she can invoke any custom of the company with regard to its not requiring or enforcing prompt payment of premiums or premium notes, when due.

Must it not be presumed that the parties interested in the contract knew of its express stipulations? How, then, can the Plaintiff in Error be heard to say that she has been de-

ceived by the manner in which the company dealt with its policy-holders, when the contract, under which she claims, so fully and clearly sets forth the *undertakings* of the company?

It is also provided in the policy that "neither this policy of insurance or renewal receipts of the same will be valid until the *actual payment of the premium;*" and the renewal receipts themselves contain a provision that "if said notes are duly paid on or before the maturity thereof, will complete the payment of the premium necessary to continue policy No. 2331 in force." They also contain a provision that if the notes are not paid when due the policy shall be void "without notice to the insured or the person for whose benefit said policy is issued, or whomsoever shall then be the lawful owner thereof."

From this it will be seen that the parties themselves have expressly set forth *how the notes* taken as part of the premium were *understood* by them. That the notes were to be considered as *payment* of the premium only "if said notes are duly paid on or before the maturity thereof."

When we take the policy, the note and the renewal receipts together we have not only a plain express contract between the parties, but also an express statement by them of what was their understanding of the contract into which they had entered. Will the Courts not give it effect?

We refer to the able opinion of Mr. Justice Woods, delivered in this case and reported in 2nd, Vol. of Woods Circuit Court Reports, page 547, as a correct exposition of the law governing the case. In that able and exhaustive opinion he carefully analyzes the case, and applies sound and safe principles of law to each and every point raised by the pleadings; and justly conceives that, either these principles must govern the case, or the contract of the parties must be disregarded, and the Court take upon itself the task of first making a contract for the parties and then of enforcing it.

WINFIELD S. LEWIS. J. F. Murphy
Attorney for Defendant in Error.
THOS. H. HERNDON,
Of Counsel for Defendant in Error.

14-261

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~325.~~ ~~79~~ 79

CALVIN H. HALE, HENRY WINSOR, CLANRICK CROSBY, SR., AND NATHANIEL CROSBY, JR., PLAINTIFFS IN ERROR,

vs.

DUNCAN B. FINCH.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF WASHINGTON.

FILED NOVEMBER 1, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 325.

CALVIN H. HALE, HENRY WINSOR, CLANRICK CROSBY, SR., AND NATHANIEL CROSBY, JR., PLAINTIFFS IN ERROR,

vs.

DUNCAN B. FINCH.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF WASHINGTON.

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1 *Writ of error.*

UNITED STATES OF AMERICA:

The President of the United States to the honorable the judges of the supreme court of Washington Territory, greeting:

CALVIN H. HALE, HENRY WINSOR, CLANRICK Crosby, sr., and Nathaniel Crosby, jr., plaintiffs in error,
vs.
DUNCAN B. FINCH, DEFENDANT IN ERROR.

Because in the records and proceedings, and also in the rendition of the judgment, of a plea which is in the said supreme court of Washington Territory, before you, between Calvin H. Hale, Henry Winsor, Clanrick Crosby, sr., and Nathaniel Crosby, jr., and Duncan B. Finch, a manifest error hath happened to the great damage of the said Calvin H. Hale, Henry Winsor, Clanrick Crosby, sr., and Nathaniel Crosby, jr., as by their complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy
2 justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said supreme court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 30th day of September, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] R. G. O'BRIEN,
Clerk of the Supreme Court of Washington Territory.

3 Allowed this 2d day of October, in the year of our Lord one thousand eight hundred and seventy-eight.

J. R. LEWIS,
Chief Justice Wash. Territory.
ROGER S. GREENE,
Associate Justice, W. T.

Returned and filed in the office of the clerk of the Supreme Court of the United States this day of , A. D. 1878.

Clerk.

4 TERRITORY OF WASHINGTON,
County of Thurston, ss:

I, R. G. O'Brien, clerk of the supreme court of Washington Territory, hereby certify that I received the annexed & foregoing writ of error on the second day of October, A. D. 1878, and in obedience thereto I have made and certified, and herewith transmit to the Supreme Court of the United States a true, correct, and complete transcript of the

record and proceeding upon which the said cause was tried in the supreme court of said Territory, and all things concerning the same, in this court, in the action wherein Calvin H. Hale, Henry Winsor, Clanrick Crosby, sr., and Nathaniel Crosby, jr., are plaintiffs in error, and Duncan B. Finch is defendant in error.

Witness my hand and the seal of said court, at my office at Olympia, this 10th day of October, A. D. 1878.

[SEAL.] R. G. O'BRIEN, *Clerk.*

5 TERRITORY OF WASHINGTON,
County of Thurston, ss:

Pleas before the supreme court of the Territory of Washington, holding terms at Olympia, in said Territory, at a term begun and holden on the second Monday of July, A. D. 1878, it being the 8th day of said month, before the honorable Joseph R. Lewis, chief justice, Samuel C. Wingard, esquire, associate justice, and Roger S. Greene, esquire, associate justice.

CALVIN H. HALE, HENRY WINSOR, CLANRICK Crosby, sr., and Nathaniel Crosby, plaintiffs in error,
vs.
DUNCAN B. FINCH, DEFENDANT IN ERROR.

Be it remembered that on the 31st day of May, A. D. 1878, a copy of a notice for a writ of error was filed in the office of the clerk of the supreme court, holding terms at Olympia, Washington Territory,
6 in the words and figures following, to wit:

TERRITORY OF WASHINGTON,
County of Thurston, in the Second Judicial District, ss:

In the district court of the second judicial district of Washington Territory, holding terms at Olympia for the counties of Thurston, Lewis, Mason, and Chehalis.

CALVIN H. HALE, HENRY WINSOR, CLANRICK Crosby, sr., and Nathaniel Crosby, plaintiffs in error,
v.
DUNCAN B. FINCH, DEFENDANT IN ERROR.

To Duncan B. Finch, the defendant above named, and R. G. O'Brien, esquire, clerk of said court:

You will please take notice that the said plaintiffs above named appeal from the judgment of the said district court of the second
7 judicial district of Washington Territory, holding terms at Olympia, in the county of Thurston, for the counties aforesaid, heretofore, on the 7th day of November, 1877, rendered against them and in favor of the defendant in a certain civil action, wherein Calvin H. Hale, Henry Winsor, Clanrick Crosby, sr., and Nathaniel Crosby were plaintiffs, and Duncan B. Finch was defendant, whereby and wherein it was considered and adjudged by the said district court "that the said plaintiff take nothing by their said action, and that the said defendant have and recover of and from the said plaintiffs the sum of thirty-

nine and $\frac{25}{100}$ dollars, his costs taxed in said action, and that execution issue therefor."

And the said plaintiff hereby take their appeal, and sue out their writ of error to remove the record, proceedings, order, decision and judgment in said action aforesaid to the supreme court of the Territory of Washington, to the end that the same may be heard; that divers errors, as is alleged, in said record, proceedings, orders, decision, and in the rendition of the judgment aforesaid appearing, to the manifest pre-
8 judice of the plaintiffs in error, may be corrected, and that justice may be done in the premises. The plaintiffs assign the following grounds of error:

First. The court erred in entertaining the motion to instruct the jury to find a verdict for the defendant.

Second. The court erred in sustaining said motion.

Third. The court erred in instructing the jury to find a verdict for defendant.

Fourth. The court erred in rendering judgment against the plaintiffs, and in favor of the defendant.

The writ of error herein will be prosecuted at the next regular term of the supreme court of Washington Territory, which said term will commence, to be held at Olympia, in the county of Thurston, in said Territory, on the second Monday in July, 1878, the same being the eighth day of said month.

The said clerk of the district court aforesaid will make out and
9 transmit to the clerk of said supreme court a certified copy of this notice, with the service thereon, that the same may be filed in the office of the clerk of said supreme court, and that a writ of error may issue according to law and the rules and practice of said supreme court.

WILLIAM STRONG AND
FRANK CLARK,
Attorneys for Plaintiffs in error.

Dated Olympia, May 31st, 1878.

I hereby accept service of the foregoing notice of appeal and writ of error this 31st day of May, A. D. 1878.

R. G. O'BRIEN,
Clerk of the Dist. Court, Second Jud'l Dist. W. T.

TERRITORY OF WASHINGTON,
County of Thurston, ss:

I, William Billings, sheriff of said county of Thurston, do hereby certify that, on this 31st day of May, A. D. 1878, I served the foregoing notice of appeal upon Duncan B. Finch, the defendant in error
10 therein named, by delivering to Joseph S. Allen, attorney of said Duncan B. Finch, personally, in person at Olympia, in said county of Thurston, Territory of Washington, a true copy of the same.

Olympia, May 31, 1878.

WILLIAM BILLINGS,
Sheriff of Thurston Co., W. T.

Fees, $2.20; service & return ; total, $2.20.

Received above fees of William Strong, att'y for plaintiff.

WM. BILLINGS,
Sheriff of Thurston County, W. T.

TERRITORY OF WASHINGTON,
Second Judicial District, ss:

I, R. G. O'Brien, do hereby certify that I am clerk of the district court of the second judicial district of Washington Territory, holding terms at Olympia, and do hereby certify that the writings annexed to this certificate are true copies of their respective originals on file and remaining of record in my office.

11 In witness whereof I have hereunto set my hand and affixed the seal of said court, at my office at Olympia, this 31st day of May, A. D. 1878.

[SEAL OF THE DISTRICT COURT.] R. G. O'BRIEN, *Clerk.*

(Endorsed on back:) District court, 2d jud'l district Wash. Territory, holding terms at Olympia. Calvin H. Hale et al., plaintiffs in error, v. Duncan B. Finch, defendant in error. Notice of appeal and writ of error to supreme court of W. T. Filed May 31st, 1878. R. G. O'Brien, clerk dist. court.

(Endorsed further:) In supreme court, Wash. Territory, July term, 1878. C. H. Hale et al. v. Duncan B. Finch. Notice of writ of error. Received and filed in supreme court May 31st, 1878. R. G. O'Brien, clerk. Strong and Clark, att'ys for plaintiff in error.

And therea ter, on the same day, a writ of error was issued in the words and figures following, to wit:

12 *Writ of error.*

In the supreme court of Washington Territory, of the July term, 1878.

CALVIN H. HALE, HENRY WINSOR, CLANRICK Crosby, sr., and Nathaniel Crosby, plaintiffs in error,
vs.
DUNCAN B. FINCH, DEFENDANT IN ERROR.

The President of the United States to the honorable judge of the district court of the Territory of Washington, for the second judicial district, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court before you, in a suit between Calvin H. Hale, Henry Winso r, Clanrick Crosby, sr., & Na thaniel Crosby, plaintiffs, and Duncan B. Finch, defendant, a manifest error hath happened, as is said, to the great damage of the said plaintiffs: We being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send a perfect transcript of the record in said suit, or so much thereof as the said plaintiff in error in writing in his notice of taking this writ has directed, and also append to said transcript a copy of the notice of suit in error herein, and of the supersedeas bond herein, if any, to the supreme court of Washington Territory, together with this writ, so that you have the same at Olympia on the second Monday of July, A. D. 1878, it being the eighth day
13 of said month, in the said supreme court to be then and there held, so that having the same in the said supreme court the said

supreme court may cause further to be done therein what of right and according to the laws of the land ought to be done.

Witness the honorable Joseph R. Lewis, chief justice of the said supreme court, and the seal of said court, this 31st day of May, A. D. 1878.

[SEAL.] R. G. O'BRIEN, *Clerk.*

(Indorsed:) No. . In the supreme court of Washington Territory. Calvin H. Hale et al., plaintiff' in error, vs. Duncan B. Finch, defendant in error. Writ of error. Returned and filed June 12th, 1878. R. G. O'Brien, clerk. Wm. Strong & F. Clark, attorneys for plaintiff in error.

14 TERRITORY OF WASHINGTON,
County of Thurston, ss:

I, R. G. O'Brien, clerk of the district court of the second judicial district of Washington Territory, hereby certify that I received the annexed writ of error on the 31st day of May, A. D. 1878, and in obedience thereto I have made and certified, and herewith transmit to the supreme court of Washington Territory, a true, correct and complete transcript of the record and proceedings and all things concerning the same in this court, in the action wherein Calvin H. Hale, Henry Winsor, Clanrick Crosby, sr., and Nathaniel Crosby are plaintiffs, and Duncan B. Finch is defendant.

Witness my hand and the seal of said court this 12th day of June, A. D. 1878.

{ SEAL OF THE DISTRICT COURT, 2D JUD'L DIST. W. T. } R. G. O'BRIEN, *Clerk.*

15 And thereafter, on the 12th day of June, A. D. 1878, plaintiffs in error, returned and filed in this supreme court the foregoing writ of error, accompanied by the certificate of the clerk of the district court of the second judicial district, and the transcript of the record and proceedings had in said cause in said district court, in the words and figures following, to wit:

16 THE TERRITORY OF WASHINGTON,
County of Thurston, ss:

Pleas before the district court of the second judicial district, holding terms at Olympia, at a term begun and holden on the day of November, A. D. 1875, before the honorable Roger S. Greene, judge of said district. * * *

CALVIN H. HALE, HENRY WINSOR, CLANRICK Crosby, sr., and Nathaniel Crosby, jr., plaintiffs,
v.
DUNCAN B. FINCH, DEFENDANT.

Be it remembered, that on the 11th day of August, A. D. 1875, a complaint was filed in the office of the clerk of the district court of the second judicial district, holding terms at Olympia, in the words and figures following, to wit:

17 *Complaint.*

TERRITORY OF WASHINGTON,
County of Thurston, ss:

In the district court of the second judicial district of Washington Territory, holding terms at Olympia, for the counties of Thurston, Lewis, Mason, and Chehalis.

CALVIN H. HALE, HENRY WINSOR, CLANRICK Crosby, sr., Nathaniel Crosby, jr., plaintiff,
v.
DUNCAN B. FINCH, DEFENDANT.

The above-named plaintiffs complain of Duncan B. Finch, the above-named defendant, and for cause of action alleges:

That during all the several times hereinafter named the plaintiffs were citizens of the United States and residents of the Territory of Washington.

That on and prior to the 23d day of November, 1867, they
18 were owners of a certain steamboat or vessel called and named the New World, then plying and being upon the waters of Puget Sound and those adjacent thereto.

That the legal title to said steamboat was in the said plaintiff Calvin H. Hale, who held the same for himself and the other plaintiffs who were part owners, and who together owned the whole of said steamboat for the common use and benefit of the plaintiffs according to their respective interests therein.

That on the said 23d day of November, 1867, and prior thereto, during all the time plaintiffs were such owners of the said steamboat they were bound in the sum of seventy-five thousand dollars liquidated damages to the Oregon Steam Navigation Company, the former owners of said steamboat, by a covenant and agreement in writing, that prior to the first day of May, A. D. 1874, the said stea mboat New World should not be run on any of the routes of travel on the rivers, bays, or waters of the State of California.

19 That at the several times in this complaint specified the defendant well knew all and singular the premises aforesaid.

That on or about the said 23d day of November, A. D. 1867, the said defendant, well knowing said premises, purchased of these plaintiffs, through the said plaintiff Calvin H. Hale, then acting for the other plaintiffs, as well as for himself, as was then and there at all times known to the said defendant, the said steamboat, and paid therefor the sum of fifty thousand dollars; and in further consideration of the sale of said steamboat to him for the said sum of fifty thousand dollars, which was less than the value of said steamboat, had the use of the same been unrestricted, the said defendant promised and agreed to and with these plaintiffs, through the said Calvin H. Hale, acting in his own name for the benefit of himself and the other plaintiffs, that the said steamboat "New World" should not thenceforth, at any time prior to the first day of May, 1874, run on any of the routes of travel on the rivers, bays,
20 or waters of the State of California, which said agreement and promise the said defendant hath not kept, but hath broken the same in this: That said defendant caused, suffered and permitted said steamboat New World to be taken to San Francisco, in the State of California, on or about the first day of October, A. D. 1868, and she was taken to the port of San Francisco, in said State of California, before the said first

day of May, 1874, and did run from and to the said port of San Francisco, upon the routes of travel on the rivers, bays and waters of the State of California, to wit, from on or about the first day of November, 1868, to said first day of May, 1874, contrary to and in violation of the said promise and agreement of the said defendant.

That soon after said steamboat commenced running on the waters of the State of California, as aforesaid, legal proceedings were commenced by said Oregon Steam Navigation Company against these plaintiffs on the covenant and agreement hereinbefore referred to, to recover
21 said sum of seventy-five thousand dollars; which said proceedings resulted, on or about the month of November, A. D. 1874, in a judgment against these plaintiffs for the sum of seventy-five thousand dollars and costs, which judgment these plaintiffs were compelled to pay, and did on or about the 13th day of April, A. D. 1875, pay and satisfy.

That by reason of the premises aforesaid, and the failure of said defendant to perform his promise and agreement as aforesaid, these plaintiffs have sustained damages in the sum of seventy-five thousand dollars, and in the further sum of about four thousand dollars as costs and expenses in defending said legal proceedings.

Wherefore plaintiffs pray that they may have and recover from the defendant the sum of seventy-nine thousand dollars, together with the costs and disbursements of this action.

B. F. DENNISON,
Attorney for Plaintiff.

TERRITORY OF WASHINGTON,
County of Thurston, ss:

22 Calvin H. Hale, being duly sworn, says that he is one of the plaintiffs in the above entitled action; that he has read the foregoing complaint and knows the contents thereof, and that he believes it to be true.

CALVIN H. HALE.

Subscribed and sworn to before me this 11th day of August, A. D. 1875.

JOSEPH H. HOUGHTON, *Clerk.*

(Endorsed on back:) District court, second judicial dist. Washington Territory, holding terms at Olympia. Calvin H. Hale et al., plaintiff, v. Duncan B. Finch, defendant. Complaint. Filed August 11th, 1875. Joseph H. Houghton, clerk. R. F. Dennison, att'y for plaintiff.

And thereupon, on the 11th day of August, A. D. 1875, a summons was issued in the words and figures following, to wit:

23 In the district court of the second judicial district of the Territory of Washington, holding terms at Olympia for the counties of Thurston, Lewis, Mason, and Chehalis.

CALVIN H. HALE, HENRY WINSOR, CLANRICK Crosby, jr., and Nathaniel Crosby, plaintiffs,
v.
DUNCAN B. FINCH, DEFENDANT.

Action brought in the district court of the second judicial district of the Territory of Washington, holding terms at Olympia for the counties of Thurston, Lewis, Mason, and Chehalis, and complaint filed in county of Thurston, in the office of the clerk of said district court.

To Duncan B. Finch, defendant:

In the name of the United States of America, you are hereby re-

quired to appear in an action brought against you by the above named plaintiffs in the district court of the second judicial district of the Territory of Washington, holding terms at Olympia, in Thurston County, for the counties of Lewis, Mason, Chehalis, and Thurston, and to answer the complaint filed herein (a copy of which accompanies
24 this summons) within twenty days (exclusive of the day of service) after the service on you of this summons, if served within this county, or if served out of this county, but within the second judicial district, within thirty days, or if served out of said district, then within sixty days, or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to recover from you seventy-nine thousand dollars as damages sustained by plaintiffs on breach of contract made by you on sale of the steamer New World, on the 23d day of November, 1867, as set out in said complaint, besides costs of suit. And you are hereby notified that if you fail to appear and answer said complaint as above required, the plaintiff will take judgment against you for the said sum of $79,000 and costs as aforesaid.

Witness Roger S. Greene, esquire, judge of the said district court, and the seal of the said court, this 11th day of August, A. D. 1875.

{ SEAL OF THE DISTRICT COURT, 2D JUD'L DIST., W. T. } JOSEPH H. HOUGHTON, *Clerk.*

25 (Endorsed on back:)

In the district court of the second judicial district, W. T. Terms at Olympia. Calvin H. Hale et al., plaintiff, v. Duncan B. Finch, defendant. Summons. B. F. Dennison, att'y for pl'ff. Filed this 12th day of August, A. D. 1875. Joseph H. Houghton, clerk.

OFFICE OF THE SHERIFF OF THURSTON COUNTY,
Territory of Washington.

I hereby certify that I received the within summons on the 11th
26 day of August, A. D. 1875, and personally served the same on the 11th day of August, A. D. 1875, by delivering to Duncan B. Finch, said defendant, personally, in the town of Olympia, county of Thurston, a copy of said summons attached to a certified copy of the complaint, dated this 11th day of August, 1875.

WILLIAM BILLINGS,
Sheriff,
Per I. V. MOSSMAN,
Deputy Sheriff.

TERRITORY OF WASHINGTON,
County of Thurston, ss:

I hereby certify that I served the within summons, and with said summons a copy of the complaint herein, by delivering to and leaving with the within named defendant, Duncan B. Finch, on the 11th day of August, A. D. 1875, at Olympia, in the county of Thurston, a copy of said summons and a copy of said complaint.

Dated this 11th day of August, 1875.

WILLIAM BILLINGS,
Sheriff,
By I. V. MOSSMAN, *Deputy.*

Sheriff's fees, $3.20.

27 And thereupon, on the 31st day of August, A. D. 1875, come

the defendant, by his attorneys, J. B. and J. S. Allen, and files his demurrer to the plaintiff's complaint, in the words and figures following, to wit:

TERRITORY OF WASHINGTON,
County of Thurston, ss:

Demurrer.

In the district court of the second judicial district of said Territory, holding terms at Olympia for the counties of Thurston, Lewis, Mason, and Chehalis.

CALVIN H. HALE, HENRY WINSOR, CLANRICK Crosby, sr., and Nathiniel Crosby, plaintiff',
vs.
DUNCAN B. FINCH, DEFENDANT.

Comes now the above named defendant, by J. B. Allen and J. S. Allen, his attorneys, and demurrs to the complaint filed herein, and for cause of demurrer says:

28 I. That the said complaint does not state facts sufficient to constitute a cause of action.

II. That there is a misjoinder of parties plaintiff, and he specifies the ground upon which his objection is taken to the said complaint, to wit: That Henry Winsor, Clanrick Crosby, sr., and Nathaniel Crosby are improperly joined as parties plaintiff, inasmuch as the title of the steamer New World was never in them, nor had they any legal interest in the said boat, or in the supposed promise or agreement.

III. That it appears by the face of said complaint that the contract therein set forth, for the alleged breach of which the said plaintiff in said complaint seek to recover judgment against said defendant, is and at all the times in said complaint mentioned was illegal and void, because in restraint of trade and against public policy.

29 IV. That said complaint does not show that the contract therein set forth, upon which said recovery is sought, was made upon or for any good, valuable, or legal consideration.

J. B. ALLEN AND J. S. ALLEN,
Attorneys for said Defendant.

(Endorsed on back:) District court, 2d judicial dist., Washington Territory. Terms at Olympia. Calvin H. Hale et al., plaintiffs, v. Duncan B. Finch, defendant. Demurrer. Filed August 31st, 1875. Joseph H. Houghton, clerk. J. B. Allen and J. S. Allen, att'y for defendant.

And thereafter, on the 23d day of November, A. D. 1875, in the district court of the second judicial district, at the November term, A. D. 1875, the following proceedings were had:

TUESDAY, *November 23d*, 1875.

* * * * * * *

CALVIN H. HALE ET AL., PLAINTIFF,
v.
30 DUNCAN B. FINCH, DEFENDANT.

And now, on this 23d day of November, 1875, come the plaintiffs, by

B. F. Dennison, and comes the defendant, by J. B. Allen and J. S. Allen, esquir's, his attorneys, and this cause coming on to be heard upon the demurrer to plaintiff's complaint, the same is argued by J. S. Allen, esquire, for defendant.

WEDNESDAY, *November 24th*, 1875.

* * * * * * *

CALVIN H. HALE ET AL., PLAINTIFFS,
v.
DUNCAN B. FINCH, DEFENDANT.

And now, on this 24th day of November, 1875, this cause coming on for further argument upon the demurrer to plaintiff's complaint, the same is argued by B. F. Dennison, esquire, for plaintiff.

31 WEDNESDAY, *December 1st*, 1875.

* * * * * * *

CALVIN H. HALE ET AL., PLAINTIFF,
v.
DUNCAN B. FINCH, DEFENDANT.

And now, on this 1st day of December, 1875, the court being fully advised in the premises, the demurrer to the plaintiff's complaint is sustained.

And now comes the plaintiff, by B. F. Dennison, esquire, and moves the court for leave to amend his said complaint; whereupon it is ordered that he have leave to amend, and that he file his amended complaint by the coming in of court on Monday morning next.

And thereupon, on the 4th day of December, 1875, came the plaintiffs, by their attorney, B. F. Dennison, esquire, and filed their amended complaint in the words and figures following, to wit:

32 *Amended complaint.*

TERRITORY OF WASHINGTON,
County of Thurston, ss:

In the district court of the second judicial district of Washington Territory, holding terms at Olympia for the counties of Thurston, Lewis, Mason, and Chehalis.

CALVIN H. HALE, HENRY WINSOR, CLANRICK Crosby, sr., & Nathaniel Crosby, plaintiffs,
vs.
DUNCAN B. FINCH, DEFENDANT.

The above-named plaintiffs, in this their amended complaint, leave for that purpose of the court being first had and obtained, for cause of action against the above-named defendant respectfully shows to the court:

I. That on the first day of May, 1864, and for a long time previous and subsequent thereto, the California Steam Navigation Company
33 was and still is a corporation duly formed and existing under the

laws of the State of California, and was engaged, by the use of steam and other vessels, in the transportation for hire of passengers and freight on the several routes of travel on the rivers, bays, and waters of the State of California.

II. That on the said first day of May, 1864, and prior thereto, and subsequent thereto, down to the present time, the Oregon Steam Navigation Company was, has been, and still is a corporation formed, existing, and duly organized under the laws of the State of Oregon, and during all said period of time has been engaged with a large number of steamboats in the transportation for hire of freight and passengers on the waters of the Columbia River and its tributaries, in the State of Oregon and Territory of Washington.

III. That on said first day of May, 1864, the said California
34 Steam Navigation Company, among sundry other vessels then owned and employed by the said corporation in the navigation of the said waters of the said State of California, owned a certain steamboat named the New World, which steamboat, then lying at the port of San Francisco, in the State of California, said California Steam Navigation Company then and there sold to the said Oregon Steam Navigation Company, for the sum of seventy-five thousand dollars, gold coin of the United States, and for the further consideration of a covenant and agreement then and there made and, in writing, entered into by the said Oregon Steam Navigation Company to and with the said California Steam Navigation Company, that the said Oregon Steam Navigation Company would not run or employ, or suffer to be run or employed, the said steamboat New World upon any of the routes of travel on the rivers, bays, or waters of the State of California for the period of ten years from the said first day of May, 1864, and the said Oregon
35 Steam Navigation Company then and there in said written agreement further stipulated that in case of a breach of the aforesaid covenant and agreement it would pay to the said the California Steam Navigation Company the sum of seventy-five thousand dollars in gold coin, as actual liquidated damages.

IV. That on the 18th day of February, 1867, the said the Oregon Steam Navigation Company, among other vessels it owned and employed in navigating the said Columbia River and its tributaries as aforesaid, then owned the said steamboat called the New World, which was the same vessel of that name which, on the first day of May, 1864, had been purchased of the California Steam Navigation Company by the said Oregon Steam Navigation Company, and which steamboat was then lying at the port of Portland, in the State of Oregon, the said steamboat having immediately after its purchase from the Cali-
36 fornia Steam Navigation Company by the Oregon Steam Navigation Company, on the first day of May, 1864, as aforesaid, being brought from San Francisco to the Columbia River, where ever since it had remained and been used in navigating said Columbia River and its tributaries, in the Territory of Washington and State of Oregon, and on said eighteenth day of February, 1867, the said Oregon Steam Navigation Company, at the city of Portland, in the State of Oregon, sold to the plaintiffs herein, the said steamboat the New World, for the consideration of seventy-five thousand dollars in gold coin, and for the further consideration of an agreement and undertaking which was then and there made, and in writing entered into, by the said plaintiffs, with one S. D. Howe and one A. R. Elder as their sureties, to and with the said Oregon Steam Navigation Company, in which said undertaking and agreement it was in substance and legal effect covenanted

37 and agreed by the said plaintiffs that the said steamboat New World should not, before the first day of May, 1874, be run on any of the routes of travel on the rivers, bays, or waters of the State of California; and the said plaintiff further stipulated in said agreement and undertaking that in case of any breach of their said agreement and undertaking they would pay to the said the Oregon Steam Navigation Company the sum of seventy-five thousand dollars in gold coin of the United States, as actual liquidated damages.

V. That at the time when the said Oregon Steam Navigation Company sold the said steamboat the New World to the plaintiffs as aforesaid, they, the said plaintiffs, were engaged in the navigation of the waters of Puget Sound and other waters adjacent thereto, and were in no wise engaged in the navigation of the waters of the State of California hereinbefore described.

38 VI. That immediately after their purchase of the said steamboat the New World, by the plaintiffs, from the Oregon Steam Navigation Company as aforesaid, they brought the said steamboat New World, to the waters of Puget Sound, and were engaged in navigating the waters of Puget Sound and the adjoining waters with said steamboat New World until they sold her to defendant, as is hereinafter set forth, and during all said period said steamboat New World did not run upon any of the waters of the State of California, or upon the Columbia Rivers and its tributaries.

VII. That on the 23d day of November, 1867, the defendant, then well knowing all and singular the premises, the plaintiffs, through Calvin H. Hale, then acting for the other plaintiffs and for himself, as was 39 then and there and at all times well known to the said defendant, at Olympia, in the Territory of Washington, sold to the defendant the said steamboat the New World, for the sum of fifty thousand dollars in gold coin, and for the consideration of an agreement and promise then and there made and entered into by the defendant to the plaintiffs, through the said Calvin H. Hale, acting in his own name, for the benefit of himself and the other plaintiffs, that the said steamboat New World should not thenceforth, at any time prior to the first day of May, 1874, run on any of the routes of travel on the rivers, bays, or waters of the State of California.

VIII. That the said defendant his aforesaid promise and agreement he hath not kept and performed, but hath broken the same in this, that the said defendant caused, suffered, and permitted the said steamboat the New World to be taken to San Francisco, and she was taken 40 from Puget Sound to the port of San Francisco, in the State of California, on or about the first day of October, 1868, and before the first day of May, 1874, and on and after the first day of November, 1868, up to the first day of May, 1874, the said defendant caused, suffered, and permitted the said steamboat New World to run upon the routes of travel on the rivers, bays, and waters of the State of California, and from and after the said first day of November, 1868, and at divers times thereafter, and prior to the first day of May, 1874, the said steamboat New World was run upon said routes of travel, and on said rivers, bays, and waters of the State of California aforesaid, contrary to and in violation of the said promise and agreement of said defendant.

IX. That on the 5th day of October, 1869, and after the said steamboat New World had commenced running on the routes of travel 41 on the rivers, bays, and waters of the State of California, as aforesaid, the said Oregon Steam Navigation Company, in the district

court of the second judicial district of Washington Territory, holding terms at Olympia, commenced an action against these plaintiffs and S. D. Howe and A. R. Elder, their sureties upon their said agreement and undertaking, hereinbefore (in the 4th article hereof) set forth, to recover of these plaintiffs and their sureties the sum of seventy-five thousand dollars, in gold coin of the United States, for an alleged breach of the covenant or agreement in said undertaking and promise of plaintiffs hereinbefore set forth. That the said Oregon Steam Navigation Company, in their complaint in said action so commenced as hereinbefore said against these plaintiffs and their said sureties, alleged that the agreement and promise so as aforesaid made by these plaintiffs, on or about the 18th day of February, 1867, had been broken by the
42 running, or suffering and permitting to run, the said steamboat the New World on the routes of travel on the rivers, bays, and waters of the State of California, from and after the first day of November, 1868, and prior to the first day of May, 1874, covering the same period of time, and being the same acts as are herein alleged as a breach of defendant's said agreement, made and entered into by him with these plaintiffs, as aforesaid, on the 23d day of November, 1867, and such proceedings were thereupon and thereafter had in said action that on the 11th day of December, 1874, by and before the said court, the said plaintiff in said action, the said the Oregon Steam Navigation Company, by the judgment and consideration of said court, recovered in said action the sum of seventy-five thousand dollars in gold coin of the United States, and costs amounting to the sum of sixteen and $\frac{55}{100}$ dollars, which judgment these plaintiffs were compelled to pay, and on or about the 13th day of April, A. D. 1875, did pay and fully satisfy.

43 X. That in defending said action these plaintiffs were compelled to expend and pay out for costs and expenses the sum of about four thousand dollars in gold coin.

XI. That plaintiffs have sustained damages by reason of the breach of his said agreement by said defendant, and by reason of the premises, in the sum of seventy-nine thousand dollars in gold coin.

Wherefore they pray that they may have and recover of the defendant the said sum of seventy-nine thousand dollars in gold coin, and their costs and disbursements herein.

B. F. DENNISON,
WM. STRONG, AND
FRANK CLARK,
Attorneys for Plaintiffs.

44 TERRITORY OF WASHINGTON,
County of Thurston, ss:

Calvin H. Hale, being first duly sworn, says that he is one of the plaintiffs in the foregoing action; that he has read the foregoing complaint and knows the contents thereof, and that he believes the same to be true; also that this verification of this complaint is made as well on the part of and for his coplaintiffs in said action as for himself.

CALVIN H. HALE.

Subscribed and sworn to before me this 4th day of December, A. D. 1875.

JOSEPH H. HOUGHTON, *Clerk.*

I hereby certify that I served a true and correct copy of the within and foregoing complaint, certified under seal of the 2d district court of

Washington Territory, holding terms at Olympia, by Joseph H. Houghton, clerk, on the defendant Duncan B. Finch, at Olympia, W. T.,
45 this 6th day of December, A. D. 1875, by delivering the same to his attorney of record in the case, John B. Allen.

WILLIAM BILLINGS,
Sheriff of Thurston County, W. T.

Sheriff's fees $1.20.

(Endorsed on back:) District court holding terms at Olympia. Calvin H. Hale, Henry Winsor, Clanrick Crosby, sr., Nathaniel Crosby, plaintiffs, v. Duncan B. Finch, defendant. Amended complaint. Filed December 4th, 1875. Joseph H. Houghton, clerk.

And thereupon, on the 16th day of December, A. D. 1875, came the defendant, by his attorneys, J. B. and J. S. Allen, and files his demurrer to the plaintiffs' amended complaint, in words and figures following, to wit:

46 *Demurrer.*

TERRITORY OF WASHINGTON,
County of Thurston, ss:

In the district court of the second jud'l district of Washington Territory, holding terms at Olympia, for the Counties of Thurston, Lewis, Mason, and Chehalis.

CALVIN H. HALE, HENRY WINSOR, CLANrick Crosby, sr., Nathaniel Crosby, plaintiff,
vs.
DUNCAN B. FINCH, DEFENDANT.

The above-named defendant, by his attorneys, J. B. and J. S. Allen, demurs to the amended complaint on file herein, for the reason that the same does not state facts sufficient to constitute a cause of action, and, among others, specifies the following causes of demurrer:

I. Because it appears upon the face of said complaint that the
47 covenant and agreement mentioned in article 3d of said amended complaint, and therein alleged to have been made by the said the Oregon Steam Navigation Company, was at all the times in said complaint mentioned, and now is, illegal and void, because in restraint of trade and against public policy.

II. Because it appears upon the face of said amended complaint that the agreement and undertaking mentioned and described in the 4th article of said amended complaint made by said plaintiffs was at all the times in said complaint mentioned, and now is, illegal and void, because in restraint of trade and against public policy.

III. Because it appears by said amended complaint that the agreement and promise in the 7th article thereof, set forth and made
48 by this defendant, was and is in restraint of trade, contrary to public policy, and void.

IV. Because it does not appear by said amended complaint that the said steamboat, the New World, therein mentioned, was at any of the times in said amended complaint mentioned, or at any time, run on any of the routes of travel on any of the rivers, bays, or waters of the State of California known, used, or existing at the time of the making of any

or all of the three foregoing alleged agreements or covenants in said amended complaint set forth.

V. Because it does not appear by said complaint that the said the Oregon Steam Navigation Company was ever compelled or ever did respond to the said the California Steam Navigation Company in damages by reason of its said alleged covenant and agreement with said corporation mentioned in the 3rd article of said amended com-
49. plaint, or by reason of any breach thereof, and because it does not appear that said the Oregon Steam Navigation Company has ever sustained any damage or injury by reason of the said alleged breach of defendant's said agreement and promise, or by reason of any act of this defendant.

VI. Because it does not appear by the said amended complaint that defendant had any notice of the alleged action against said *said* plaintiffs therein described, or that he ever had any rights, privilege, or oppertunity of defending said action.

50 VII. Because it appears from said amended complaint that plaintiffs' damage, if any they suffered, was in consequence of their alleged covenant made with the Oregon Steam Navigation Company mentioned in the said amended complaint, but is not therein alleged that this defendant undertook or agreed to save plaintiffs' harmless, or to indemnify them for loss or liability by reason of the breach of plaintiffs' alleged covenant with said the Oregon Steam Navigation Company.

VIII. Because it does not appear from said complaint that defendant undertook to pay the judgment, costs, and expenses, or either, in said amended complaint mentioned, or any judgment that might be recovered against plaintiffs' by reason of the breach of defendant's alleged agreement in said complaint set forth, or to reimburse plaintiffs any
51 expense incurred by reason of any judgment recovered against them.

Wherefore defendant prays that this action be dismissed at plaintiffs' costs.

J. B. & J. S. ALLEN,
Attorneys for Defendant.

(Endorsed on back:) In the dis't court. Calvin H. Hale et al., plaintiff, v. Duncan B. Finch, defendant. Demurrer to amended complaint. Filed December 16th, 1875. Joseph H. Houghton, clerk. Demurrer overruled 15th March, 1876. Greene.

And thereafter, on the 20th day of January, A. D. 1876, the parties herein, by their attorneys, filed their stipulation in words and figures following, to wit:

52 *Stipulation.*

In the district court of the second judicial district of Washington Territory, holding term at Olympia.

CALVIN H. HALE, HENRY WINSOR, CLANRICK Crosby, sr., and Nathaniel Crosby, plaintiffs,
v.
DUNCAN B. FINCH, DEFENDANT.

I. It is hereby stipulated by and between the parties to the above entitled action that *that* the said defendant have until thirty days next

prior to the first day of the April, 1876, term of said court in which to file his answer to the amended complaint on file in said cause.

II. That the demurrer now on file in said cause to said amended complaint be brought on for hearing and argument before his honor
53 Roger S. Greene, judge of said court, on the 10th day of February, A. D. 1876, at 10 o'clock a. m., or as soon thereafter as counsel may be heard, and that no further notice thereof than herein given shall be required.

ALLEN BROS.,
Attorneys for Defendant.
B. F. DENNISON,
Attorney for Plaintiffs.

JAN'Y 20TH, 1876.

(Endorsed on back:) District court. Calvin H. Hale et al., plaintiffs, v. Duncan B. Finch, defendant. Stipulation. Filed January 20, 1876. Joseph H. Houghton, clerk.

And thereafter, on the 15th day of March, A. D. 1876, the following action was had on the said demurrer, to wit:

CALVIN H. HALE ET AL., PLAINTIFFS,
v.
DUNCAN B. FINCH, DEFENDANT.

54 And now, on this 15th day of March, A. D. 1876, this cause having been brought on to be heard on the defendant's demurrer to the amended complaint, and the court having heard counsel, and being fully advised in the premises, the said demurrer is overruled.

And now comes the defendant, by J. B. Allen and J. S. Allen, esquires, his attorneys, and excepts to the ruling of the court in overruling said demurrer, which exception is allowed.

And thereupon, on the 17th day of March, A. D. 1876, came the defendant, by his attorneys, J. B. and J. S. Allen, and files his answer to the amended complaint filed herein, in words and figures following, to wit:

55 *Answer.*

TERRITORY OF WASHINGTON,
County of Thurston, ss:

In the district court of the second judicial district of Washington Territory, holding terms at Olympia for the counties of Thurston, Lewis, Mason, and Chehalis.

CALVIN H. HALE, HENRY WINSOR, CLANRICK Crosby, sr., Nathaniel Crosby, plaintiff,
v.
DUNCAN B. FINCH, DEFENDANT.

The defendant, by Allen Bros., his attorneys, comes, and answering the amended complaint filed herein—

I.

1. Denies that, on the 1st day of May, 1864, or at any time, the California Steam Navigation Company was engaged in transportation of freight and passengers on the several routes of travel on the
56 rivers, bays, and waters of the State of California.

2. Denies that the Oregon Steam Navigation Company was, on the 1st day of May, 1864, or at any time, engaged with a large number of steamboats in the transportation of freight and passengers in the waters of the tributaries of the Columbia River, in the State of Oregon and Territory of Washington.

3. He denies that on said 1st day of May, 1864, the steamboat New World was employed by the California Steam Navigation Company in the navigation of said waters of said State of California.

4. He denies that on the 18th day of February, 1867, the said Oregon Steam Navigation Company employed in navigating the Columbia River and its tributaries the said New World, nor had said boat
57 been, ever since it was brought from San Francisco to the Columbia River, used in navigating said Columbia River and its tributaries, in the Territory of Washington and State of Oregon. He denies that on that day the said Oregon Steam Navigation Company sold said steamer to the plaintiffs, or that the consideration of the sale was that alleged in the complaint, or that such agreement as is therein alleged was made by the said plaintiffs with the sureties, or in substance, or to the legal effect, or with the stipulations alleged in said amended complaint.

5th.

6th.

7th. He denies that on the 23d day of November, 1867, this defendant knew or was informed or had any notice of the matters alleged in the complaint touching the alleged agreements, covenants, and stipulations of the plaintiffs, or of the said Oregon Steam Navigation Company, or that the plaintiff Calvin H. Hale was then acting
58 for the other plaintiffs or any of them, or that the sale of said boat to the defendant was for the sum of fifty thousand dollars, and for the further consideration of an agreement and promise, as is alleged, or that there was any other consideration than the said fifty thousand dollars; and he denies that any promise or agreement was then and there, or at any time or place, made and entered into by the defendant to the plaintiffs, through the said Calvin H. Hale or otherwise, or that the said Calvin H. Hale was acting for the benefit of the other plaintiffs, or that this defendant ever promised or agreed to or with any person or persons, at any time or place, that the said steamboat New World should not thenceforth, at any time prior to the first day of May, 1874, run on any of the routes of travel on the rivers, bays, or waters of the State of California, or any other agreement or promise in any way or manner restrictive of the use of said boat.

59 8th. He denies that he hath not kept, or that he hath broken, any promise or agreement by him made to the plaintiffs, or either of them; and he denies that he caused, suffered, or permitted said steamboat New World to be taken to the port of San Francisco, or permitted her to run upon the routes of travel on the bays and waters of California (except so far as he acted in concert with the plaintiffs, and for their account and with their concurrence and consent); and he denies that the said steamboat New World, was at any time run upon said routes of travel or on said rivers, bays, and waters of the State of Cal-

ifornia, contrary to or in violation of any promise and agreement of this defendant.

9. This defendant has no knowledge or information sufficient to found a belief as to the truth of the obligations contained in the 9th paragraph of the amended complaint touching the institution, pleadings,
60 prosecution, and determination of the alleged suit of the Oregon Steam Navigation Company against the plaintiffs in this court on the judgment therein or the payment thereof, and therefore he denies said allegations.

10th. Defendant has no knowledge to found a belief whether the said plaintiffs in *in* defending said action were compelled to expend, or did expend or pay out for costs and expenses, the sum of about four thousand dollars in gold coin or any other sum, and therefore he denies the same; and on information and belief the defendant avers that the said action was collusive, and was brought and conducted to its close entirely at the cost and expense of the plaintiff therein, and no part of said judgment was paid in any other way than by the assignment of the cause of action in this suit.

11th. He denies that the plaintiffs have sustained any damages
61 by reason of the breach of the alleged or any agreement of this defendant, in the sum of seventy-five thousand dollars or any other sum.

II.

But this defendant avers that on the 23d of November, 1867, the plaintiff, Hale, was the sole owner of the New World, and this defendant and George S. Wright were the owners of and running the Eliza Anderson, and on or about that day, this defendant, acting for himself and Wright, entered into an agreement with said Hale to pay the debts of the New World, amounting to nearly ten thousand dollars, and to pay six notes given upon the purchase of said steamboat from the Oregon Steam Navigation Company, secured by a mortgage on said boat and amounting to thirty thousand dollars of principal, besides accrued interest, and that said Hale should execute a bill of sale of the New World to the defendant, and that thereafter the said Hale should be interested to the extent of one-eighth in the said steamers
62 New World and Eliza Anderson, and the profits of the business of this defendant and said Wright, which was the business of the said Eliza Anderson, for freight and passengers between Olympia and Victoria, in which water the two boats had theretofore been running in opposition to each other, and this agreement was carried into effect. The object of this agreement was to remove the said New World from said route, and it was understood that the New World was to be sold in San Francisco. In accordance with this agreement, and the better to subserve the interests of the said Hale and this defendant and Wright, the said boat was transferred by this defendant to said Wright and taken to San Francisco by said Wright some time in 1868, for the purpose of sale, with the full knowledge and consent of said Hale, and there sold by said Wright on joint account of the said Hale, Wright, and this defendant, of which sale the said Hale was then and
63 there fully informed and consented thereto. Some time after the arrangements with said Hale was made, he informed this defendant that C. Crosby was equally interested with him, and that he desired to sell his interest, and after the said sale was made and the said Hale fully informed thereof, this defendant also purchased his interest, and

this defendant avers that he has had no interest in the said New World since the said Hale ceased to be interested therein, and has had nothing to do with or respecting said New World except jointly with the said Hale.

III.

And for a further and separate answer and defense, this defendant alleges that the said steamer New World was, by and with the consent and approval of the said plaintiffs, transferred to George S. Wright, with the object, intent, and purpose that the said steamer New World should by him be taken or caused to be removed to the State of Cali-
64 fornia, and there sold without restraint of use or *or* employment, and it was understood and agreed between the plaintiffs and defendant and said Wright, that she should be removed to California and there sold, and in accordance with this understanding and agreement the said New World was removed to San Francisco in California, and the said Wright there entered into a contract with one James M. Ryder, contractor for building the California Pacific Railroad, terminating at tide water near Vallejo, in said State, and who was desirous of purchasing the said boat, solely to be used in connection with said railroad to ply between the said terminus near Vallejo and San Francisco aforesaid, a route which had not been before that time in use, for the sale of said boat. That after entering into such contract of sale, the said California Steam Navigation Company and the Oregon Steam Navigation Company gave notice to the said Ryder that said boat, or
65 her machinery, could not lawfully be run without their consent on said route, and they would prevent the running of said boat and her machinery on the waters of the State of California, and published a notice to that effect in some of the public newspapers published in the city and county of San Francisco. That thereupon the said Ryder, being requested to complete the contract, refused to do so because of such adverse claims and threats, and thereupon the said Wright instituted a suit in the district court of the fourth judicial district of the State of California in and for the city and county of San Francisco against the said Ryder, and in his complaint therein alleged the said contract or agreement of sale, his demand of performance, and the refusal, and prayed for a judgment requiring the defendant Ryder to perform the said agreement, and the said Ryder filed his answer, in which he did not deny the said agreement, demand of performance, and refusal, but set up the said contract between the said California
66 Steam Navigation Company and said Oregon Steam Navigation Company, made on the 2d day of May, 1864, setting forth a copy thereof, and the sale made by said Oregon Steam Navigation Company to Henry Winsor on the 18th day of February, 1867, setting forth a copy of the proviso or condition therein contained restricting her use, and alleging the bond made by plaintiffs to said vendors, and that said California Steam Navigation Company respectively threatened to prevent the said Ryder from running the said boat or her machinery on the said route. To which answer the plaintiff interposed a demurrer, specifying as the ground of said demurrer that said answer did not state facts sufficient to constitute a defense nor to bar plaintiff therein from being entitled to the judgment and relief there prayed for; and said cause came on to be heard on the complaint, answer, and demurrer to said answer, and after hearing argument, the cause having been sub-
67 mitted and duly considered, the court sustained said demurrer,

and the defendant declining to amend his answer or make any further or other answer, judgment final was entered in favor of the plaintiff, from which judgment the said Ryder took an appeal to the supreme court of the State of California, where the cause was argued by counsel and duly considered by the court upon its merits, and the judgment affirmed at the October term of the year 1868. And this defendant avers that of the commencement and pendency of said action the said California Steam Navigation Company and the Oregon Steam Navigation Company had due notice, and appeared and were heard by their counsel, learned in the law, both in the district court and in the supreme court, and after hearing such counsel it was adjudged and determined that the said several contracts, provisoes, stipulations, and bonds restrictive of the use of the said steamer New World were
68 in restraint of trade, against public policy, and void, and this defendant insists that all the parties to this suit as well as the said two corporations were privies to the said action and adjudication, and estopped to deny that said contracts, provisoes, and stipulations were against public policy, and void; and the said plaintiffs, when they were sued by the Oregon Steam Navigation Company upon their bond had full knowledge and notice of all and singular the matters hereinbefore set forth, and it was their duty to have set up the said adjudication in bar of the said action.

IV.

And for a further and separate defense this defendant alleges that the said steamboat New World is a side-wheel steamboat, with upright engine, side guards, with her principal passenger accommodation on the upper deck, not originally constructed for nor suitable for ocean navigation, but intended, fit, and constructed for river navigation, and before the sale thereof by the California Steam Navigation Company had been for more than ten years plying upon the
69 route from San Francisco to Sacramento, by way of the Sacramento River, transporting freight and passengers, for which trade she was well fitted, and when sold to the Oregon Steam Navigation Company she was purchased by them to be employed in navigating the Columbia River and its tributaries, and was so employed and used by said company, and the said boat was fit and convenient for that use, and there was no other use besides the navigation of the rivers, bays, and waters of the State of California or the Columbia River and its tributaries for which the said steamer was fit or convenient, or any other trade, employment, or business in which the said boat or her machinery could be employed to any profit or advantage or without actual loss. And defendant avers that said alleged agreement was in general
70 restraint of trade, and in effect operated to prevent the use of said steamboat at all. That the same was unreasonable and without any consideration to support it.

V.

And for a further and seperate answer this defendant avers, that at the time of the sale of said boat to James M. Ryder he was engaged as contractor in the construction of the California Pacific Railroad from tidewater on the straits of Mare Island to Sacramento, the capitol of the State of California, intended to form a route of travel between said Sacramento and the city of San Francisco by means of said railway and

a steamboat plying in connection therewith; and the said Ryder had the right of possession and the use of said road until its entire completion; that the said Ryder had constructed a wharf at the terminus of said road on said straits, with conveniences for the transaction
71 of the freight and passenger business, and the said road was at that time completed to Davisville, more than half way from the wharf to Sacramento, and with steamboat connection with San Francisco, and by stage with Sacramento, was the most speedy, certain, and convenient route for passengers between the city of San Francisco, which is the principal commercial centre of said State of California, and Sacramento, the capitol of said State; and the public interest was greatly subserved by the establishment and maintenance of said line; and there was no other steamboat on the waters of the Pacific coast of the United States which could be purchased by the said Ryder or the said California Pacific Railroad Company, fit, suitable, or convenient for said use, and the said route of travel was not in existence at the time of the making of the several sales by the said California Steam Navigation Company and the Oregon Steam Navigation Company, or at
72 any time before, nor until the building of said railroad; nor had it ever been used or employed by either companies, and the use of a steamer was essential to carry out the purpose of the construction of the said road, and for the sole purpose of using the said steamboat to ply upon the route between the terminus of said railroad and San Francisco she was sold to and bought by said Ryder, and was, after being refitted, placed on said route, and has never been employed or used on any other.

VI.

And for further and seperate answer defendant alleges that the said supposed agreement, alleged to have been made by this defendant, is an agreement that by its terms would not be performed within one year from the making thereof, and such agreement, nor any note or memorandum thereof expressing the consideration, is not and never
73 was in writing, and subscribed by this defendant, the party charged therewith.

VII.

And, for a further and seperate answer, this defendant alleges that the said supposed agreement, alleged to have been made by this defendant, if any, was a special promise to answer for the default or miscarriage of another, and there is not, and never was, any agreement nor any note nor memorandum thereof, in writing, expressing considerations, subscribed by this defendant, the party to be charged therewith.

VIII.

And for a further and seperate answer, this defendant alleges that he never did undertake and promise, in manner and form as plaintiff has alleged, within six years next before the bringing of this suit, and he plead' the 2d subdivision of section 27 of the act to regulate the
74 practice and proceedings in civil actions, in bar of this action.

IX.

And for a further and seperate answer, this defendant alleges that

action hath not accrued to the said plaintiffs for any matter in that behalf alleged in their complaint within three years before the bringing of this suit, and he pleads in bar of this action the third subdivision of section 28 of the act to regulate the practice and proceedings in civil actions.

Wherefore defendant prays that this action be dismissed at the cost of plaintiff.

J. B. AND J. S. ALLEN,
Attorneys for Defendant.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Duncan B. Finch, being duly sworn, says that he is the defendant above named; that he has read the foregoing answer, and knows
75 the contents thereof; that the *the* same is tru of his own knowledge, except as to the matters therein stated on information and belief; and as to those matters, he believes it to be true.

D. B. FINCH.

Subscribed and sworn to before me this 27th day of December, 1875.

{ WASHINGTON TERRITORY. } J. H. BLOOD,
Notary Public and Commissioner of Deeds for the Territory of Washington in San Fransicco, California.

(Endorsed on back:) In the district court, second judicial dist., W., T., holding terms at Olympia. Calvin H. Hale et al., plaintiff, v. Duncan B. Finch, defendant. Answer. Filed March 17, 1876. Joseph H. Houghton, clerk.

And thereupon, on the 4th day of April, A. D. 1876, came the plaintiff by their attorneys, B. F. Dennison, F. Clark, and William Strong, and filed their motion to strike from the answer of defendant in words and figures following, to wit:

76 In the district court of the second judicial district of Washington Territory, holding terms at Olympia.

CALVIN H. HALE ET AL., PLAINTIFFS,
v.
DUNCAN B. FINCH, DEFENDANT.

And now come the plaintiffs in the above-entitled action and move the court to strike out each of the following specified parts or portions of the answer of defendant filed herein, namely:

First. Commencing with the word "or," in line 23 of paragraph 7 of article 1, and ending with the paragraph.

(Strike.)

Second. Commencing with line "one" of paragraph 8 of same article, and ending with the word "and" in line 4, same paragraph.

(Strike.)

77 Third. Commencing with the word "except," in line 9 of said paragraph 8, and ending with line 12 of same paragraph.

(Denied except as included in 5.)

Fourth. Lines 17 and 18 of paragraph 8, same article.

(Do.)

Fifth. All of said paragraph 8.

(Strike.)

Sixth. Commencing with the word "and" in line 8 of paragraph 10, article 1, and ending with the paragraph, because each of said portions of said answer is irrelevant and redundant, also each of the articles of said answer, numbered as follows, namely: II, III, IV, V, VI, VII, VIII, and IX, because each is shown frivolous and irrelevant.

(Strike.)

B. F. DENNISON,
FRANK CLARK AND
WM. STRONG,
Attorneys for Plaintiffs.

Also strike II, III, IV, V, and VII.
Denied VI, VIII, & IX.

78 (Endorsed on back:) In the dist. court, second judicial district, W. T., holding terms at Olympia. C. H. Hale et al., plaintiffs, v. Duncan B. Finch, defendant. Motion to strike out parts of answer. Filed April 4th, 1876. Joseph H. Houghton, clerk. B. F. Dennison, Wm. Strong, and Frank Clark, att'ys for pl't'ffs.

On the 17th day of March defendant filed his interrogatories in the words and figures following, to wit:

In the district court of the second judicial district of Washington Territory, holding terms at Olympia, for the counties of Thurston, Lewis, Mason, and Chehalis.

CALVIN H. HALE, HENRY WINSOR, CLANRICK Crosby, sr., Nathaniel Crosby, plaintiffs,
v.
DUNCAN B. FINCH, DEFENDANT.

79 Comes now the above-named defendant, by his attorneys, J. B. and J. S. Allen, and file herein the following interrogatories, according to the provisions of section three hundred and ninety-seven (397) of chapter XXVII of the civil practice act of said Territory, of 1873, page one hundred and ten (110).

First interrogatory. State when and where the judgment for $75,000 *dollars* and costs, mentioned in the amended complaint in this cause, was paid (if the same was paid), and state the names of any and all persons who were present at such payment.

Interrogatory second. State what the amount of such payment was, whether the same was in money, in whole or in part; and, if in part, how much thereof was in money, and what person or persons furnished such money.

Interrogatory third. State (in case said payment was not wholly
80 or partly in money) in what such payments or the remainder thereof consisted, and state as fully and particularly as you are able to do, all the facts and circumstances constituting and pertaining to the payment and satisfaction of said judgment, in case such payment and satisfaction were made.

Fourth interrogatory. State whether the payment and satisfaction in said complaint alleged were absolute or conditional.

4. A. Interrogatory. State whether the Oregon Steam Navigation Company, mentioned in said complaint, has any interest, legal or equitable, actual or contingent, in the recovery which is sought in this action

or suit; and, if so, state the nature and extent and particulars of such interest, as far as you are able so to do.

81 Fifth interrogatories. State whether or not this suit is prosecuted wholly or partly for the benefit in any manner of said company, or of any person or persons other than the plaintiffs herein; and, if yea, state the particulars of such benefit.

Sixth interrogatory. State whether at the time of the rendition of said judgment, or at any time, there was or is any agreement or understanding of any kind between you and your co-plaintiffs in this suit and the said company, any person or persons for said company, to the effect that the recovery in this suit, or any recovery against said defendant, on account of the breach of the contract in said complaint alleged to have been broken by him, should or shall enure in whole or in part in any way to the benefit of said company, its successors or assigns (if yea, state the particulars of such agreement or understanding), or that such recovery should be assigned to said company, its successors or assigns, or for its benefit, or that said judgment should be released and

82 satisfied on condition that such recovery be assigned in whole or in part to said company, its successors or assigns, or for its or their benefit.

Seventh interrogatory. State as fully as you can how the defendants knew or was informed that the other plaintiffs were jointly interested with the plaintiff Hale in the said steamboat New World at the time of the alleged sale of said steamboat to defendant.

Eighth interrogatory. State whether or not, at the time of the said sale to the said defendant, you knew or was informed that the said steamboat was to be taken to, and was to be run upon, any of the rivers, bays, or waters of the State of California; and whether at said time there was any understanding between you and said defendant as to where said boat was to be taken, or as to what use the said boat was to be put to; and, if yea, state the particulars as fully as you can.

83 Ninth interrogatory. State whether or not, at the time of or before the sale to defendant, as alleged in said complaint, there was any memorandum in writing reciting the terms and conditions of said sale, or the objects for which said boat was purchased by defendant; if yea, is said memorandum in existence, and in whose custody, and where is the same?

Tenth interrogatory. Was there not prior to said sale a memorandum in writing, executed by said defendant and said Hale, in which it was agreed that said defendant should have a clear bill of sale of said New World, free from restrictions of the use of said boat, or to that effect in substance? If yea, where and in whose custody is the same, and is it now in existence?

Eleventh interrogatory. State whether or not, at or before the said sale of said New World to defendant, there was any agreement

84 by which any of said plaintiffs was to retain a one-eighth or any interest in said New World, and whether or not any of said plaintiffs did retain any interest in said New World, and how long such interest was retained.

Twelfth interrogatory. State whether, subsequent to the said sale to defendant, and after the time when said boat was taken to the waters of California, as in said complaint alleged, any of said plaintiffs, and who of them, had or secured any money or other thing of value from or on account of the sale of said New World; if so, what and from whom, and by virtue of what agreement or understanding.

Thirteenth interrogatory. State if you know of any other facts or doc-

uments material to the defense of this action; if yea, state what facts and what such documents are, where they are, and in whose custody the same now are.

The above interrogatories are hereby required to be answered
85 by each of said plaintiffs.

March 17, 1876.

J. B. ALLEN & J. S. ALLEN,
Attorney' for said Defendant.

(Endorsed on back:) In the district court, second judicial district, W. T., holding terms at Olympia. C. H. Hale et al., plaintiff', v. Duncan B. Finch, defendant. Interrogatories. Filed March 17, 1876. Joseph H. Houghton, clerk. J. B. and J. S. Allen, attor'ys for defendant.

And thereupon, on the 6th day of April, A. D. 1876, came the plaintiffs, and filed their answers to the interrogatories in the words and figures following, to wit:

In the district court of the second judicial district of Washington Territory, holding terms at Olympia.

CALVIN H. HALE ET AL., PLAINTIFFS,
v.
DUNCAN B. FINCH, DEFENDANT.

86 Answer of plaintiff CALVIN H. HALE to the interrogatories of the defendant filed in the above-entitled action, to be answered by plaintiff:

Answer to interrogatory 1:

1. Notes were drawn and placed in the hands of Judge Dennison; do not remember the date.

2. Judge Dennison delivered the notes to the Oregon Steam Navigation Company, and obtained a release of the judgment.

Answer to interrogatory II:

2. Seventy-five thousand dollars in all, negociable notes with sureties, besides more than four thousand dollars paid to car'y on suit brought against the plaintiffs by the O. S. N. Co.

Answer to interrogatory 3:

3. Replied to in answer No. 2.

Answer to interrogatory 4:

4. Absolute.

Answer to interrogatory 4 A:

4 A. No interest.

87 Answer to interrogatory 5:

5. No.

Answer to interrogatory 6:

6. No.

Answer to interrogatory 7:

I. 7. At the time of the sale, and prior to the sale of the steamer New World to D. B. Finch, he well knew said steamer was bound in the sum of $75,000 *dollars* not to run in the waters of California or Columbia

River. He obtained the information from the custom-house. At the time of the sale of said steamboat I informed him who the parties were, and he, Finch, had the restricting clause inserted in the bill of sale, which was drawn up by his attorney, as per memorandum agreement.

Answer to interrogatory 8:

I. 8. No understanding except the bill of sale. I supposed she would run on Puget Sound.

Answer to interrogatory 9:

I. 9. There was a memorandum which was placed in the hands
88 of the attorney who drew up the papers in regard to the sale of the steamer. Said memorandum was used in making out the bill of sale and agreement.

Answer to interrogatory 10:

S. 10. There was no such agreement, or paper, or understanding; but on the contrary he, Finch, agreed to receive a bill of sale with the same restrictions we received from the O. S. N. Co. A true copy of the binding clause was inserted in the bill of sale by his own attorney.

Answer to interrogatory 11:

11. There is an agreement, of which D. B. Finch had a copy. There was no interest retained by either of the plaintiffs.

Answer to interrogatory 12:

I. 12. Not a farthing received after the steamer left the Puget Sound trade.

Answer to interrogatory 13:

89 13. I have a copy of bill of sale of *sale of* steamer New World, in which a clause is inserted expressly stating that the said steamer is not to be run in any of the waters of California. I know of no papers or facts material to the defense of this action.

CALVIN H. HALE.

Sworn to before me, and subscribed in my presence, by Calvin H. Hale this 4th day of April, 1876.

A. A. PHILLIPS,
Auditor of Thurston County, W. T.

90 In the district court of the second judicial district of Washington Territory, holding terms at Olympia.

CALVIN H. HALE ET AL., PLAINTIFFS,
v.
DUNCAN B. FINCH, DEFENDANT.

Answer of HENRY WINSOR, one of the plaintiffs in the above-entitled action, to the interrogatories of defendant.

Answer to interrogatory one. The judgment, so far as the damages were concerned, was paid in negociable promis'ory notes, signed by all the plaintiffs, with sureties. I think the amount, seventy-five thousand dollars, was put into three notes, payable with interest at different times in gold coin. They were sent by our attorney B. F. Dennison to Portland, and he negociated the settlement with the Oregon Steam Navigation Company, by which that company took the notes, and executed
91 and delivered to Mr. Dennison for a full satisfaction of the dam-

ages recovered against the plaintiffs in this action by the Oregon Steam Navigation Company. I was not present at the time of the settlement, and do not of my own knowledge know who was.

Answer to interrogatory 2. There was no money paid to the Oregon Steam Navigation Company so far as I know. We had the costs to pay, and those, I presume, were paid in money. For answer to the remainder of the question I refer to my answer to interrogatory one (1).

Answer to interrogatory 3. I have already answered this question in my answers to interrogatories 1 & 2, and to those answers I refer.

Answer to interrogatory 4. It was absolute and not conditional.

Answer to interrogatory 4 A. The Oregon Steam Navigation
92 Company has not to my knowledge any interest, direct or indirect, contingent or otherwise, in the amount which may be recovered in this action. The plaintiffs are prosecuting it exclusively for their own benefit. It may indirectly benefit the Oregon Steam Navigation Company for us to get money to enable us to pay off our notes, but I consider that this action is entirely for our benefit.

Answer to interrogatory 5. This action is prosecuted entirely for the benefit of plaintiffs herein, as I have said in answer to the preceeding question.

Answer to interrogatory 6. There was no understanding between the Oregon Steam Navigation Company and myself, or, so far as I know, between said company and the other plaintiffs, or any of them, of the kind mentioned in the question. We defended it as long as we had any hope of success, and did all that we could to prevent a judgment against us.

93 Answer to interrogatory 7. I was told by Capt. Hale that he had fully informed Capt. Finch prior to the sale to him of the relation the plaintiffs stood in toward the New World, and of our bond to the Oregon Steam Navigation Company. I think these relations were a matter of such general notoriety here that Mr. Finch, being himself a steamboat man, must have known all about it from common rumor.

Answer to interrogatory 8. I had no knowledge that the New World was to be taken to California, or that it was intended that she should run anywhere else than on the waters of Puget Sound and those adjacent thereto.

Answer to interrogatory 9. I do not know anything about any such or any agreement or memorandum of an agreement other than the regular bill of sale, by which vessels are transferred, with a restrictive
94 clause, such as was contained in the bill of sale of the Oregon Steam Navigation Company to me of the same steamboat.

Answer to interrogatory 10. I do not know of any such memorandum.

Answer to interrogatory 11. I know of no such agreement.

Answer to interrogatory 12. None of the plaintiffs, to my knowledge, received any money on such account.

Answer to interrogatory 13. I do not know of any other facts or of the existence of documents which would be material or of advantage to the defendant.

HENRY WINSOR.

Subscribed and sworn this 5 day of April, 1876, before me.

E. MARSH,
Notary Public in and for W. T.

95 In the district court of the second judicial district of Washington Territory, holding terms at Olympia.

CALVIN H. HALE ET AL., PLAINTIFF,
v.
DUNCAN B. FINCH, DEFENDANT.

Answer of NATHANIEL CROSBY, one of the plaintiffs in the above entitled action, to interrogatories filed herein by defendant:

Answer to interrogatory 1. The judgment was paid in negociable notes, signed by the plaintiffs, with sureties. We first placed in the hands of Judge Dennison our own notes, & he took them to Portland to try and settle the judgment with the O. S. N. Company; security was demanded, and he had to return here to procure it. After the notes had been signed by sureties he again went to Portland, and succeeded in obtain-
96 ing a settlement. I do not remember the date of the settlement, nor do I know who were present at the time it was effected. The notes were for the sum of seventy-five thousand dollars.

Interrogatory 2. There was no money paid to the Oregon Steam Navigation Company. This interrogatory is answered in interrogatory 1.

Interrogatory third has been answered in my reply to questions 1 & 2. The judgment was satisfied, as I am informed, by the Oregon Steam Navigation Company, so far as the damages were concerned.

Answer to interrogatory 4th. It was to be absolute, and I believe it was to be so entered; the record will show.

Answer to interrogatory 4 a. The Oregon Steam Navigation Company, so far as I know, has no interest, legal or equitable, actual or con-
97 tingent, in the amount to be recovered in this action. It may be that it will put us in better circumstances to pay our notes to that company.

Answer to interrogatory 5th. This action is prosecuted solely for our benefit—I mean for the benefit of the plaintiffs, and for no one else.

Answer to 6th interrogatory. There was no understanding between the Oregon Steam Navigation Company and the plaintiffs in this action, or with any of them, so far as I know, of the kind mentioned in the question. We defended the action against us so far as we could, with any hope of success, and were beaten, because we could not prevent it.

Answer to interrogatory 7th. I was told by my uncle, Capt. Clanrick Crosby, and by Capt. Hale, that they had informed Capt. Finch all about it, and I also supposed that Capt. Finch would have known it
98 from the record at the custom-house. It was also a matter of common rumor, and must have been known to him from that source. I do not recollect ever talking to him about it myself.

Answer to interrogatory 8th. I understand that the steamboat was to continue running on Puget Sound, and was not in any event to be taken to California.

Answer to interrogatory 9th. I do not know of any contract or memorandum of the terms of the contract of sale, except that I understood that there was a bill of sale containing the restrictive clause against her running in California waters.

Answer to interrogatory 10th. I know of no such memorandum.

Answer to interrogatory 11th. I know of no such agreement.

Answer to interrogatory 12th. None of the plaintiffs received
99 any money on such account, to my knowledge.

Answer to interrogatory 13th. I do not know of any other facts or of

the existence of other documents material to the defense of this action.

NATHANIEL CROSBY.

TERRITORY OF WASHINGTON,
County of Thurston, ss:

Nathaniel Crosby, being duly sworn according to law, declares and says that the foregoing answers by him made are true.

NATHANIEL CROSBY.

Sworn and subscribed before me this 4th day of April, 1876.

ELWOOD EVANS,
Notary Public, W. T.

100 In the district court of the second judicial district of Washington Territory, holding terms at Olympia.

CALVIN H. HALE ET AL., PLAINTIFFS,
v.
DUNCAN B. FINCH, DEFENDANT.

Answer of the plaintiff, CLANRICK CROSBY, Sr., to the interrogatories of defendant, filed in the above entitled action, to be answered by plaintiffs:

Answer to interrogatory 1:

I. I was in San Francisco at the time, and know nothing of it personally, but my son W. F. Crosby held a full power of attorney to act for me, and I have understood that he did so.

Answer to interrogatory 2:

II. I can make no other answer than to the first.

101 Answer to interrogatory 3d:

III. I can make no other answer than I have already made.

Answer to interrogatory 4th:

IV a. I have understood since my return that it was absolute.

Answer to interrogatory 4th a:

IV. I know of no such interest.

Answer to interrogatory 5:

V. No; it is not wholly or partly for the benefit of any one except for the plaintiffs.

Answer to interrogatory 6:

VI. I do not, of any such understanding referred to in the question.

Answer to interrogatory 7:

VII. I had told him myself how the plaintiffs stood with regard to the New World, previous to his purchase of Hale.

Answer to interrogatory 8:

VIII. There was no understanding or agreement that she was
102 to be run in California to my knowledge, nor did I know she was to be taken there. She was sold with restrictions in the bill of sale, and I supposed she would be run in accordance with the same.

Answer to interrogatory 9:

IX. I know there was a memorandum in writing, but I do not know where it is or its terms.

Answer to interrogatory 10:

X. I don't know whether there was or not.

Answer to interrogatory 11:

XI. There was no such agreement to my knowledge.

Answer to interrogatory 12:

XII. I do not know of any one receiving anything.

Answer to interrogatory 13:

XIII. I don't know of any.

TERRITORY OF WASHINGTON,
County of Thurston, ss:

103 Clanrick Crosby, sen., being first duly sworn, says that the answers to the foregoing interrogatories are true to the best of his knowledge and belief.

C. CROSBY, SEN.

Subscribed and sworn to before me, the undersigned, a justice of the peace in and for said county, on this 4th day of April, 1876.

SAM'L G. WARD,
Justice of the Peace.

(Endorsed on back:) District court 2d judicial dis't, W. T. Calvin H. Hale et al., plaintiffs, vs. Duncan B. Finch, defendant. Answers of plaintiffs to interrogatories filed by defendant, March 17, 1876. Answers of C. H. Hale, N. Crosby, Henry Winsor, Clanrick Crosby, sr. Filed April 6th, 1876. Joseph H. Houghton, clerk.

104 And thereafter, on the 7th day of April, 1876, in said district court, among other the following was had and done:

CALVIN H. HALE ET AL., PLAINTIFF,
v.
DUNCAN B. FINCH, DEFENDANT.

And now, on this 7th day of April, A. D. 1876, this cause coming on to be heard on the motion of plaintiffs to strike out from defendant's answer, the court having heard William Strong, esquire, in support of said motion, and B. S. Brooks, esquire, in opposition, takes the matter under advisement.

CALVIN H. HALE ET AL., PLAINTIFFS,
v.
DUNCAN B. FINCH, DEFENDANT.

And now, on this 10th day of April, A. D. 1876, the court being fully advised in the premises, the motion of the plaintiff to strike out
105 from defendant's answer is allowed as follows, and it is ordered that the following portions of said answer be stricken out, to wit:

1st. Commencing with the word "or," in line 23, of paragraph 7 of article 1, and ending with the paragraph.

2d. Commencing with line 1, of paragraph 8 of same article, and ending with the word "and." in line 4 same paragraph.

3d. All of paragraph 8.

4th. Commencing with the word "and," in line 8, of paragraph 10, article 1, and ending with the paragraph.

Also each of the articles of said answer numbered as follows II, III, IV, V, and VII.

And now comes defendant, by B. S. Brooks, esquire, and excepts to this ruling of the court, which exception is allowed.

And thereupon on the 11th day of April, A. D. 1876, came the defendant, by his attorneys, B. S. Brooks and J. B. & J. S. Allen, and files his amended answer in the words and figures following, to wit:

106 *Amended answer.*

TERRITORY OF WASHINGTON,
County of Thurston, ss :

In the district court of the second judicial district of Washington Territory, holding terms at Olympia for the counties of Thurston, Lewis, Mason, and Chehalis:

CALVIN H. HALE, HENRY WINSOR, CLANRICK Crosby, sr., and Nathaniel Crosby, plaintiffs,
vs.
DUNCAN B. FINCH, DEFENDANT.

The defendant, by Allen Brothers, his attorneys, comes and answering the amended complaint filed herein—

I.

1. Denies that on the first day of May, 1864, or at any other time, the California Steam Navigation Company was engaged in transpor'tion of freight and passengers on the several routes of travel on the rivers, bays, and waters of the State of California.

2. Denies that the Oregon Steam Navigation Company was
107 on the first day of May, 1864, or at any time, engaged with a large number of steamboats in the transportation of freight and passengers on the waters of the tributaries of the Columbia River, in the State of Oregon, and Territory of Washington.

3. He denies that on said first day of May, 1864, the steamboat New World was employed by the California Steam Navigation Company in the navigation of said waters of said State of California.

4. He denies that on the 18th day of February, 1867, the said The Oregon Steam Navigation Company employed in navigating the Columbia River and its tributaries the said New World, nor had said boat been, ever since it was brought from San Francisco to the Columbia River, used in navigating said Columbia River and its tributaries in the Territory of Washington and State of Oregon. He denies that on that day the said Oregon Steam Navigation Company sold said steamer to the plaintiffs, or that the consideration of the sale was that alleged
108 in the complaint, or that such agreement as is therein alleged was made by the said plaintiff with the sureties, or in substance, or to the legal effect, or with the stipulations alleged in said amended complaint.

5, 6, & 7. He denies that on the 23d day of November, 1867, or at or prior to the making of the agreement mentioned in the 7th paragraph

of the complaint this defendant knew all and singular or any of the premises in said paragraph alleged or referred to, and he denies that on that day or at any other time the plaintiffs, through the said Calvin H. Hale, or otherwise, sold the defendant the steamer New World, or that the said Calvin H. Hale was then, or at the time of the sale of said steamer, or at any of the times, or in any of the matters alleged in said complaint, acting for the other plaintiffs, or any or either of them, or that the same was then or at any time known to the defendant, or that said steamer was then or at any time at Olympia, or elsewhere,
109 sold to the defendant for the sum of fifty thousand dollars in gold coin, and for the further consideration of an agreement or promise then or there or at any time or place made or entered into by the defendant to the plaintiff, or any or either of them, through the said Cavin H. Hale, acting in his own name for the benefit of himself and the other plaintiffs, or otherwise, or at all, that the said steamer New World should not thenceforth, or at any time prior to the first day of May, 1874, run on any of the routes of travel on the rivers, bays, or waters of the State of California.

8. He denies that this defendant, his aforesaid promise and agreement, hath not kept and performed, or that he hath broken the same, or that the said defendant caused, suffered, or permitted said steamboat the New World to be taken to San Francisco, or that the said defendant caused, suffered, or permitted the said steamboat New World to run upon the routes of travel, on the rivers, bays, or waters of the State of California, or any of them. He admits that on the first
110 day of November, 1868, and thereafter at various times the said steamboat the New World was run upon routes of travel and on said rivers, bays, and waters of the State of California aforesaid; but denies that said steamboat was run on any of them contrary to or in violation of the said supposed promise or agreement of this defendant.

9. This defendant has no knowledge or information sufficient to found a belief as to the truth of the allegations contained in the 9th paragraph of the amended complaint touching the institution, pleading, prosecution, and determination of the alleged suit of the Oregon Steam Navigation Company against the plaintiffs in this court or the judgment therein or the payment thereof, and therefore he denies the said allegaions.

10th. Defendant has no knowledge or information sufficient to found a belief whether the said plaintiffs in defending said action were compelled to expend, or did expend, or pay out for costs and ex-
111 penses, the sum of about four thousand dollars gold coin, or any other sum, and therefore he denies the same.

11th. He denies that the plaintiffs have sustained any damages by reason of the breach of the alleged or any agreement of this defendant, in the sum of seventy-five thousand dollars or any other sum.

II.

And for a further and separate answer and defense, the defendant avers that the said supposed promise and agreement in the said complaint mentioned, in the 7th paragraph thereof, was and is an agreement that by its terms was not and is not to be performed in one year from the making thereof, and such agreement, contract, or promise was not, nor was any note or memerandum thereof, in writing, and signed by this defendant, or by any other person by him thereunto lawfully authorized according to the form of the statute in such case made and provided.

112 III.

And for a further and separate answer and defense to the said complaint, the said defendant alleges that the said steamer New World was taken to San Francisco, and run upon the routes of travel on the bays and waters of the State of California, by the leave and liscense of the said plaintiffs to the said defendant for that purpose first given and granted, to wit, at Olympia, in the county of Thurston, on, to wit, the first day of July, A. D. 1868.

IV.

And for a further and separate answer and defense, this defendant avers that the said supposed cause of action in the said complaint alleged did not accrue to the said plaintiffs within six years next before the bringing of this suit, and he pleads the 2d subdivision of section 27 of the act to regulate the practice and proceedings in civil actions, in bar of this action.

V.

113 And for a further and separate answer and defense, this defendant alleges that action has not accrued to said plaintiffs for any matter in that behalf alleged in this complaint, within three years next before the bringing of this suit, and he pleads in bar of this action the 3d subdivision of section 28 of the act to regulate the practice and proceedings in civil actions.

Wherefore defendant prays that this action be dismissed, and that he be saved from all costs and expenses herein.

B. S. BROOKS &
ALLEN BROTHERS,
Att'ys for Defendant.

TERRITORY OF WASHINGTON,
County of Thurston, ss:

Duncan B. Finch, being duly sworn, says he is the defendant in the above entitled action; that he knows the contents of the foregoing amended answer, and that said amended answer is true, as he verily believes.

D. B. FINCH.

114 Subscribed and sworn to before me this day of April, A. D. 1876.

JOSEPH H. HOUGHTON,
Clerk.

Resworn to before me this 13th day of April, A. D. 1876.

JOSEPH H. HOUGHTON,
Clerk.

(Endorsed on back:) 2nd district court at Olympia. Calvin H. Hale et al., plaintiffs, v. Duncan B. Finch, defendant. Amended answer. Filed April 11th, 1876. Joseph H. Houghton, clerk. B. S. Brooks & Allen Bro's, att'ys for defend't.

And thereafter, on the 12th day of April, A. D. 1876, came the defendant, by his attorneys, J. B. and J. S. Allen, and files his exceptions to

the answers to the interrogatories filed herein, and motion to strike complaint, in the words and figures following, to wit:

115 *Exceptions to answers.*

2nd district court.

CALVIN H. HALE
v.
DUNCAN B. FINCH.

The defendant excepts to the answers made by the plaintiffs to the interrogatories heretofore propounded to them by said defendant, and filed herein, in the particulars and for the reasons hereinafter specified.

I.

To the answers of C. H. Hale:

1. His answer to the first interrogatory is insufficient, in that he does not declare when or where the payment referred to therein was paid, nor state the names of any or all persons who were present at such payment.

2. His answer to the second interrogatory is insufficient, in that it does not declare the dates, amounts, or terms of the promissory notes, nor by whom they were signed or endorsed, and that part reading "besides more than four thousand dollars paid to carry on suit
116 brought against the plaintiffs by the O. S. N. Co." is irresponsive and irrelevant.

3. The 3d interrogatory is not answered.

4. That which is given as an answer to the 7th interrogatory is irresponsive and irrelevant, and no part of said interrogatory is responded to.

5. The answer given to the 8th interrogatory is not responsive thereto, and no part of said interrogatory is answered.

6. The answer to the ninth interrogatory is insufficient, in that said plaintiff does not answer whether there was any other memorandum than that mentioned, nor the name of the attorney in whose hands it was placed, nor the contents or purport thereof in the respects mentioned in the interrogatory, nor whether the same is in existance, nor in whose custody, nor where the same is.

7. The answer to the 10th interrogatory is insufficient, in that
117 it does not state whether there was not, prior to said sale, a memorandum in writing executed by said defendant and said Hale, nor to what effect in substance, nor where, nor in whose custody the same is, nor whether it is now in existance, and the whole of the answer after the word "understanding" is irresponsive and irrelevant.

8. No part of the 12th interrogatory is answered, and what is given as an answer is irrelevant and irresponsive.

9. The whole of the answer to the 13th interrogatory is irrelevant and irresponsive, except the last sentence.

II.

To the answer of Henry Winsor:

1. The answer to the 1st interrogatory is insufficient, in that it does not state the terms of the notes, nor the names of the sureties.

2. The statement in the answer to the 2d interrogatory, "We
118 had the costs to pay, and these, I presume, were paid in money," is irresponsive and should be struck out.

3. The answer to the 7th interrogatory is irrelevant and irresponsive.

4. The answer to the 8th interrogatory is insufficient, in this, that it is not stated whether at said time there was any understanding between you and said defendant as to where said boat was to be taken, or as to what use the said boat was to be put to, nor does it state the particulars of said understanding, if any there was.

5. The answer to the 10th interrogatory is insufficient, in that it does not state whether prior to said sale a memorandum in writing was executed between defendant and plaintiff Hale, nor where nor in whose custody it is.

III.

To the answer of Nathaniel Crosby:

1. The answer to the 1st interrogatory is insufficient, in that it
119 does not state the particulars of the notes given—the tenor or terms thereof, the names of the sureties, nor where the settlement took place.

2. The answer to the 7th interrogatory is irresponsive, except the last sentence.

3. No part of the 8th interrogatory is answered.

IV.

To the answer of Claurick Crosby:

1. The answer to the 7th interrogatory is not responsive, and no part of said interrogatory is answered.

2. The answer to the 8th interrogatory is not responsive, and no part of said interrogatory is answered.

3. The answer to the 9th interrogatory is insufficient, in that it is not stated whether such memorandum is in existance.

4. The answer to the 10th interrogatory is insufficient, in that it is not stated whether or not any of said plaintiffs did retain an interest in said "New World," nor how long such interest was retained.

District court 2nd judicial district, holding terms at Olympia.

120 CALVIN H. HALE ET AL.
vs.
DUNCAN B. FINCH.

Now comes the said defendant, by his attorneys aforesaid, and moves the court that the complaint filed herein be struck out, on the ground and for the reason that the plaintiffs have not, nor have either of them, answered the interrogatories propounded to them in writing and filed herein by the defendant, and that more than twenty days have elapsed since the said interrogatories were propounded; and he files herewith specifications of the particulars in which the said plaintiffs have failed to answer said interrogatories.

The said motion will be made upon the pleadings on file herein, and the interrogatories and the document filed for answer thereto.

ALLEN BROTHERS,
Att'ys for Defendant.

(Indorsed:) Dist. court, 2nd jud'l dist., W. T., holding term at Olympia. Calvin H. Hale et al., plaintiffs, v. Duncan B. Finch, defendant. Exceptions to answers. Motion to strike complaint. Filed April 12th, 1876. Joseph H. Houghton, clerk. Allen Brothers, att'ys for defendant.

121 In the district court of the second judicial district, Territory of Washington, holding terms, Olympia.

CALVIN H. HALE ET AL., PLAINTIFFS,
v.
DUNCAN B. FINCH, DEFENDANT.

And now comes the plaintiff and moves the court to strike out from the amended answer filed in the above-entitled action each of the following specified parts or portions of the same, because the said several parts or portions are each sham, frivolous, and irrelevant:

First. The seperate answer said defense set forth in Article III.

Second. All that part or portion of Article IV which purports to set forth as a defense that the said defendant did not undertake or promise in manner and form, &c., within six years before the bringing of this suit.

122 Third. The seperate answer and *and* defense set forth in Article V.

B. F. DENNISON,
FRANK CLARK, AND
WILLIAM STRONG,
Att'ys for Pl't'ffs.

(Endorsed:) 2d dist. court, Olympia. Calvin H. Hale et al., plaintiffs, v. Duncan B. Finch, defendant. Motion to strike out parts of amended answer. Filed April 13th, 1876. Joseph H. Houghton, clerk. Dennison, Strong & Clark, att'ys for pl't'ffs.

* * * * * * *

CALVIN H. HALE ET AL., PLAINTIFFS,
v.
DUNCAN B. FINCH, DEFENDANT.

And now, on this 13th day of April, A. D. 1876, comes the defendant, by B. J. Brooks, esquire, and moves the court to strike out the complaint filed herein, for the reason that the plaintiffs have not, nor
123 has either of them, answered the *the* interrogatories propounded to them in writing and filed herein; and come the plaintiff, by William Strong, esquire, and oppose said motion, and the court having heard counsel for plaintiff as well as for defendant, and being fully advised in the premises, the motion is denied.

And now come the plaintiffs, by William Strong, esquire, and move the court to strike out a portion of defendant's amended answer; and the court having heard counsel for plaintiff as well as for defendant, and being fully advised in the premises, the motion is allowed, as follows: It is ordered that the following portions of defendant's amended answer be stricken out, to wit:

All that part of Article IV beginning with the word "alleges," in line 3 of said article, to and including the word "be" in line 9 of said article.

* * * * * * *

And thereupon, on the 15th day of April, A. D. 1876, came the plaintiff by their attorneys, and filed herein their demurrer to the defendant's amended answer, in the words and figures following, to wit:

124 In the district court of the second judicial district of Territory of Washington, holding terms at Olympia.

CALVIN H. HALE ET AL., PLAINTIFFS,
v.
DUNCAN B. FINCH, DEFENDANT.

I.

The plaintiffs demur to the further and seperate answer and defense in Article II of defendant's amended answer set forth and stated, because the same is insufficient in this, that it does not state facts sufficient to constitute a defense.

II.

They demur to the seperate answer and defense in Article III of defendant's amended answer set forth and stated, because the same does not state facts sufficient to constitute a defense.

III.

They demur to the seperate answer and defense in Article IV
125 of defendant's amended answer set forth and stated, because the same does not state facts sufficient to constitute a defense.

IV.

They demur to the seperate answer and defense in article V, of defendant's amended answer set forth and stated, because the same does not state facts sufficient to constitute a defense.

B. F. DENNISON,
FRANK CLARK &
WM. STRONG,
Att'ys for Pl'ff's.

(Endorsed:) In district court 2d judicial district, W. T., holding terms at Olympia. Calvin H. Hale, et al. plaintiff, v. Duncan B. Finch, defendant. Demurrer to amended answer. Filed April 15th, 1876, Joseph H. Houghton, clerk. B. F. Dennison, Frank Clark, Wm. Strong, att'ys for pl'ffs.

126 And thereafter, on the 18th day of April, A. D. 1876, the plaintiffs, by their attorneys, B. F. Dennison, Frank Clark, and William Strong, filed their reply, in words and figures following, to wit:

In the district court of the second judicial district, Territory of Washington Territory, holding terms at Olympia.

CALVIN H. HALE ET AL., PLAINTIFFS,
v.
DUNCAN B. FINCH, DEFENDANT.

The plaintiff's for reply to the amended answer filed herein—

I.

To the seperate answer and defense in said Article II of said answer

set forth and stated, say that it is not true, and they deny that the said promise and agreement in said 7th paragraph of the complaint mentioned was or is an agreement that by its terms or otherwise was not and is not an agreement to be performed in one year from the making thereof.

II.

127 And for a further and seperate reply to the said seperate answer and defense in said Article II, set forth and stated, the plaintiffs aver that said promise and agreement mentioned was and is in writing, and was and is signed by the said defendant.

III.

And to the separate answer and defense in Article III of said amended answer set forth and stated, plaintiffs say that it is not true, and they deny that the said steamer New World was taken to San Francisco, or was run upon the routes of travel on the bays and waters of the State of California, or upon any of such routes on said bays and waters, or upon part of the same by their leave or liscense given to said defendants on the first day of July, 1868, or at any other time, at Olympia or elsewhere; and they deny that on the first day of July, 1868, at Olympia, or at any other time or place, they gave to said defendant leave or liscense to run said steamer on any of the routes of travel on the bays or waters of the State of California, or upon any of such bays or waters

128 IV.

And to the seperate answer and defense in article IV, of said amended answer, the plaintiffs say that it is not true, and they deny that said cause of action in the complaint alleged did not accrue to the plaintiffs within six years next before the bringing of this action, and they aver that said cause of action accrued to the plaintiffs less than six years next before the commencement of said action.

V.

And for a further and seperate reply to the said seperate answer and defense in said article IV of the amended answer set forth and stated, plaintiffs aver that on or about the 10th day of July, 1871, said defendant did depart from and reside out of the Terrritory of Washington, to wit, in the State of California and elsewhere without the Territory of Washington continuously for the period of four years and upward to date of commencement of this action; and that during said period he was absent from said Territory and residing out of the limits of the same for more than three years.

129 VI.

And to the seperate answer and defense in article V, of said amended answer set forth and stated, plaintiffs aver that this action is founded upon a contract in writing.

VII.

And for a further and seperate reply to said seperate answer and de-

fense in said article V of said amended answer set forth and stated, plaintiffs aver that this action is founded upon a liability which does arise out of a written instrument.

VIII.

And for a further and seperate reply to said seper ate answer and defense in the said article V of said amended answer set forth and stated, plaintiffs aver that on or about the 10th day of July, 1871, defendant did depart from the Territory of Washington and from and after said time, to wit, the 10th day of July, 1871, has resided out of said Territory, to wit, in the State of California and elsewhere, without the limits of said Territory of Washington continuously for the period of more
130 than four years prior to the commencement of this action; and that during the period from and after the 10th day of July, 1871, and the commencement of this action, said defendant has been absent from this Territory, and residing without the limits thereof for the period of more than three years.

B. F. DENNISON,
FRANK CLARK, &
WILLIAM STRONG,
Att'ys for Pl'ff's.

TERRITORY OF WASHINGTON,
County of Thurston, ss:

Calvin H. Hale, being duly sworn, says he is one of the plaintiffs in the above entitled action; that he has read the foregoing reply and knows the contents thereof; that he verifies the same for himself and co-plaintiffs, and that he believes the same to be true.

CALVIN H. HALE.

Subscribed and sworn to before me this 18th day of April, A. D. 1876.

JOSEPH H. HOUGHTON,
Clerk.

131 (Endorsed on back:) In dist. court 2d jud'l dist. W. T., holding terms at Olympia. C. H. Hale et al., plaintiffs, v. Duncan B. Finch, defendant. Reply. Filed April 18, 1876. Joseph H. Houghton, clerk. B. F. Dennison, Frank Clark, William Strong, pl't'ff' attorneys.

CALVIN H. HALE ET AL., PLAINTIFFS,
v.
DUNCAN B. FINCH, DEFENDANT.

And now, on this 18th day of April, A. D. 1876, the court being fully advised in the premises, the demurrer to defendant's amended answer is overruled, and to this ruling of the court plaintiffs except, and their exception is allowed.

And now come the parties with their attorneys; comes also, at the order of the court, a jury of lawful men, to wit: Gideon Miller, A. Ellingson, J. T. Newland, F. R. Carter, Julius Andrews, Benjamin Harned, D. S. B. Henry, N. Bannister, M. N. Ernsberger, A. S. Wooster, L. L. Talcott and John O. Doss, who are duly elected, empannelled,
132 tried, and sworn, to well and truly try the issue between the plaintiffs and defendant, and a true verdict give according to the law and evidence as given them on the trial.

By consent of parties, the jury are allowed to seperate during the adjournments of the court, under the usual admonition of the court.

CALVIN H. HALE ET AL., PLAINTIFFS,
v.
DUNCAN B. FINCH, DEFENDANT.

And now, on this 19th day of April, A. D. 1876, come the parties with their attorneys; comes also the regularly empannelled jury in this case, and it appearing by call of the jurors that they are all present, the hearing of this cause proceeds; and the evidence being concluded on the part of plaintiffs as well as of defendant, comes now the defendant by his attorney, B. S. Brooks, esquire, and moves the court to instruct the jury to find a verdict for the defendant, and this motion comes on to be argued.

133 By consent of parties, the jury are allowed to seperate under the usual admonition of the court, and—

Court adjourned to 10 o'clock a. m. to-morrow.

CALVIN H. HALE ET AL., PLAINTIFFS,
v.
DUNCAN B. FINCH, DEFENDANT.

And now, on this 20th day of April, A. D. 1876, this cause coming on for further argument on the motion of defendant that the court instruct the jury to find a verdict for the defendant, is argued by counsel for defendant and plaintiff until the hour of adjournment.

Court adjourned to 9.30 a. m. to-morrow.

CALVIN H. HALE ET AL., PLAINTIFFS,
v.
DUNCAN B. FINCH, DEFENDANT.

And now, on this 21st day of April, 1876, this cause coming on for further argument on said motion of the defendant, and the court having heard B. S. Brooks, esquire, in support of said motion, and

134 William Strong and B. F. Dennison, esquires, in opposition, and being fully advised in the premises, allows said motion; and the said jury being now called and answering to their names, are instructed by the court, and thereupon return their verdict and say they find for the defendant, which verdict is received by the court, and filed with the clerk, and the jury is discharged.

And now come the plaintiffs by their attorneys and except to the ruling of the court in allowing said motion, and except further to the instructions of the court to the jury; which exceptions are allowed.

* * * * * * *

CALVIN H. HALE ET AL., PLAINTIFFS,
vs.
DUNCAN B. FINCH, DEFENDANT.

And now, on this 22nd day of April, 1876, on motion of Frank Clark, esquire, attorney for plaintiffs, it is ordered that plaintiffs have till the first Monday of June to settle their bill of exceptions.

135 CALVIN H. HALE, HENRY WINSOR, Clanrick Crosby, sr., & Nathaniel Crosby, plaintiffs,
v.
DUNCAN B. FINCH, DEFENDANT.

Now, on this 10th day of June, A. D. 1876, it is ordered that judgment be entered upon the verdict heretofore, to wit, on the 20th day of April, A. D. 1876, rendered in this court. It is therefore considered by the court that the plaintiffs take nothing by their action, and that the defendant, Duncan B. Finch, recover against Calvin H. Hale, Henry Winsor, Clanrick Crosby, sr., and Nathaniel Crosby, plaintiffs, thirty-seven dollars and sixty cents, the costs of this action, and that execution issue therefor.

And it is further ordered that this judgment be entered nunc pro tunc as of the 22d day of April, A. D. 1876.

136 Bill of exceptions follows this.

And thereupon, on the 6th day of June, 1876, the plaintiffs, by their attorneys, William Strong and Frank Clark, esquires, file herein their bill of exceptions, in the words and figures following, to wit:

137 TERRITORY OF WASHINGTON,
County of Thurston, ss:

In the district court of the second judicial district of Washington Territory, holding terms at Olympia for the counties of Thurston, Lewis, Mason, and Chehalis.

CALVIN H. HALE, H. WINSOR, CLANRICK Crosby, sr., and Nathaniel Crosby, plaintiffs,
vs.
DUNCAN B. FINCH, DEFENDANT.

Be it remembered that on Tuesday, the 18th day of April, A. D. 1876, it being a judicial day of a regular term of said district court, begun and held at Olympia, on Monday, the 3d day of April, A. D. 1876, the above entitled cause was called for trial, and the parties being all personally present, and being also represented by their respective counsel, the said action came on to be heard upon the amended complaint of plaintiffs, the amended answer of defendant, and the reply of plaintiffs to
138 said amended answer theretofore filed in the said cause; and a jury of twelve good and lawful men were duly elected, tried, and sworn to try the issue joined in the said cause. And thereupon the plaintiffs offered in evidence and submitted to the said court the following written and oral testimony, to wit:

[EXHIBIT A.]

STATE OF CALIFORNIA,
Department of State:

I, Drury Melone, secretary of state of the State of California, do hereby certify that I have compared the annexed copy of California Steam Navigation Company with the original now on file in my office, and that the same is a correct transcript therefrom and of the whole thereof.

Witness my hand and the great seal of State, at office in Sacramento, California, the 27 day of November, A. D. 1874.

DRURY MELONE,
Secretary of State,

{ GREAT SEAL OF THE STATE OF CALIFORNIA. } By N. E. WHITE,
Deputy.

139 *Articles of incorporation.*

This is to certify that the subscribers, citizens of the State of California, pursuant to the provisions of an act of the legislature of California, approved April 14th, 1853, entitled "An act to provide for the formation of corporations for certain purposes," do hereby organize themselves into a corporation, and do declare as follows:

First. The corporate name of said association shall be the California Steam Navigation Company.

Second. The objects for which said company is formed, are for the purposes of navigating the Pacific Ocean and the waters of the State of California with boats or vessels propelled by steam in whole or in part; and to ply and run such boats or vessels for the conveyance and transportation of passengers and freight, property, &c.

Third. The said corporation shall continue for the term of fifty
140 years, unless sooner discontinued or disincorporated according to the provisions of the act of the legislature of California aforesaid.

Fourth. The capital stock of said company shall be two million five hundred thousand dollars, divided into twenty-five thousand shares of one thousand dollars each.

Fifth. The number of trustees who shall manage the company for the first three months shall be nine; and shall consist of Richard Chenery, Charles Minturn, Horatio N. Squire, Richard M. Jessup, Wallace B. Minturn, Thomas W. Lyle, Thomas R. Hope, Samuel J. Hensley, and James Whitney, jr.

Sixth. San Francisco shall be the principal place of business of said company.

In witness whereof, the subscribers hereunto set their respective hands and seals this twenty second day of February, one thousand eight hundred and fifty-four, at San Francisco, State of California.

R. CHENERY. [SEAL.]
CHARLES MINTURN. [SEAL.]
THOS. R. HOPE. [SEAL.]
141 T. W. LYLES. [SEAL.]
F. F. LOW. [SEAL.]
JOHN BENSLEY. [SEAL.]
JNO. H. BOSWORTH. [SEAL.]
J. WHITNEY, JR. [SEAL.]
E. SCHULTZ. [SEAL.]

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On the twenty-second day of February, A. D. (1854) one thousand eight hundred and fifty-four, before me, Joseph Grant, a notary public, in and for said county, duly commissioned and sworn, dwelling in the city of San Francisco, personally appeared R. Chenery, Charles Minturn, Thomas R. Hope, T. W. Lyles, F. F. Low, John Bensley, John H. Bosworth, J. Whitney, jr., and E. Schultz known to me as the individuals described in, and who executed the foregoing instrument, and sev-

erally acknowledged to me that they executed the same freely and volun
tarily, and for the use and purposes therein mentioned.
142 In testimony whereof I have hereunto set my hand and affixed
my official seal, at city of San Francisco, the day and year above
written.

[NOTARIAL SEAL.] JOSEPH GRANT,
Notary Public.

STATE OF CALIFORNIA,
Office of Secretary of State:

This is to certify that Joseph Grant, whose name is signed above as notary public, was at the time of said signiture a duly commissioned notary public, in and for the county of San Francisco, State of California, authorized by law to take the acknowledgments of deeds and other instruments. That said signiture is genuine, said certificate of acknowledgment in due form of law, and that the act of said Joseph Grant in the capacity of notary public are entitled to full faith and credit.

Witness my hand and the seal of State at Benicia, this twenty-third day of February, A. D. 1854.

[SEAL OF STATE.] J. W. DENVER,
Secreta'y of State.

143 (The following endorsements are on the foregoing:) California
Steam Navigation Company. Filed in office Feb'ry 23d, 1854.
Recorded on page 316, H. Copy of articles of incorporation of Cal. S.
N. Company. C. H. Hale et al. v. Duncan B. Finch. Exhibit "A."
Joseph H. Houghton, clerk.

EXHIBIT B.

Articles of incorporation of the Oregon Steam Navigation Company.

ARTICLE 1. J. C. Ainsworth, D. T. Bradford, R. R. Thompson, and S. G. Reed, their associates, successors, and assigns, do hereby associate
themselves, under and by virtue of the provisions of an act of the
144 legislative assembly of the State of Oregon, entitled "An act
providing for private incorporation," approved October , A. D.
1862.

ART. 2. The name of this incorporation, and by which it shall be known, is the Oregon Steam Navigation Company.

ART. 3. The object of this incorporation and the business in which it proposes to engage is the navigation by steam, and otherwise, of the Columbia River, from its mouth to the 49th parallel of north latitude, and Snake River, from its mouth to Fort Boise, and Willamette River, from its mouth to Eugene City, and the Pacific and other oceans, together with the construction and use of all necessary rail, or plank, or clay roads, and bridges at any of the portages of the said Columbia, Snake, and Willamette Rivers, or to purchase, own, and use any such roads that may be constructed or is now constructed or may be in course of construction; and to collect such tolls, fare, or freight on all roads, boats, or vessels that may be owned, chartered, or controlled by said
incorporation as shall be deemed expedient by the officers of said
145 incorporation, and to purchase and to own all lands, lots, wharfs,
boats, and vessels, and all real and personal property of any
name and nature that may be deemed necessary to the interests of said

incorporation in the prosecution of the business above referred to, and to sell and transfer the same.

ART. 4. The principal office of this incorporation shall be in the city of Portland, in the State of Oregon.

ART. 5. The amount of the capital stock of *of* this incorporation shall be two million of dollars.

ART. 6. The amount of each share of such capital stock shall be five hundred dollars.

In witness whereof we have hereunto set our hands this 18th day of October, A. D. 1862.

J. C. AINSWORTH,
DANIEL F. BRADFORD.
R. R. THOMPSON.
S. G. REED.

STATE OF OREGON,
County of Multnomah, ss:

146 Be it known that on the eighteenth day of October, A. D. 1862, personally appeared before me, a notary public in and for said county, the within named J. C. Ainsworth, Daniel F. Bradford, R. R. Thompson, and S. G. Reed, known to me to be the identical persons described in and who executed the foregoing articles of incorporation, and acknowledged to me that they signed and executed the same for the uses and purposes therein named and expressed.

Witness my hand and notarial seal the day and year aforesaid.

[NOTARIAL SEAL.] THEO. WYGANT,
Notary Public.

[5c. rev. stamp cancelled.]

147 *Oregon Steam Navigation Company.*

Amendatory and supplemental articles of incorporation.

Whereas at a regular annual meeting of the stockholders of the Oregon Steam Navigation Company, held at the office of said corporation, in the city of Portland, county of Multnomah, in the State of Oregon, all of the stockholders being present or represented, on the second day of November, A. D. 1868, the following resolutions by the assent of all of the said stockholders was adopted:

Resolved, That the directors of this corporation be, and they are hereby, instructed and directed to file, as soon as they can reasonably be prepared, supplementary articles of incorporation, amending article III of the present articles, so as to include the navigation by steam, or otherwise, of all navigable waters, sea and inland, wherever it may be deemed expedient; also the constructing, purchasing, and operating telegraph lines, and, so far as may be found lawful, the construct-
148 ing, purchasing, and operating railroads and other roads; art. 5, so as to increase the capital stock to five million dollars; article 6 to make the shares of the value of one hundred dollars each:

Now, therefore, we, J. C. Ainsworth, R. R. Thompson, S. G. Reed, and W. S. Ladd, directors of the said incorporation, by virtue of the resolutions of the said stockholders, and in pursuance of the authority therein and under the laws of this State conferred, do hereby make and establish the following supplementary article of said incorporation:

Article III shall read as follows: The object of this incorporation

and the business in which it proposes to engage is the navigation by steam, or otherwise, of the Columbia River and its tributaries, and all other navigable waters, sea and inland, wherever it may be deemed expedient; to construct, purchase, maintain, and operate any railroad or roads, macadamized road or roads, plank roads, canals, or bridges, for the purpose of transporting freight or passengers across any portage
149 on the line of navigation upon any stream or other waters which the said corporation may be navigating; also such other railroad and other roads as, under the laws of this State, said corporation may lawfully engage or be interested in; also to construct, purchase, maintain, and operate telegraph lines wherever may be deemed expedient, and to charge and collect such tolls, fare, or freight on all roads, boats, or vessels, or means of conveyance or transportation as may be owned, chartered, or controlled in whole or in part by said corporation, and such rates for the use of the telegraph lines of said corporation, or for the transmission thereon of telegraphic messages, as shall be deemed expedient, and to purchase and own all lands, lots, wharfs, boats, and vessels, and all real and personal property of every name and nature, that may be deemed necessary to the interests of said corporation in the prosecution of the business above referred to, and to sell and transfer the same.

Article 5 shall read as follows: The amount of capital stock of this corporation shall be five million dollars.

150 Article 6 shall read as follows: The amount and value of each share of the capital stock shall be one hundred dollars.

In witness whereof we have hereunto set our hands, at the city of Portland, this (7th) seventh day of November, A. D. 1868.

J. C. AINSWORTH.
R. R. THOMPSON.
S. G. REED.
W. S. LADD.

STATE OF OREGON,
County of Multnomah, ss:

Be it remembered that on this 7th day of November, 1868, at my office at said county, personally appeared before me the undersigned, a notary public within and for the State of Oregon, J. C. Ainsworth, R. R. Thompson, S. G. Reed, and W. S. Ladd, known to me to be the persons described in and who executed the foregoing supplemental articles of incorporation, and acknowledged each that he executed the same for the purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed
151 my seal, notarial, the day and year in this certificate first above written.

[NOTARIAL SEAL.] E. W. McGRAW,
Notary Public, Multnomah County, Oregon.

STATE OF OREGON,
Department of State:

To all to whom these presents shall come, greeting:

I, Samuel E. May, secretary of state for the State of Oregon, do hereby certify that I have compared the foregoing copy of the articles of incorporation of the Oregon Steam Navigation Company with the original, also amendatory and supplemental articles of incorporation of said company, each of which are now on file in this department, and

that the same is a correct transcript therefrom, and of the whole of said originals; and I do further certify that said articles of incorporation were filed in this department October 21, 1862, at 2 o'clock p. m., and that the articles amendatory and supplemental were filed in this department Nov. 9, 1868.

In testimony whereof I have hereunto set my hand and the
152 great seal of the State of Oregon, at Salem, this 22d day of March, A. D. 1870.

{ SEAL OF STATE OF OREGON. } SAMUEL E. MAY.
Secretary of State.

The following endorsements are on the foregoing: Oregon Steam Navigation Co'y, ag't, et al. Copy of articles of incorporation. C. H. Hale, et al. Duncan B. Finch. Exhibit B. Joseph H. Houghton, clerk.

153 EXHIBIT C.

Bill of sale, steamer New World.

To all whom these presents shall come, greeting:

Know ye, that the Oregon Steam Navigation Company, a corporation duly organized under the laws of the State of Oregon, and having its principal place of business at the city of Portland, in said State, sole owner of the steamboat or vessel called the New World, of the burden of five hundred and twenty-four $\frac{66}{95}$ tons or thereabouts, for and in consideration of the sum of seventy-five thousand dollars, lawful money of the United States, to said Oregon Steam Navigation Company paid, before the sealing and delivery of these presents, by Henry Winsor, of Olympia, Territory of Washington, the receipt whereof is hereby acknowledged, has bargained and sold, and by these presents does bargain and sell unto the said Henry Winsor, and to his executors, administrators and assigns, the whole of the said steamboat New World, together with all and singular her boilers, engines, machinery,
154 tackle, apparel, furniture and other necessaries thereunto appertaining and belonging.

The certificate of the enrollment of said steamboat or vessel is as follows, to wit:

Enrollment.

(Permanent, fourteen.)

Enrollment in conformity to an act of the Congress of the United States of America, entitled "An act for enrolling and liscensing ships or vessels to be employed in the coasting trade or fisheries, and for regulating the same," approved February 18th, 1793; and "An act to regulate the admeasurement of ton'age of ships and vessels of the United States," approved May 6th, 1864.

Theodore Wygant, secretary of the Oregon Steam Navigation Company, of Portland, having taken or subscribed the oath required by the said act, and having sworn that the said Oregon Steam Navigation Company is composed entirely of citizens of the United States, sole owner of the ship or vessel called the New World, of Portland, Oregon, whereof John H. Wolf is at present master, and, as he hath sworn, is a citizen of the United States, and that the said ship or vessel was built at the

155 city of New York, in the year A. D. eighteen hundred and forty-nine, as appears by enrollment No. 33, dated at this port on the thirty-first day of May, 1864, now surrendered, vessel remeasured; and Geo. H. Belden, special surveyor of the port of Portland, having certified that said ship or vessel has two decks, and no masts; that her length is two hundred and eighteen feet; her breadth is twenty-five feet; her depth is eight feet; her height is seven feet, and that she measures five hundred and thirty tons and sixty-seven hundredths, viz:

Capacity under ton'age deck	301.01
Capacity between decks, under ton'age deck	229.66
Enclosures on upper deck.	
Total tonage	530.67

That she is steamboat; has round stern and billet head; and the said Theodore Wygant, secretary, &c., having agreed to the discription and admeasurement above specified, and sufficient security having been given according to the said act, the said steamboat New World has been duly enrolled at the port of Astoria, Oregon.

Given under my hand and seal at the port of Astoria, this sixteenth day of December, one thousand eight hundred and sixty-
156 five.

[L. S.] W. W. PARKER,
Deputy Collector.

To have and to hold the said steamboat New World, vessel, and appurtenances thereunto belonging, with him, the said Henry Winsor, and unto his executors, administrators, and assigns forever.

And the said Oregon Steam Navigation Company has, and by these presents does, covenant and agree for itself and its successors to and with the said Henry Winsor, and with his heirs, executors, administrators, and assigns, to warrant and defend the said steamboat or vessel New World, and all the other before-mentioned appurtenances against all and every person whomsoever; and it is understood and agreed that this sale is upon the express condition, that steamboat or vessel is not within ten years from the first day of May, 1867, to be run upon any of the routes of travel on the rivers, bays, or waters of
157 the State of California, or the Columbia River and its tributaries, and that during the same period last aforesaid the machinery of the said steamboat shall not be run or employed in running any steamboat or vessel or craft upon any of the routes of travel on the rivers, bays, and waters of the State of California, or the Columbia River and its tributaries.

In witness thereof the said Oregon Steam Navigation Company, by its president, John C. Ainsworth, and its secretary, Theodore Wygant, at the city of Portland, Oregon, has this 18th day of February, 1867, set its name and seal, hereunto.

Signed and sealed.

OREGON STEAM NAV. CO'Y,
By J. C. AINSWORTH, *Pres't.*
[O. S. N. CO. SEAL.] THEO. WYGANT,
Sec'y O. S. N. Co.

In presence of—
SHUBRICK NORRIS.
BENJ. F. GOODWIN.

[Here are five 15 c. int. rev. stamps, cancelled, in the bill of sale.]

STATE OF OREGON,
County of Multnomah, ss:

158 On this 19th day of February, A. D. 1867, before the undersigned, a notary public within and for said county and State, personally appeared John C. Ainsworth and Theodore Wygant, to me known as the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as president and secretary of the Oregon Steam Navigation Company, its act and deed.

Witness my hand and notarial seal.

[L. S. OF NOTARY.] BENJ. F. GOODWIN.
Notary Public.

[5 c. int. rev. stamp. B. F. G. Feb'y 19th, 1867.]

Recorded by W. W. Parker, deputy collector and clerk, Feb. 22d, 1867.

159 EXHIBIT D.

Memorandum of agreement made and entered into between Henry Winsor, Clanrick Crosby, Nathaniel Crosby, jr., and Calvin H. Hale, of Washington Territory, and S. D. Howe and A. R. Elder, sureties, and the Oregon Steam Navigation Company of the State of Oregon.

Whereas the said Oregon Steam Navigation Company have sold to the said Clanrick Crosby, Henry Winsor, Nathaniel Crosby, jr., and Calvin H. Hale the steamboat New World, for the consideration of the sum of seventy-five thousand dollars, and also of a covenant and agreement by said Winsor, C. Crosby, N. Crosby and Hale, that the said steamboat shall not be run upon any of the routes of travel on the rivers, bays, or waters of the State of California, or the Columbia River and its tributaries, for the period of ten years from the first day of May, 1867:

Now these presents are intended to evidence the said covenant and agreement; and the said Winsor, C. Crosby, N. Crosby, and Hale, for themselves, their successors and assigns, have agreed, and do hereby, and covenant and agree in consideration of the premises that they will not run or employ, or suffer to be run or employed, the said steamboat New World upon any of the said routes of travel on the rivers, bays, or waters of the State of California, or the Columbia River and its
160 tributaries, for the period of ten years from the first day of May, 1867; and the said Winsor, C. Crosby, N. Crosby, and Hale have further covenanted and agreed that the machinery of the said steamboat New World shall not be run or employed in running any steamboats, vessel, or craft upon any of the routes of travel on the rivers, bays, or waters of the State of California, or the Columbia River and its tributaries, for the period of ten years from the first day of May, 1867. And the said Winsor, C. Crosby, N. Crosby, and Hale do hereby agree that in case of any breach of this covenant and agreement, to pay to the said Oregon Steam Navigation Company the sum of seventy-five thousand dollars, in gold coin of the United States, as actual liquidated damages; but this provision shall not have the effect to prevent the said Oregon Steam Navigation Company from taking such other remedy by injunction, or otherwise, as they may be advised.

In witness whereof the said Henry Winsor, Clanrick Crosby, Nathaniel Crosby, and Calvin H. Hale, and S. D. Howe and A. R. Elder,

161 as sureties, have hereunto set their hands and seals this 18th day of February, 1867.

C. CROSBY.
NATHANIEL CROSBY, JR.
CALVIN H. HALE.
S. D. HOWE,
A. R. ELDER,
Security.

[50 c. int. rev. stamp, cancelled.]

(Endorsed:) Bond. Henry Windsor & others in regard to steamer New World. Calvin H. Hale et al. v. Duncan B. Finch. Exhibit D. Joseph H. Houghton, clerk.

162 EXHIBIT E.

[$40.00 U. S. rev. stamp, cancelled.]

To all to whom these presents shall come, greeting:

Know ye that Henry Winsor, sole owner of the steamboat or vessel called the New World, of the burden of five hundred and thirty $\frac{67}{100}$ tons or thereabouts, for and in consideration of the sum of forty thousand dollars, gold coin of the United States, to me paid, to my full satisfaction, before the sealing and delivery of these presents, by the Oregon Steam Navigation Company, a corporation organized under the laws of the State of Oregon, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do bargain and sell, unto the Oregon Steam Navigation Company and unto its successors and assigns the whole of the said steamboat or vessel New World, together with all and singular her boilers, engines, machinery, tackle, apparel, and furniture, and other necessaries thereunto appertaining and belonging. The certificate of enrollment or registry of the said steamboat or vessel New World is as follows, to wit:

No. 3.] Temporary three.

163 [SEAL.] J. A. GRAHAM,
Act. Ass't Register.

(Across the face:) Cancelled March 9, '69. J. J. H. V. B., record clerk.

In pursuance of an act of Congress of the United States of America entitled "An act for registering and recording ships or vessels," approved Dec. 31, 1792, and "An act to regulate the admeasurement of ton'age of ships and vessels of the United States," approved May 6, 1864, Henry Winsor, mariner, of Olympia, W. T., having taken or subscribed the oaths required by the said act, and having sworn that he is the sole and only owner of the ship or vessel called the New World, of Olympia, W. T., whereof Charles T. Winsor is at present master, and as he hath sworn is a citizen of the United States, and that the said ship or vessel was built at the city of New York in the year eighteen hundred and forty-nine, as appears by permanent enrollment No. 14, issued at the port of Astoria, Oregon, on the 16th day of December, 1865, and now surrendered, new owners and change of district and for register; and said certificate of enrollment having certified that said ship or vessel has two

decks and no masts, and that her length is two hundred and eighteen ($218\frac{0}{10}$) feet, her breadth twenty-five ($25\frac{0}{10}$); her depth eight ($8\frac{0}{10}$)
164 feet; her height, seven ($7\frac{0}{10}$) feet; and that she measures five hundred and thirty (530) tons and 67 hundredths, viz:

	Ton'age	$\frac{1}{100}$
Capacity under ton'age deck	301	01
Capacity between decks above ton'age deck	229	66
Enclosures on the upper deck	000	....
Total ton'age	530	67

[SEAL.] W. W. PARKER,
Dep. Collector.

That she is a steamboat; has a round stern and a billet head; and the said Henry Winsor having agreed to the description and admeasurement above specified, and sufficient security having been given according to the said act, the said steamboat has been duly registered at the port of Astoria, Oregon.

Given under my hand and seal at the port of Astoria this 25th day of February, in the year one thousand eight hundred and sixty-seven (1867).

[SEAL.] (Sig.) W. W. PARKER,
Deputy Collector.

J. A. GRAHAM,
Act. Ass't Register.

To have and to hold the said steamboat or vessel New World,
165 with her appurtenances aforesaid thereunto belonging unto the said Oregon Steam Navigation Company and unto its successors and assigns forever. And I do further by these presents covenant and agree, for myself, my heirs, executors, and administrators, to and with the said Oregon Steam Navigation Company and with its successors and assigns, to warrant and defend the said steamboat or vessel New World and all other before-mentioned appurtenances against all and every person whomsoever.

The condition of this sale is that whereas the said Henry Winsor has purchased of the said Oregon Steam Navigation Company the said steamboat or vessel New World and her before-mentioned appurtenances, and for the payment of forty thousand dollars paid has delivered to the said Oregon Steam Navigation Company the following described promissory notes, namely: eight promissory notes, all bearing date the 18th day of February, 1867, all made by H. Winsor, C. Crosby, N. Crosby, jr., and C. H. Hale, all payable to the order of the said Oregon Steam Navigation Company in gold coin of the United States, at
166 the banking house of Ladd and Tilton, in the city of Portland, Oregon, and each for the sum of five thousand dollars, with one per cent. interest per month from the date of the same, one payable in three months from its date, one in six months, one in nine months, one in twelve months, one in fifteen months, one in eighteen month', one in twenty-one months, and one in twenty-four months from the date thereof.

Now, therefore, if the said promissory notes shall be paid as they severally become due and payable according to the form and tenor thereof, then this to be void, but in case of failure to pay the same or any of them, to be and remain in full force.

In testimony whereof I have hereunto set my hand and seal, at the city of Portland, this 22nd day of February, A. D. 1867.

(Signed) HENRY WINSOR. [L. S.]

Signed, sealed and delivered in the presence of—
(Sig.) THEODORE WYGANT.

(Across the face:) Cancelled March 10th, 1869. J. J. H. V. B., record clerk.

167 STATE OF OREGON,
Clatsop County, ss:

ASTORIA, *February* 22, 1867.

Before the undersigned, a notary public, within and for said county, personally appeared Henry Winsor, to me known as the person described in and who executed the foregoing instrument, and acknowledged that he executed the same for the purposes herein specified.

Witness my hand and seal the day and year and at the place hereinabove written.

[NOTARIAL SEAL.] (Signed) W. W. PARKER,
Notary Public for Oregon.

[6 c. U. S. rev. stamp.]

Received March 7th, 1867, and recorded by me.

EDW. S. DYER,
Recording Clerk.

The foregoing mortgage has been fully satisfied by the payment of all amounts specified in said mortgage.

Witness the seal of the said Oregon Steam Navigation Company and the signature of its president this 17th day of February, A. D. 1869, at Portland, Oregon.

[SEAL.] (Signed) J. C. AINSWORTH,
President.

(Signed) THEO. WYGANT,
Secretary.

[U. S. stamp, 5 c., cancelled.]

168 Received and recorded this 9th day of March, A. D. 1869.
(Signed) J. J. H. VAN BOKKELEN,
Record Clerk.

CUSTOM-HOUSE,
Port Townsend, W. T., July 31, 1874.

I certify the foregoing to be a true copy of mortgage from the records of this office.

{ SEAL, COLL. CUSTOMS, P'T TOWNSEND. } P. D. MOORE,
Deputy Collector.

Mortgage. Henry Winsor to O. S. N. Co. Dated 22d February, 1867.

Exhibit No. 1.

Recorded at the custom-house at Astoria, district of Oregon, Feb'y 22, 1867, on pages 222, 223, & 224 of vol 11, records of bills of sale, &c., of vessels.

By W. W. PARKER,
Col'er, Clerk, &c.

Fees, 50c.

169 *Exhibit No. 2.*

Recorded at the custom-house at Port Townsend, district of Puget Sound, March 4th, 1867. Book B, page 3, of records of enrolled vessels.

EDW. S. DYER,
Recording Clerk.

It is admitted that Exhibits C, D, & E were all of the same transaction, and were delivered at the same time.

EXHIBIT F.

[Bill of sale of registered vessels. Blank No. 43, register's office.]

[U. S. R. stamp cancelled, $75.00.]

To all to whom these presents shall come, greeting:

Know ye, that I, Henry Winsor, of Olympia, in the Territory of Washington, sole owner of the steamboat or vessel called the New World, of said Olympia, W. T., of the burden of $530\frac{67}{100}$ tons or thereabout, for and in consideration of the sum of seventy-five thousand dollars, lawful money of the United States of America, to me in hand paid, before
170 the sealing and delivery of these presents, by Calvin H. Hale, of said Olympia, and Territory aforesaid, the receipt whereof I do hereby acknowledge, and am herewith fully satisfied, contented, and paid, have bargained and sold, and by these presents do bargain and sell, unto the said Calvin H. Hale, his executors, administrators, and assigns, the whole of the said steamboat or vessel, together with her boilers, engines, machinery, mast, bowsprit, the sail, boats, anchors, cables, and all other necessaries thereunto appertaining and belonging. The certificate of the registry of which said steamboat or vessel is as follows, viz:

Permanent No. 14.

[Official numbers; numeral, letters.]

In pursuance of an act of Congress of the United States of America, entitled "An act concerning the registering and recording of ships or vessels," approved December 31, 1792, and of "An act to regulate the admeasurement of ton'age of ships and vessels of the United States," approved May 6, 1864 (signed Henry Winsor. register,
171 Seal of United States Treasury. of Olympia, Territory of Washington), having taken or subscribed the oath required by the said acts, and having sworn that he is sole and only owner of the ship or vessel called the New World of Olympia, W. T., whereof Charles F. Winsor is at present master, and as he hath sworn, is a citizen of the United States, and that the said ship or vessel was built at the city of New York, in the year A. D. 1849, as per temporary register, No. 3, issued at the port of Astoria, Oregon, on the 22d day of February, 1867, now surrendered; and said register having certified that the said ship or vessel has two decks and no mast; and that her length is $218\frac{}{10}$ feet; her breadth, $25\frac{}{10}$ feet; her dep'h, $8\frac{}{10}$ feet; her height $7\frac{}{10}$; and that she measures $530\frac{67}{100}$ tons, viz:

Signed:

[SEAL.] *Collector.*

Signed.

[SEAL.]

Capacity under ton'age decks	301.01
Capacity between decks above ton'age decks	229.66 tons.
Enclosures on the upper deck, viz, total ton'age	530.67 tons.

That she is a steamboat; has a billet head, and a round stern. And the said Henry Winsor, having agreed to the description and admeasurement above specified, and sufficient security having been given according to the said acts, the said steamboat New World has been
172 duly registered at the port of Port Townsend, W. T., district of Puget Sound.

Given under my hand and seal at the port of Port Townsend, this fourth (4) of March, in the year one thousand eight hundred and sixty-seven (1867).

To have and to hold the said whole of said steamboat New World, together with the boilers, engines, machinery, tackle, apparel, and furniture, and appurt'ances thereunto belonging unto him, the said Calvin H. Hale, his executors, administrators, and assigns, to the sole and only proper use, benefit, and behoof of him, the said Calvin H. Hale, his executors, administrators, and assigns, forever, and I, the said Henry Winsor, have, and by these presents do promise, covenant, and agree, for myself, my heirs, executors, and administrators, to and with the said Calvin H. Hale, his heirs, executors, administrators, and assigns, to warrant and defend the said whole of said steamboat New World, her boilers, engines, machinery, tackle, apparel, and all other before mentioned appurtanences against all and every person and persons whomsoever.
173 In testimony whereof I, the said Henry Winsor, have hereunto set my hand and seal, this fifth (5) day of March, in the year of our Lord one thousand eight hundred and sixty-seven.

(Signed) HENRY WINSOR. [SEAL]

Signed, sealed, and delivered in presence of—
(Sig.) EDW. S. DYER.
(Sig.) JAMES K. KENNEDY.

Bill of sale. Henry Winsor, of Olympia, W. T., to Calvin H. Hale. Steamer called the New World. Dated March 5th, 1867.

Recorded at the custom-house, Port Townsend, Puget Sound district, March 7, 1867, on page 11 of book B of records of bills of sale of registered vessels.

EDW. S. DYER,
Recording Clerk.

Fees, 50c.

174 TERRITORY OF WASHINGTON,
County of Jefferson, ss:

On this seventh day of March, A. D. 1867, before the undersigned, a notary public, within and for said county and Territory, personally appeared Henry Winsor, to me known as the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

Witness my hand and seal the day and date above written.

[NOTARIAL SEAL.] (Sig.) JAMES K. KENNEDY,
Notary Public.

[U. S. r. stamp, 5 c.]

175 EXHIBIT G.

To all to whom these presents shall come, greeting:

Know ye, that I, Calvin H. Hale, of Olympia, in the Territory of

Washington, sole owner of the steamboat or vessel called the New World, now lying at the port of Olympia, Washington Territory, of the burden of five hundred and thirty and $\frac{67}{100}$ tons, or thereabouts, for and in consideration of the sum of fifty thousand dollars, lawful money of the United States of America, to me in hand paid before the sealing and delivery of these presents, by Duncan B. Finch, of the same place, the receipt whereof I do hereby acknowledge, and am therewith fully satisfied, contented, and paid; have bargained and sold, and by these presents do bargain and sell unto the said Duncan B. Finch, his executors, administrators, and assigns, the whole of the said steamboat or vessel; together with her engines, boilers, machinery, the mast, bowsprit, sails, boats, anchors, cables, and all other necessaries there-
*176 unto appertaining and belonging. The certificate of the registry of which said steamboat is as follows, to wit:

Permanent No. 15.

(On the margin:) J. A. Graham, actg. asst. register.

In pursuance of an act of the Congress of the United States of America entitled "An act concerning the registering and recording of ships or vessels," approved December 31st, 1792, and of "An act to regulate the admeasurement of ton'age of ships and vessels of the United States," approved May 6, 1864, Calvin H. Hale, of Olympia, Washington Territory, having taken or subscribed the oath required by the said act, and having sworn that he is a citizen of the United States, and the true and only owner of the ship or vessel called the New World, of Olympia, W. T., whereof Henry Winsor is at present master, and is a citizen of the United States, as he hath sworn, and that the said ship or vessel was built at the city of New York, in the year 1849, as appears by permanent register No. 14. issued at Port Townsend, district of Puget Sound, March 4th, 1867, now surrendered, change of owners.

177 And the said register having certified that the said ship or vessel has two decks, no mast, and that her length is 218 feet; under ton'age deck, 301 tons $\frac{01}{10}$; her breadth, 25 feet, between decks, above ditto, 229$\frac{67}{10}$ tons; her depth, 8 feet; enclosures, and an upper deck, in her hight*h*, 7 feet, and that she measures five hundred and thirty tons and sixty-seven hundredths; that she is a steamboat; has a round stern, and no head. And the said Calvin H. Hale, having agreed to the discription and admeasurement above specified, and sufficient security having been given, according to the said act, the said steamboat has been duly registered at the port of Port Townsend, district of Puget Sound.

Given under my hand and seal, at the port of Port Townsend, this 7th day of March, in the year one thousand eight hundred and sixty-seven.

[L. S.] (Signed) W. E. BARNARD,
Deputy Collector.

To have and to hold the said , of said steamboat New World, her engines, boilers, machinery, tackle, apparrel, furniture, and appurtenances thereunto belonging *belonging*, unto him, the said Dun-
178 can B. Finch, his executors, administrators and assigns, to the sole and only proper use, benefit, and behoof of him, the said Duncan B. Finch, his executors, administrators and assigns forever; and I, the said Calvin H. Hale, have, and by these presents do promise,

covenant, and agree, for myself, my heirs, executors and administrators, to and with the said Duncan B. Finch, his heirs, executors, administrators and assigns, to warrant and defend the whole of said steamboat New World, her engines, boilers, machinery, and all the other before mentioned appurtenances, against all and every person and persons whomsoever.

And it is understood and agreed that this sale is upon this express condition, that said steamboat or vessel is not within ten years from the first day of May, 1867, to be run upon any of the routes of travel, on the rivers, bays, or waters of the State of California or the Columbia Rivers or its tributaries, and that during the same period last aforesaid the machinery of the said steamboat shall not be run, or be em-
179 ployed in running, any steamboat or vessel or craft upon any of the routes of travel on the rivers, bays, or waters of the State of California, or the Columbia River and its tributaries.

In testimony whereof, I, the said Calvin H. Hale, have hereunto set my hand and seal this twenty-third day of November, in the year of our Lord one thousand eight hundred and sixty-seven.

C. H. HALE. [SEAL.]

Signed, sealed, and delivered in presence of—
ELWOOD EVANS.
B. F. DENNISON.

TERRITORY OF WASHINGTON,
County of Thurston, ss:

On this twenty-third day of November, in the year one thousand eight hundred and sixty-seven, before the undersigned, a notary public in and for said Territory, duly commissioned and sworn, personally appeared the above-named Calvin H. Hale, to me personally known to be the identical individual who signed and executed the foregoing bill of sale, and in due form of law acknowledged to me that he exe-
180 cuted the same freely and voluntarily, and for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my notarial seal, at Olympia, W. T., in the day and year last above written.

[SEAL.] ELWOOD EVANS,
[5 c. int. rev. stamp.]
Notary Public.

[U. S. int. rev. stamp, fifty dollars, cancelled.]

(The following endorsements are on the foregoing:) Calvin H. Hale v. Duncan B. Finch. Exhibit G. Joseph H. Houghton, clerk.

DISTRICT OF PUGET SOUND,
Port of Port Townsend:

Received this 26th day of November, 1867, and recorded in book B of records of registered vessels, on page 26.

EDW. S. DYER.
Recording Clerk.

181 EXHIBIT H.

[Int. rev. 5 c. stamp, cancelled.]

Articles of agreement between Duncan B. Finch, of the one part, and Calvin H. Hale, of the other part, both of the town of Olympia, Washington Territory, as follows, viz:

Whereas the said Calvin H. Hale, in consideration of the sum of fifty

thousand dollars, has this day executed, in favor of the said D. B. Finch, a bill of sale of the steamer New World, and assigned the mail contract for carrying the mails on Puget Sound, together with the post-office drafts for the remainder of said mail service; which consideration money is to be paid and discharged by said Duncan B. Finch in manner and form as hereinafter recited; now, therefore, it is covenanted, agreed, and concluded by and between the said parties to these presents, for themselves, their executors, administrators, and assigns, in manner and form following, that is to say:

The said D. B. Finch, for himself, his executors, administrators,
182 and assigns, doth covenant and agree—

First. That he will give due notice by advertisement to all creditors of, or persons legally claiming against the said steamer New World, to present to him, within sixty days, their said claims with proper vouchers, or approved by said Calvin H. Hale, and he, the said D. B. Finch, will pay the same.

Second. That he, the said D. B. Finch, does hereby assume and agree to pay, discharge, and satisfy six certain promis'ory notes, bearing date the 18th day of February, 1867, for five thousand dollars each, held by the Oregon Steam Navigation Company, and secured by a mortgage upon said steamer New World, together amounting in principal and interest, up to this date, to the sum of thirty-two thousand two hundred and eighty-eight & $\frac{57}{100}$ dollars ($32,288.57).

Third. That should the two foregoing assumed classes of liabilities not amount to forty thousand dollars ($40,000) then the said D. B.
Finch hereby agrees to pay to the said Calvin H. Hale the
183 defference between the said sum and the aggregate of said liabilities of the said steamer New World paid and assumed by said D. B. Finch.

Fourth. The payment of the remaining ten thousand dollars, consideration hereinbefore recited, shall remain in abeyance until the said D. B. Finch shall have had time to communicate with George S. Wright, and should said Wright assent to the said Calvin H. Hale acquiring and holding an eighth ($\frac{1}{8}$) interest in the two steamboats Eliza Anderson and New World in lieu of the payment of said ten thousand dollars, then a bill of sale, to said Calvin H. Hale, for such eighth interest in each of said steamboats shall be a full payment and discharge of the said sum. And until the said George S. Wright shall have signified his willingness or objection to the above condition, the said D. B. Finch hereby covenants and agrees to pay to the said Calvin H. Hale
a dividend equal to one-eighth of the net earning of the steamers
184 Eliza Anderson and New World, upon Puget Sound, and upon refusal to convey said ($\frac{1}{8}$) eighth interest, then to pay the just and full sum as aforesaid, of ten thousand dollars. And the said Calvin H. Hale, for himself, his executors and administrators, in consideration of the premises, hereby covenants and agrees that he will promptly, and on the receipt from time to time of drafts from the United States Post-Office Department for said mail services on Puget Sound, by virtue of the contract this day assigned to Duncan B. Finch, transfer and deliver to said Finch all of said drafts, to the end that the said D. B. Finch shall receive the pay for said mail service. And the said Calvin H. Hale further covenants and agrees that he will accept the aforesaid consideration of fifty thousand dollars in the manner and form as hereinbefore covenanted and agreed to be paid. It is further agreed by and between the parties that wherever the word "dollars" is used in this agreement, it is

185 expressly understood that it is to mean gold coin of the United States of America.

In witness whereof we have hereunto set our hands and seals, at Olympia, this 23d November, A. D. 1867.

D. B. FINCH. [SEAL.]
C. H. HALE. [SEAL.]

In presence of us—
ELWOOD EVANS.

(The following endorsements are on the foregoing agreement:) D. B. Finch and C. H. Hale. Agreement. Calvin H. Hale et al. v. Duncan B. Finch. Exhibit H. Joseph H. Houghton, clerk.

186 Capt. J. C. AINSWORTH, sworn for plaintiff, testifies:

That in May, 1864, and prior thereto, the California Steam Navigation Company were owners of the steamboat New World, and were engaged in navigating the waters of California, carrying freight and passengers for hire, with said steamboat New World, and many other steam and other vessels. That at same time the Oregon Steam Navigation Company had from 12 to 20 steamers engaged in navigating the waters of the Columbia River and its tributaries, and about this time bought steamer New World to run from Portland to Cascades; that this company continued to own said steamer New World till February 18th, 1867, then sold the said steamboat to plaintiffs in this action. Consideration paid by plaintiff was steamer Josie McNear, $5,000 coin, and eight notes for $5,000.00 each. Capt. Finch paid some of these notes. Josie McNear was taken for $30,000.00.

Cross examined by defendant's counsel:

187 The California Steam Navigation Company was running on Sacramento River to Sacramento, and San Joaquin to Stockton. Oregon Steam Navigation Company was doing the principal business at this time on the Columbia River and its tributaries, and I considered the California Steam Navigation Company were doing the principal business on the inland waters of the State of California. The Oregon Steam Navigation Company purchased the steamer New World, because the company wanted her.

CALVIN H. HALE, sworn for plaintiff, testifies:

I was one of the owners of the steamer New World by purchase from the Oregon Steam Navigation Company. Plaintiff bought the New World to carry the mail from Olympia to Victoria and way ports. We paid steamer Josie McNear, valued at $30,000, $5,000 coin, and our notes, eight in number, for $5,000 each, secured by mortgage on the
188 boat, for her. Capt. Finch and myself had several talks about sale to Finch. At the time of the sale to Finch the title was in me, but Henry Winsor, Clanrick Crosby, N. Crosby, and myself were real owners. I told Capt. Finch all about it. Capt. Finch knew we were under liabilities to the O. S. N. Company if the steamer should go to California to run. I informed him we were under bonds in sum of $75,000 not to run on waters of Oregon or California; he said he was willing to take bill of sale in same way with same clause.

EXHIBIT I.

Memorandum of agreement made and entered into between the Oregon Steam Navigation Company, of the State of Oregon, and California Steam Navigation Company, of the State of California:

Whereas the said California Steam Navigation Company have sold to the said Oregon Steam Navigation Company the steamboat called the New World, for the consideration of the sum of seventy-five
189 thousand dollars, and also of a covenant and agreement by the said Oregon Steam Navigation Company that the said steamboat shall not be run upon any of the routes of travel on the rivers, bays, or waters of the State of California for the period of ten years from the first day of May, 1864:

Now these presents are intended to evidence the said covenant and agreement, and the said Oregon Steam Navigation Company for themselves, their successors and assigns, hath agreed, and doth hereby covenant and agree, in consideration of the premises, that they will not run or employ or suffer to be run or employed the said steamboat New World upon any of the routes of travel on the rivers, bays, and waters of the State of California, for the period of ten years from the first day of May, 1864.

And the said Oregon Steam Navigation Company have further covenanted and agreed that the machinery of the said steamboat New World shall not be run or employed in running any steamboat, vessel, or craft upon any of the routes of travel, or on the rivers,
190 bay', or waters of the State of California for the period of ten years from the first day of May, 1864.

And the said Oregon Steam Navigation Company doth hereby agree that in case of any breach of this covenant and agreement to pay to the said California Steam Navigation Company the sum of seventy-five thousand dollars in gold coin of the United States as actual liquidated damages, but this provision shall not have the effect to prevent the said California Steam Navigation Company from taking such other remedy by injunction or otherwise as they may be advised.

In witness whereof the said Oregon Steam Navigation Company hath caused this instrument to be signed by its president and countersigned by its secretary, and their corporate seal to be affixed at Portland, Oregon, on this 2d day of May, A. D. 1864.

[O. S. N. CO. SEAL.] (Signed) J. C. AINSWORTH,
Pres't O. S. N. Co.

GEO. W. MURRAY,
Sec. O. S. N. Co.

[50 c. U. S. int. rev. stamp, cancelled.]

191 EXHIBIT K.

In the United States district court of the second judicial district of Wash. Terr'y holding terms at Olympia, for Thurston, Lewis, Mason, and Chehalis Counties. November term, A. D. 1869.

THE OREGON STEAM NAVIGATION COMPANY, plaintiff,
v.
HENRY WINSOR, C. CROSBY, NATHANIEL Crosby, jr., Calvin H. Hale, S. D. Howe, and A. R. Elder, defendants.

The Oregon Steam Navigation Company, a corporation duly organ-

ized under the laws of the State of Oregon, and doing business in the said State and in the Territory of Washington, plaintiff, comes now and by leave of the court filing this their amended complaint, com-
192 plains of Henry Winsor, C. Crosby, Nathaniel Crosby, jr., Calvin H. Hale, S. D. Howe, and A. R. Elder, of Thurston County, Wash. Terr'y, defendants, and for cause of action alleges the following facts:

1st. That plaintiff is a corporation duly organized under the laws of the State of Oregon, and has been since the 18th day of October, A. D. 1862, for the navigation by steam and otherwise, of the Columbia River and its tributaries in the State of Oregon and Territory of Washington, and the Pacific and other oceans; and have been engaged in said waters in the prosecution of said business, from said date of October, 1862, and is still engaged in the prosecution of said business in conveying passengers and freight for hire.

2d. That in May, 1864, and for a long time previous thereto, the California Steam Navigation Company, a duly organized company, under the laws of the State of California, were engaged, by the use of a large number of steam and other vessels, in the transportation for hire of passengers and freight on the several routes of travel, on the rivers, bays, and waters of the State of California.

193 3rd. That at said date of May, A. D. 1864, the said California Steam Navigation Company, among sundry other vessels there owned and used by said company in the navigation of the said waters of said State of California, owned a certain steamer, New World, which vessel said California Steam Navigation Company sold to this plaintiff for the consideration of seventy-five thousand dollars gold coin of the United States, and for the further consideration (and for the needed protection of the rights and interest of said company on said waters,) of a covenant and agreement then made by this plaintiff, in the words and figures following, to wit:

Memorandum of the agreement made and entered into between the Oregon Steam Navigation Company of the State of Oregon, and the California Steam Navigation Company of the State of California.

Whereas the said California Steam Navigation Company have sold to the Oregon Steam Navigation Company the steamboat called the New World, for the consideration of the sum of seventy-five thousand dollars, and also for a covenant and agreement by the said Oregon
194 Steam Navigation Company that the said steamboat shall not run upon any of the routes of travel on the rivers, bays, or waters of the State of California, for the period of ten years from the first day of May, A. D. 1864:

Now these presents are intended to evidence the said covenant and agreement, and the said Oregon Steam Navigation Company, for themselves, their successors and assigns, hath agreed, and doth hereby covenant and agree, in consideration of the premises, that they will not run, or employ, or suffer to be run or employed, the said steamboat New World, upon any of the routes of travel, on the rivers, bays, or waters of the State of California, for the period of ten years from the first day of May, 1864.

And the said Oregon Steam Navigation Company have further covenanted and agreed that the machinery of the said steamboat New World shall not be run or employed in running any steamboat, vessel, or craft upon any of the routes of travel on the rivers, bays, or waters of the State of California for the period of ten years from the first day

of May, 1864. And the said Oregon Steam Navigation Com-
195 pany doth hereby agree that in case of any breach of this cov-
enant and agreement to pay to the said California Steam Navigation Company the sum of seventy-five thousand dollars, in gold coin of the United States, actual liquidated damages; but this provision shall not have the effect to prevent the said California Steam Navigation Company from taking such other remedy, by injunction or otherwise, as they may be advised.

In witness whereof the said Oregon Steam Navigation Company hath caused this instrument to be signed by its president and countersigned by its secretary, and their corporate seal to be affixed at Portland, Oregon.

[SEAL O. S. N. CO.] (Signed) J. C. AINSWORTH,
Pres. O. S. N. Co.

(Signed) GEO. W. MURRAY,
Sect. O. S. N. Co.

4th. And the plaintiff further shows that afterwards, to wit, on the 18th day of February, 1867, four other defendants, viz, C. Crosby, Henry Winsor, Nathaniel Crosby, jr., and Calvin H. Hale, pur-
196 chased of plaintiff the steamboat New World for the sum of
seventy-five thousand dollars, cash, which is admitted to be paid; and the further consideration of an agreement and understanding, in writing, with the other defendants, S. D. Howe and A. R. Elder, as sureties, whereby the defendants to this action agreed and covenanted to and with the plaintiff that the said steamboat New World should not be run on any of the routes of travel on the rivers, bays, or waters of the State of California or the Columbia River and its tributaries for the period of ten years from the first day of May, 1867; and also that none of the machinery of the said steamboat New World should be employed within said period in running any steamboat, vessel, or craft upon any of the said waters; said further consideration and agreement is in the words and figures following, to wit:

Memorandum of agreement made and entered into between Henry Winsor, Clanrick Crosby, and Nathaniel Crosby, jr., and Calvin H. Hale, of Washington Territory, and S. D. Howe and A. R. Elder, as sureties, and the Oregon Steam Navigation Company of
197 the State of Oregon.

Whereas the said Oregon Steam Navigation Company have sold to the said Clanrick Crosby, Henry Winsor, Nathaniel Crosby, jr., and Calvin H. Hale the steamboat called the New World for the sum of seventy-five thousand dollars, and also for a covenant and agreement by the said Winsor, C. Crosby, N. Crosby, and Hale, that the said steamboat shall not be run upon any of the routes of travel on the rivers, bays, and waters of the State of California or the Columbia River and its tributaries for the period of ten years from the first day of May, 1867:

Now, these presents are intended to evidence the said covenant and agreement, and the said Winsor, C. Crosby, N. Crosby, jr., and Hale for themselves, their successors, and assigns have agreed, and do hereby covenant and agree, in consideration of the premises, that they will not run, or employ, or suffer to be run or employed the said steamboat New World upon any of the routes of travel on the rivers, bays, or
198 waters of the State of California or the Columbia River and its

tributaries for the period of ten years from the first day of May, 1867; and the said Winsor, C. Crosby, N. Crosby, and Hale have further covenanted and agreed that the machinery of *of* the said steamboat New World shall not be run, or employed in running any steamboat, vessel, or craft upon any of the routes of travel on the rivers, bays, or waters of the State of California, or the Columbia River and its tributaries for the period of ten years from the first day of May, 1867; and the said Winsor, C. Crosby, N. Crosby, and Hale do hereby agree that in case of any breach of this covenant and agreement to pay to the said Oregon Steam Navigation Company the sum of seventy-five thousand dollars in gold coin of the United States as actual liquidated damages, but this provision shall not have the effect to prevent the said Oregon Steam Navigation Company from taking such other remedies by injunction or otherwise as they may be advised.

199 In witness whereof the said Henry Winsor, Clanrick Crosby, Nathaniel Crosby, and Calvin H. Hale, and S. D. Howe and A. R. Elder, as sureties, have hereunto set their hands and seals this 18th day of February, 1867.

HENRY WINSOR.
C. CROSBY.
NATHANIEL CROSBY, JR.
CALVIN H. HALE.
S. D. HOWE. *Security.*
A. R. ELDER, "

[Cancelled int. rev. stamp, 50 c.]

5th. This plaintiff further alleges that at the sale and delivery to these defendants of the said steamer New World, plaintiff was engaged in navigating the waters of the Columbia River and its tributaries, in the State of Oregon, and Territory of Washington, as set out in said covenant and agreement last described, and that at the date of said sale of said steamer New World, to these defendants, the said California Steam Navigation Company were engaged with numerous steam and other vessels in navigating the said waters of the said State of California and in the transportation thereby of large amounts of freight and
200 passengers for pay, [and that the several provisions in said covenant made between this plaintiff and defendants were reasonably necessary for the protection of the interests of the plaintiff on said waters of Oregon and Washington Territory, and for the protection of plaintiff in the covenant heretofore described as made between this plaintiff and the California Steam Navigation Company.]

(On the margin:) All of article 5th in brackets stricken out.

6th. Plaintiff further alleges that at the time of the sale to these defendants of said steamer New World, the defendants C. Crosby, N. Crosby, jr., H. Winsor, and C. H. Hale were engaged in the navigation of the waters of Puget Sound, in the Territory of Washington, and were in nowise engaged in the navigation of the waters of Oregon and of the Territory of Washington, set out and described in the said covenant and agreement made by these defendants with this plaintiff, nor in the navigation of the waters of California described and set out in said last named covenant.

[7th. Plaintiff avers that about the 23 of Nov., 1867, these de-
201 fendants sold and delivered the said steamer New World to Geo. S. Wright and Duncan B. Finch, and the said bill of sale did not contain any covenant or agreement against the running of the said steamer on said waters of State of Oregon and Territory of Washington

or said waters of the State of California, set out in the covenant and agreement made between these defendants and plaintiff, as the interests of plaintiff required, and defendants had covenanted to do.]

(On the margin:) All of article 7th struck out.

8th. Plaintiff avers that after the making of said covenant and agreements of writing by these defendants with plaintiff, and within ten years from the first day of May, 1867, to wit, from or about the first day of Nov., 1868, and up to the present time the said steamer New World has been properly fitted up and prepared for the transportation of freight and passengers, and that said steamer has been engaged in the transportation for hire of passengers and freight from the city of San Francisco to Vallejo, in the State of California, the said route of travel
202 being on the waters of the State of California, set out and described in the covenant made by these defendants with plaintiff hereinbefore described.

9th. And plaintiff avers that at said date of November, 1867, and to this time, the said California Steam Navigation Company were occupied in the navigation of the said waters of California by means of large numbers of steam vessels suited for the wants of trade, and were largely interested in the transportation for pay of freight and passengers on said waters of the State of California.

10th. Plaintiff avers that the covenant made by these defendants with plaintiff, that the said steamer New World should not within ten years from the first day of May, 1867, run on any of the routes of travel, rivers, bays, or waters of the State of California, has not by these defendants been kept, but that these defendants have broken the same, whereby plaintiff has been damaged in the sum of seventy-five thousand dollars, gold coin of the United States [by virtue, among
203 other reasons, of the terms of the covenant made by plaintiff with the California Steam Navigation Company, and the damages plaintiff is liable to pay and have paid to the said California Steam Navigation Company, and by reason of the covenant made between plaintiff and these defendants], and though often requested to pay the same, these defendants have neglected and refused and still refuse to pay said sum or any part thereof.

(On the margin:) All of article 10 in brackets is stricken out.

11th. Wherefore plaintiff asks judgment against said defendants, Henry Wisnor, C. Crosby, Nathaniel Crosby, jr., and Calvin H. Hale, principals, and S. D. Howe and A. R. Elder, sureties upon said agreement, for the sum of seventy-five thousand dollars gold coin of the United States, and for all costs and disbursements herein.

CLARKE AND WYCHE,
Attorneys for Plaintiffs.

TERRITORY OF WASHINGTON,
County of Thurston, ss:

204 Frank Clark, being duly sworn, says that he is attorney for the plaintiff, and that plaintiff is not within this county or judicial district, and that this action is founded on a written instrument of writing in affiant's possession, and that all the material allegations of the foregoing amended complaint are within the personal knowledge of this affiant, and that this verification is made by this affiant for the reasons here set forth, and this affiant says he has read the foregoing amended complaint, and that he believes the same to be true.

FRANK CLARK.

Subscribed and sworn to before me this 1st April, 1870.

R. O. DUNBAR, *Clerk.*

This amended complaint came to hand April 1st, at one o'clock p. m., 1870, and was served the same day at 30 minutes past one p. m., by placing a true copy of the same certified by me to be such in the hands of B. F. Dennison, esq'r, at Olympia, W. T.

WM. BILLINGS,
Sheriff of Thurston County.

Cost of service, 1.00; mileage, 2 m., 20; copying, 4.00—$5.20.

205 (Endorsed on back:) Oregon Steam Navigation Company, plaintiff, vs. Hale, Crosby, et al., defendants. Amended complaint. Filed April 1st, 1870. R. O. Dunbar, clerk. Clark & Wyche, pl'ff's att'y.

Demurrer.

Washington Territory, second judicial district, holding terms at Olympia.

OREGON STEAM NAVIGATION CO.
vs.
CALVIN H. HALE ET AL.

Defendants demur to amended complaint filed in the above en-
206 titled action and for cause of demurrer alleges:

1st. The amended complaint does not state facts sufficient to constitute a cause of action.

2d. The contract set out in the complaint is one in restraint of trade and against public policy, and therefore void.

3d. That the agreement as set forth in the complaint is in contravention of the laws of Congress regulating commerce, navigation, and the coasting trade, and is therefore illegal and void.

McFADDEN, DENNISON AND HEWETT,
Att'ys for Def'd'ts.

(The following endorsements are on the foregoing:) Demurrer was this day submitted and sustained by court. O. Jacobs, judge, &c., 3d, judicial district, W. T. Plaintiff excepts. Exception allowed. O. Jacobs, judge, 3d jud. district, W. T. O. S. N. Co. v. C. H. Hale
207 et al. Demurrer to amended complaint. Filed August 3d, 1870. L. B. Andrews, clerk. Filed Septe'r 26th, 1870. R. O. Dunbar clerk.

OREGON STEAM NAVIGATION CO.
vs.
C. H. HALE ET AL.

Whereas a demurrer has been filed to the amended complaint, and is now pending in the above entitled cause, it is hereby agreed by and between the parties by their respective attorneys that the said demurrer be heard and determined by O. Jacobs, judge of the 3d judicial district, W. T., at the present term of the district court now being held at Seattle, in King County; said determination to have the same force and effect, and judgment thereon to be entered on the records of the district court at Olympia, in the second judicial district, at the Sept. term, 1870, thereof, the same as though heard and determined then by the judge of said district.

Seattle, Aug. 2nd, 1870.

208 CLARKE AND WYCHE,
Att'ys for Plaintiff.
McFADDEN, DENNISON AND HEWIT,
For Def'ts.

(The following endorsements are on the foregoing:) O. S. N. Co. vs. C. H. Hale et al. Stipulation. Filed August 5th, 1870. L. B. Andrews, clerk. Filed Sept. 26th, 1870. R. O. Dunbar, clerk.

At a regular term of the district court of the second judicial district of Washington Territory, begun and held at Olympia, in the district aforesaid, on the fourth Monday of September, A. D. 1870, the same being the 26th day of said month.

Present, the honorable Roger S. Greene, associate justice of the supreme court of said Territory and judge of the said second judicial district.

209 OREGON STEAM NAVIGATION COMPANY
vs.
HALE, CROSBY, ET AL.

In pursuance of the stipulation herein filed, and of the decision made by O. Jacobs at the time and place mentioned in said stipulation sustaining the demurrer to the amended complaint, judgment is entered that the action be and is dismissed with costs against the plaintiff taxed at sixty-five and eighty one hundredth dollars.

To which judgment plaintiff, by his counsel, excepts.

October 4th, 1870.

Remittitur.

At a regular term of the supreme court of the Territory of Washington, begun and held at Olympia, the seat of government of said Territory, on the second Monday of July, A. D. 1874, it being the 13th day of said month.

Present, honorable O. Jacobs, Roger S. Greene, and Joseph R. Lewis, esquire.

THE OREGON STEAM NAVIGATION COMPANY, plaintiffs in error,
210 *vs.*
HENRY WINSOR, CLANRICK CROSBY, Nathaniel Crosby, jr., Calvin H. Hale, Samuel D. Howe, and Alfred R. Elder, defendants in error.

And now this day is filed the judgment and mandate of the Supreme Court of the United States in this cause, whereby the judgment heretofore, to wit, at the December term, A. D. 1870, in this cause in this court is reversed with costs, and the cause is remanded to this court to be proceeded in according to law.

Whereupon, on motion of Frank Clark, esquire, attorney for said Oregon Steam Navigation Company, it is ordered by the court that this cause be docketed, and it is now here ordered and adjudged that the judgment of the district court of the second judicial district of the Territory, holding terms at Olympia, in this cause be, and the same is hereby, reversed with costs; and that the said plaintiff in error, the Oregon Steam Navigation Company, recover against the said de-
211 fendant in error, as well the sum of dollars, for its costs herein expended, as also the sum of seventy-four dollars and twenty-six cents, in the said Supreme Court of the United States by said

mandate ordered and adjudged to be paid, and that said Oregon Steam Navigation Company have execution therefor. And it is further considered that this cause be, and the same is hereby, remitted to the district court of the second judicial district, holding terms at Olympia, and that said district court proceed with the same according to law.

July 15th, 1874.

OFFICE OF THE SUPREME COURT OF WASHINGTON TERRITORY.

I, Joseph H. Houghton, clerk of said supreme court, do hereby certify that the above and foregoing is a true copy of the judgments of said court at the July term, A. D. 1874, in a certain cause wherein the Oregon Steam Navigation Company is plaintiff in error, and Henry Winsor and others are defendants in error, as the same appears in the records of said court.

In witness whereof I have hereunto set my hand and the seal of
212 said court at Olympia this 18th day of November, A. D. 1874.

[SUPREME COURT SEAL.] JOSEPH H. HOUGHTON, *Clerk.*

(The following endorsements are on the foregoing remittitur:) Oregon Steam Navigation Company vs. Winsor, Crosby, et al. Remittitur. Filed November 18th, 1874. J. H. Houghton, clerk.

TERRITORY OF WASHINGTON,
Second Judicial District, ss:

I, J. H. Houghton, clerk of the district court of the second judicial district of Washington Territory, holding terms at Olympia, do hereby certify that the writings annexed to this certificate are true copies of their respective originals on file and remaining of record in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court at my office at Olympia this 4th day of November, A. D. 1874.

[SEAL.] JOSEPH H. HOUGHTON, *Clerk.*

213 At a term of the district court of the second judicial district of Washington Territory, begun and held at Olympia, in said district and Territory, on the fourth Monday of November, A. D. 1874, it being the 23d day of said month.

Present, Roger S. Greene, esquire, district judge.

THE OREGON STEAM NAVIGATION COMPANY, plaintiff,
vs.
HENRY WINSOR, C. CROSBY, NATHANIEL CROSBY, jr., Calvin H. Hale, S. D. Howe, and A. R. Elder, defendants.

And now comes Elwood Evans, esquire, and enters his appearance as attorney for the defendants, and moves the court for leave to withdraw the answers of the defendants filed herein. No one appearing in opposition, it is ordered that the defendants have leave to withdraw their said answers. And now comes the plaintiff, by William Strong and Frank Clarke, esquires, and move the court that the default of the defendants be entered, and the said defendants being three times severally called come not, but make default. Whereupon it is ordered that the

214 default of *of* the said defendants in the premises be entered, which is hereby done accordingly. And now, on motion of William Strong, esquire, it is ordered that judgment be entered against the said defendants in accordance with the prayer of plaintiff's complaint on file.

It is, therefore, by virtue of the law and by reason of the premises aforesaid, considered by the court that the Oregon Steam Navigation Company, plaintiff, do have and recover of and from the defendants, Henry Winsor, C. Crosby, Nathaniel Crosby, jr., Calvin H. Hale, S. D. Howe, and A. R. Elder, the sum of seventy-five thousand dollars, gold coin of the United States, with interest thereon from date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action, taxed at sixteen dollars and fifty-five cents, and that execution issue therefor.

(Dec. 11, 1874. Jour., vol. 5, p. 406.)

215 In the district court of the second judicial district of Washington Territory, holding terms at Olympia.

THE OREGON STEAM NAVIGATION COMPANY, plaintiff,
vs.
HENRY WINSOR, CLANRICK CROSBY, CALVIN H. HALE, Nathaniel Crosby, jr., Samuel D. Howe, and A. R. Elder, defendants.

Judgment for plaintiff, November term, A. D. 1874, for the sum of $75,000 and costs.

Satisfaction by payment of the above described judgment in the above entitled action is hereby acknowledged, and the clerk of the above entitled court is hereby authorized to enter the same of record.

In testimony whereof the Oregon Steam Navigation Company, plaintiff, has upon this 13th day of April, A. D. 1875, at the city of Portland, Oregon, hereby caused its common seal to be affixed.

OREGON STEAM NAV. CO.,
By J. C. AINSWORTH, *Prest.*

Attest:
THEO. WYGANT, *Secretary.*

Filed August 12th, 1875.

JOSEPH H. HOUGHTON, *Clerk.*

216 *Transcript of judgment.*

Judgment debtors: Henry Winsor, C. Crosby, Nathaniel Crosby, jr., Calvin H. Hale, S. D. Howe, and A. R. Elder.
Judgment creditor: The Oregon Steam Navigation Company.
Judgment, $75,000 gold coin.
Costs, $16.55.
Time of entry, December 11th, 1874.
Where entered, in journal, vol. 5, p. 406.
Clerk's fees, $5.60.
Sheriff's fees, 95.
Witness fees, ——.
Att'y fee, 10.00.
(Execution docket, p. 510.)

(Across the face:) Satisfied. Satisfaction on file No. 743. Joseph H. Houghton, clerk.

(Endorsed:) C. H. Hale et al., v. D. B. Finch. Exhibit L. Joseph H. Houghton, clerk.

217 EXHIBIT M.

In the district court of the second judicial district of the Territory of Washington, holding terms at Olympia.

THE OREGON STEAM NAVIGATION COMPANY, plaintiff,
vs.
HENRY WINSOR, CLANRICK CROSBY, CALVIN H. HALE, Nathaniel Crosby, jr., Samuel D. Howe, and A. R. Elder, defendants.

Judgment for plaintiff, November term, A. D. 1874, for the sum of $75,000 and costs.

Satisfaction by payment of the above described judgment in the above entitled action is hereby acknowledged, and the clerk of the above entitled court is hereby authorized to enter the same of record.

In testimony whereof the Oregon Steam Navigation Company, plaintiff, has, upon this 13th day of April, A. D., 1875, at the city of Portland, Oregon, hereby caused its common seal to be affixed.

[SEAL O. S. N. CO.] OREGON STEAM NAV. CO.,
By J. C. AINSWORTH, *Prest.*

Attest:
THEO. WYGANT, *Secretary.*

218 (Endorsed:) C. H. Hale et al. vs. D. B. Finch. Exhibit M. Joseph H. Houghton, clerk. Filed August 12th, 1875. Joseph H. Houghton, clerk, 743.

EXHIBIT N.

$25,000. OLYMPIA, W. T., *Dec.* 19, 1874.

One year from date we jointly and severally promise to pay to the Oregon Steam Navigation Company the sum of twenty-five thousand dollars, the same being in part payment of a certain judgment rendered in the dis't court against us.

CALVIN H. HALE.
HENRY WINSOR.
CLANRICK CROSBY, SR.,
219 By W. F. CROSBY, *Agt.*
N. CROSBY.

Sureties:
S. D. HOWE.
A. R. ELDER.

$25,000. OLYMPIA, W. T., *Dec.* 19*th*, 1874.

Two years from date, we jointly and severally promise to pay to the Oregon Steam Navigation Company the sum of twenty-five thousand

dollars, the same being in part payment of a certain judgment rendered in the dist. court against us.

C. H. HALE.
HENRY WINSOR.
CLANRICK CROSBY, SR.,
By W. F. CROSBY, *Ag't.*
N. CROSBY.

Sureties:
S. D. HOWE.
A. R. ELDER.

$25,000. OLYMPIA, W. T., *Dec. 19th*, 1874.

Three years from date, we jointly and severally promise to pay to the Oregon Steam Navigation Company the sum of twenty-five thousand dollars, the same being in part payment of a certain judgment rendered in the dist. court against us.

C. H. HALE.
HENRY WINSOR.
220 CLANRICK CROSBY, SR.,
By W. F. CROSBY, *A'gt.*
N. CROSBY.

Sureties:
S. D. HOWE.
A. R. ELDER.

(The following endorsements are on the foregoing:) C. H. Hale et al. v. D. B. Finch. Exhibit N. Joseph H. Houghton, clerk.

DUNCAN B. FINCH, sworn for plaintiff, testifies:

I left Washington Territory 7th or 8th of July, 1871; my family was with me; we were absent about one year from the Territory; returned in July, 1872; went away again in October, 1872, and was absent till April, 1874; returned and remained till October, 1874; then left and was absent till May, 1875.

Cross examined:

Testified this was my home; I was away on a visit; have re-
221 sided in Olympia for 13 years; have claimed the right to vote here and nowhere else for 13 years. Was on a visit to my parents in the east; left my furniture here; when I left for California second time my son was sick; my family consisted of wife, son, and myself; was detained in San Francisco; stopped at Russ House; went east after sickness was over; returned to San Francisco in fall of 1873, and came up here in spring of 1874; I have never had the intention of changing my residence since I came here 13 years ago; I left property and an agent here when I left.

Redirect:

Before July, 1867, was engaged steamboating with steamers Olympia, Wilson G. Hunt, and Eliza Anderson, running from Olympia to Victoria and way ports; gave up this business to Starr when I left in July, 1871. My principal business was dealing in money, drafts, and trading. When I left I took steamer Olympia, and all my family; had only a room for residence in Olympia; left that in hands of Mrs. Huntington; my wife attended to paying for rooms; I did not pay Mrs. Huntington nor any one; have no personal knowledge of
222 the payment since 1871; took my principal property with me

when I left; I'd taken a subsidy for not running the Eliza Anderson here—$1,500 a month; took subsidy in San Francisco for not running Olympia; I now board at the hotel here; we never kept house prior to 1871; I was under a doctor's treatment about a year; when I came here in 1872, I intended to make my home here; my family then consisted of my boy, niece, wife, and self.

JOHN E. HIGGINS, sworn for plaintiff, testifies:

I am residing in Olympia; am a shipwright; in winter of 1868 I saw the steamer New World in San Francisco; saw her there in 1869; in August, '69, I went on her from San Francisco to S. Vallejo; she was then carrying freight and passengers for Cal. & Pacific Railroad.

Plaintiff rests.

Defendant, called and sworn in his own behalf, testifies to handwriting and signature to defendant's

223 *Exhibit* 1.

Articles of agreement between Duncan B. Finch, of the one part, and Calvin H. Hale, of the other part, both of the town of Olympia, Washington Territory, as follows, viz:

Whereas the said Calvin H. Hale, in consideration of the sum of fifty thousand dollars, has this day executed in favor of said D. B. Finch a bill of sale of the steamer New World, and assigned the mail contract for carrying the mail on Puget Sound, together with the post-office drafts for the remainder of said mail service, which consideration-money is to be paid and discharged by said Duncan B. Finch in manner and form as hereinafter recited: Now, therefore, it is covenanted, agreed, and concluded, by and between the said parties to these presents, for themselves, their executors, administrators, and assigns, in manner and form following, that is to say: That said D. B. Finch, for himself, his executors, administrators, and assigns, doth covenant and agree:

First. That he will give due notice by advertisement to all creditors of, or persons legally claiming against, the said steamer New
224 World, to present to him within sixty days their said claims, with proper vouchers, or approved by said Calvin H. Hale, and he, the said D. B. Finch, will pay the same.

Second. That he, the said D. B. Finch, does hereby assume and agree to pay, discharge, and satisfy six certain promis'ory notes, bearing date the 18th day of February, 1867, for five thousand dollars each, held by the Oregon Steam Navigation Company, and secured by a mortgage upon said steamer New World, together amounting in principal and interest up to this date to the sum of thirty-two thousand two hundred and eighty-eight and $\frac{51}{100}$ dollars. ($32,288.51.)

Third. That should the two foregoing assumed classes of liabilities not amount to forty thousand dollars ($40,000), then the said D. P. Finch hereby agrees to pay to the said Calvin H. Hale the difference between the said sum and the aggregate of said liabilities of the said steamer New World paid and assumed by said D. B. Finch.

Fourth. The payment of the remaining ten thousand dollars, consideration hereinbefore recited, shall remain in abeyance until the said D. B. Finch shall have had time to communicate with George S.
225 Wright, and should said Wright assent to the said Calvin H. Hale acquiring and holding an eighth ($\frac{1}{8}$) interest in the said steamboats

Eliza Anderson and New World in lieu of the payment of said ten thousand dollars, then a bill of sale to said Calvin H. Hale, for such eighth interest in each of said steamboats, shall be a full payment and discharge of the said sum, and until the said George S. Wright shall have signified his willingness or objection to the above condition, the said D. B. Finch hereby covenants and agrees to pay to the said Calvin H. Hale a dividend equal to one-eighth the net earnings of the steamers Eliza Anderson and New World upon Puget Sound, and upon refusal to convey said eighth interest, then to pay the just and full sum as aforesaid of ten thousand dollars; and the said Calvin H. Hale, for himself, his executors, and administrators, in consideration of the premises, hereby covenants and agrees that he will promptly and on the receipt from time to time of drafts from the United States Post Office Department for said mail service on Puget Sound, by virtue of the contract this day
226 assigned to Duncan B. Finch, transfer and deliver to said Finch all of said drafts, to the end that the said D. B. Finch shall receive the pay for said mail service. And the said Calvin H. Hale further covenants and agrees the' he will accept the aforesaid consideration of fifty thousand dollars in the manner and form as hereinbefore covenanted and agreed to be paid. It is further agreed between the parties that wherever the word "dollars" is used in this agreement, it is expressly understood that it is to mean gold coin of the United States of America.

In witness whereof we have hereunto set our hands and seals at Olympia, this 23d November, A. D. 1867.

D. B. FINCH. [SEAL.]
C. H. HALE. [SEAL.]

In presence of us—
ELWOOD EVANS.
B. F. DENNISON.

[2c. U. S. int. rev. stamp, cancelled.]

Received, Olympia, March 26, 1868, from D. B. Finch, four thousand dollars (U. S. coin), for one-half of the one-eighth ($\frac{1}{8}$) interest claimed by me in the steamers New World and Eliza Anderson as men-
227 tioned in this agreement, and in consideration of the receipt of said four thousand dollars (coin) ($4,000), from D. B. Finch, which I hereby acknowledge, I do transfer all my right, title, and interest in one-half of the said one-eighth ($\frac{1}{8}$) interest in said steamers N. W. and E. A. to D. B. Finch, for his sole benefit and use. Such transfer shall not change the nature or obligation of this agreement except so far as it relates to the above mentioned one-sixteenth ($\frac{1}{16}$) interest.

C. H. HALE.

Witness:
FRED'K FINCH.

[5 c. int. rev. stamp, cancelled.]

Received, at Olympia, March 31, 1868, From D. B. Finch, $244.$\frac{43}{100}$ (two hundred and forty-four $\frac{43}{100}$ dollars), being balance in full for liquidation of all outstandings and claims against st'r New World as stipulated in this agreement, and I hereby acknowledge the obligation of D. B. Finch to satisfy such claims and outstandings as cancelled.

C. H. HALE.

[2 c. rev. stamp.]

(The following endorsements are on the foregoing:) Calvin H. Hale et al. vs. Duncan B. Finch. Exhibit 1. Joseph H. Houghton, clerk.

228 This agreement contained terms of contract; I did not know the parties were under bond. Hale didn't tell me so or any one else. Hale didn't tell me others were owners; told me he could give me clear title. The payment of dividends were made under the contract. These books that I have are receipt books; the following are receipts of those dividends:

One receipt dated Dec. 6, 1867, for $131.

Receipt Jan'y	4, 1868,	$\frac{1}{8}$	net earnings,	$208.
"	February 8, 1868,	$\frac{1}{8}$	" "	172.79.
"	March 7, 1868,	$\frac{1}{8}$	" "	204.
"	April 4, 1868,	$\frac{1}{16}$	" "	178.02.

In March I bought $\frac{1}{2}$ of Capt. Hale's interest=$\frac{1}{16}$.

Hale knew the steamer New World was going to California, and that it was going to be sold to Ryder. Hale never objected to the steamer going to California or to its being sold to Ryder. Here ceived the earnings of the New World after she left Puget Sound; have a receipt dated October 2, 1868, relating to New World only. It is for $295.78, for going to wreck of steamer Suwanee, and thence to San Francisco in California. I have receipts from Hale for net earnings of

229 steamer Eliza Anderson, as follows:

May 14, 1868	$158 68
June 5, 1868	182 53
July 10, 1868	99 82
Aug. 7, 1868	280 88
Sept. 5, 1868	140 25
Nov. 7, 1868	130 86
Dec. 5, 1868	203 21
Jan'y 8, 1869, mail pay (c'y)	136 12
" 9, 1869	120 99
" 29, 1869, Sept. qr	153 25
Febr'y 5, 1869	129 09
Mch. 12, 1869	114 86
Sept. 11, 1869	30 10
" 11, 1869, mail pay (c'y)	430 99

Hale's interest terminated June 30, 1870. I bought Hale out then, and give him $5,000.00. Hale knew when New World left here she was going to San Francisco. He made no objections to her going there to run. He was pleased. I told him of her sale to Ryder. I don't know that he asked me in regard to payments. The New World was a river boat, and was not fit for ocean service.

Cross-examined:

230 San Francisco is the first port of entry in California to which all vessels going there must report. Capt. Hale didn't know of contract to go to wreck of Suwanee. After going to wreck New World came to Port Townsend. I knew the receipt was partly for that time. The receipts were none of them for earnings of the New World in California waters. Mr. Wright didn't convey, or consent, or refuse, or decline to convey any interest in New World to Capt. Hale. I can't name any particular time when Capt. Hale consented to her being run on the waters of California. He did on Anderson several times. Can't remember any one being present. He talked of her being sold in California. Don't remember talk of her being sold to go to Amoor River. I didn't ever ask him if I might run her on waters of California. He never told me I might. Judge Dennison, my counsel, told me this was a clean bill of sale.

Defendant rests.

231 Capt. HALE, recalled for plaintiff, testifies:

I never consulted or said to anybody that the steamer New World might be run in California waters. I never received earnings of New World knowing they were for anything but Puget Sound trade. I never received a cent for earnings of New World when she went to wreck save for going and bringing the material to Port Townsend.

Plaintiff rests.

Both parties having now rested, and there being no further testimony offered by either party, the defendant moves the court to instruct the jury to find a verdict for the defendant, which motion is allowed, and plaintiff excepts, which exception is allowed.

The counsel for plaintiff requests verbally that the jury be instructed in writing.

Whereupon the court instructs the jury as follows, namely: "The jury are instructed to find a verdict for the defendant."

To which instruction the plaintiff, by their counsel, except, and their exception is allowed by the court.

The jury thereupon return their verdict as follows, namely:

232 We, the jury, in the case wherein Calvin H. Hale, Henry Winsor, C. Crosby, sr., and N. Crosby, jr., are plaintiffs, and Duncan B. Finch is defendant, find for the defendant.

JOHN T. NEWLAND,
Foreman.

OLYMPIA, *April* 21, 1876.

To which verdict plaintiffs except and exception is allowed.

It is understood by the parties hereto that no objection is made as to the time when defendant's motion to instruct the jury to find for defendant was made, nor as to the form of said motion.

And the plaintiffs file their bill of exceptions to all and singular the matters herein shown and specified, which is allowed and signed.

ROGER S. GREENE, [SEAL.]
Judge 2d Judicial District.

233 TERRITORY OF WASHINGTON,
County of Thurston, Second Judicial District, ss:

In the district court of the second judicial district of Washington Territory, holding terms at Olympia for the counties of Thurston, Lewis, Mason, and Chehalis.

CALVIN H. HALE, HENRY WINSOR, CLANRICK Crosby, sen., and Nathaniel Crosby, jr., plaintiffs,
v.
DUNCAN B. FINCH, DEFENDANT.

To Duncan B. Finch, the defendant in the above-entitled cause, and to the clerk of said court.

You, and each of you, are hereby notified that the plaintiffs in the above-entitled action, Calvin H. Hale, Henry Winsor, Clanrick Crosby, sen., and Nathaniel Crosby, hereby sue out their writ of error to remove the record and proceedings, and the order, decision, and judgment therein, heretofore, on the 10th day of June, A. D. 1876, made and ren-

dered by the said district court to the supreme court of Washing-
234 ton Territory, for hearing and correction of certain manifest errors committed by the said district court on the trial and in rendering the said judgment in said action.

The judgment upon which this writ of error is sued out is that rendered by and before the district court of the second judicial district of Washington Territory, holding terms at Olympia for the counties of Thurston, Lewis, Mason, & Chehales, on the 10th day of June, 1876, in a certain action then pending in and before said court, wherein the said Calvin H. Hale, Henry Winsor, Clanrick Crosby, sen'r, and Nathaniel Crosby were plaintiffs, and the said Duncan B. Finch was defendant, wherein in was considered, ordered, and adjudged by said court and by Roger S. Greene, judge thereof, that the said plaintiffs take nothing by their action, and that the defendant, Duncan B. Finch, recover against Calvin H. Hale, Henry Winsor, Clanrick Crosby, sen'r, and Nathaniel Crosby, plaintiffs, thirty-seven dollars and sixty cents, the costs of this action, and that execution issue therefor; and it is further or-
235 dered that this judgment be entered nunc pro tunc as of the twenty-second day of April, A. D. 1876.

The said plaintiffs in said action and plaintiffs in error herein assign for error in said proceedings and judgment—

First. The court erred in sustaining the motion made by defendant's counsel to instruct the jury to find a verdict for the defendant.

Second. The court erred in instructing the jury as follows: The jury are instructed to find a verdict for the defendant.

Third. The court erred in rendering a judgment in favor of the defendant and against the plaintiffs.

Fourth. The court erred in rendering a judgment on the 10th day of June, 1876, the same not being at any term of said court.

Fifth. The court erred in rendering a judgment herein on the 10th day of June, 1876, to take effect on the twenty-second day of April, 1876.

236 The writ of error herein will be prosecuted at the next regular term of the supreme court of Washington Territory, to be held at Olympia, in said Territory, on the second Monday in July, A. D. 1877.

The clerk of said district court will forthwith make and duly certify and transmit to the clerk of the said supreme court of Washington Territory, to be filed by said clerk of said supreme court in his office, a complete transcript of the record in said action, according to the rules and practice of the supreme court of said Territory; the said transcript to include copies of the pleadings in the action, of all journal and record entries, and of all the evidence offered in the action, and of plaintiff's bill of exceptions.

Dated Olympia, October 21st, 1876.

CALVIN H. HALE,
HENRY WINSOR,
CLANRICK CROSBY, SEN'R, &
NATHANIEL CROSBY,
Plaintiffs,

By WILLIAM STRONG AND
FRANK CLARK,
Their Attorneys of Record and in fact.

237 2ND JUDICIAL DISTRICT, W. T.,
Thurston County, ss:

I hereby certify that I served the within notice of prosecution of a writ of error, &c., on Duncan B. Finch, the within-named defendant,

by delivering to J. B. Allen, one of his attorneys of record in said action, in the said second judicial district court, holding terms at Olympia, W. T., a true and correct copy thereof, duly certified to be such, at Olympia, Washington Territory, this 21st day of October, A. D. 1876.

WILLIAM BILLINGS,
Sheriff of Thurston County, W. T.

Sheriff's fees, $2.00.

I hereby accept and acknowledge service of this notice of prosecution of writ of error, &c., and of the within and foregoing paper writing, at Olympia, in Thurston County, Washington Territory, this 21st day of October, A. D. 1876.

R. G. O'BRIEN,
Clerk Dist. Court.

238 (The following endorsements are on the foregoing:) Calvin H. Hale, Henry Winsor, Clanrick Crosby, sen., & Nathaniel Crosby, plaintiffs, vs. Duncan B. Finch, defendant. Notice of prosecution of writ of error to supreme court, &c. Filed October 21, A. D. 1876. R. G. O'Brien, clerk.

And thereafter, on the 12th day of July, 1877, in the said supreme court of said Territory, the following judgment was had and entered of record:

Judgment of dismissal.

CALVIN H. HALE, HENRY WINSOR, CLANRICK Crosby, sr., & Nathaniel Crosby, jr., plaintiff in error,
239 *vs.*
DUNCAN B. FINCH, DEFENDANT IN ERROR.

And now, on this 12th day of July, 1877, this cause coming on to be heard, the court having examined and duly considered the matters and things in the transcript of the record filed herein, find that there is no final judgment or determination of the case in the district court, and this court has no jurisdiction herein.

Whereupon it is considered by the court that this writ of error be dismissed, and that the case be remanded to the district court of the second judicial district of Washington Territory, holding terms at Olympia for Thurston and other counties, for such further proceedings as said district court shall be advised. And it is further ordered that said plaintiff in error have leave to withdraw from the files of this court the transcript of the record filed herein. And it is further ordered that the said defendant in error have and recover of and from the said plaintiffs in error the sum of thirty-seven and $\frac{90}{100}$ dollars, costs and disbursements in this action, and that execution issue therefor.

240 And thereafter, on the 7th day of December, A. D. 1877, in the said district court, comes plaintiffs, by their attorneys, Strong and Clark, and files a certified transcript of the judgment and mandate of the supreme court of W. T. in the words and figures following, to wit:

Be it remembered that on Friday, the 7th day of December, A. D. 1877, the same being the 5th judicial day of the regular December term of the district court of the second judicial district of Washington Terri-

tory, holding terms at Olympia for the counties of Thurston, Mason, Lewis, and Chehalis, the following, among other proceedings, were had and transacted, to wit:

Frank Clark, attorney for Calvin H. Hale, Henry Winsor, Clanrick Crosby, sr., and Nathaniel Crosby, jr., plaintiffs in the case of said plaintiff v. Duncan B. Finch, defendant.

And comes also J. B. and J. S. Allen, attorneys for the defendant, the above-named Duncan B. Finch, and file in open court a certified
241 transcript of the judgment and mandate of the supreme court of Washington Territory, rendered at the July term thereof, for the year 1877, which is in the words and figures following, to wit:

Judgment of dismissal.

UNITED STATES OF AMERICA:

In the supreme court of Washington Territory.

At a term of the supreme court of Washington Territory, begun and held at Olympia, on the second Monday of July, A. D. 1877, it being the 9th day of said month. Present, the honorable Joseph R. Lewis, chief justice; Roger S. Greene, esquire, and Samuel C. Wingard, esquire, associate justices.

CALVIN H. HALE, HENRY WINSOR, CLANRICK, Crosby, sr., and Nathaniel Crosby, jr., plaintiffs in error,
vs.
DUNCAN B. FINCH, DEFENDANT IN ERROR.

And now on this 12th day of July, 1877, this cause coming on to be heard, the court having examined and duly considered the matters and things in the transcript of the record filed herein, find that there
242 is no final judgment or determination of the case in the district court, and that this court has no jurisdiction herein.

Whereupon it is considered by the court that this writ of error be dismissed, and that the case be remanded to the district court of the second judicial district of Washington Territory, holding terms at Olympia, for Thurston and other counties, for such further proceedings as said district court shall be advised.

And it is further ordered that the said plaintiff in error have leave to withdraw from the files of this court the transcript of the record filed herein.

And it is further ordered that the said defendant in error have and recover of and from the said plaintiffs in error the sum of thirty-seven and $\frac{90}{100}$ dollars, costs and disbursements in this action, and that execution issue therefor.

TERRITORY OF WASHINGTON, *ss:*

I, R. G. O'Brien, clerk of the supreme court of Washington Territory, do hereby certify that the foregoing is a judgment and mandate of said court, in a certain cause heard and decided at the July term, 1877,
243 wherein Calvin H. Hale, Henry Winsor, Clanrick Crosby, sr., and Nathaniel Crosby, jr., are plaintiffs in error, and Duncan B. Finch is defendant in error, as the same appears of record.

In testimony whereof I have hereunto set my hand and affixed the

seal of said supreme court, at Olympia, this sixth day of December, A. D. 1877.

{ IMPRESSION SUPREME COURT SEAL. } R. G. O'BRIEN, *Clerk.*

And thereafter, the same day, the following entry appears of record in said district court, to wit:

CALVIN H. HALE, HENRY WINSOR, CLANRICK Crosby, sr., & Nathaniel Crosby, jr., plaintiffs,
vs.
DUNCAN B. FINCH, DEFENDANT.

And now on this 7th day of December, A. D. 1877, comes Frank
244 Clark, attorney for the plaintiffs, and J. B. and J. S. Allen, attorneys for the above named defendant, and file the duly certified transcript of the judgment of the supreme court of Washington Territory, at its July term for the year 1877, rendered upon a hearing in said court upon a writ of error sued out by the above named plaintiffs, to review the judgment entered by the 2nd judicial district court of Washington Territory, holding terms at Olympia, nunc pro tunc, in vacation, on the 10th day of June, A. D. 1876, as of the 22d day of April, A. D. 1876, upon the verdict of the jury rendered in said action at the April term thereof for the year 1876, and moved the court to have the above cause placed upon the docket, and the same is done accordingly; and thereupon the said attorneys for the said parties to said action move the court to set aside and vacate the said judgment entered nunc pro tunc on the said 10th day of June, A. D. 1876, in the said action; and it appearing by the said transcript of the said judgment of the said supreme court rendered as aforesaid upon the hearing of the said writ of error,
245 that the said supreme court considered and adjudged the said judgment so entered by this said court nunc pro tunc on the 10th day of June, A. D. 1876, in the said action, to be void, and dismissed the said writ of error for want of jurisdiction, on motion of said attorneys for said parties to said action, it is now here ordered and adjudged by this court that the same be vacated and held for naught.

And thereafter, the same day, the following entry appears of record in said court, to wit:

CALVIN H. HALE, HENRY WINSOR, CLANRICK Crosby, sr., & Nathaniel Crosby, jr., plaintiffs,
vs.
DUNCAN B. FINCH, DEFENDANT.

And now on this 7th day of December, A. D. 1877, comes said defendant, Duncan B. Finch, by his attorneys, J. B. and J. S. Allen (the said plaintiffs being present by their attorney, Frank Clark, and waiving notice in the premises), and moves the court for judgment
246 upon the verdict rendered in this cause and court on the 21st day of April, A. D. 1876, in favor of said defendant. And it appearing to the court that said defendant is entitled to judgment on said verdict, it is considered and adjudged by the court that the said plaintiffs, Calvin H. Hale, Henry Winsor, Clanrick Crosby, sr., and Nathaniel Crosby, jr., take nothing by their action; and that the said defendant, Duncan B. Finch, have and recover of and from said plaint-

iff his costs and disbursements in this action, taxed at thirty-nine and ninety-five one hundredths dollars and that execution issue therefor.

Office of the clerk of the district court of the second judicial district of Washington Territory, holding terms at Olympia, for Thurston, Lewis, Mason, and Chehalis Counties.

DECEMBER 8TH, A. D. 1877.

I, R. G. O'Brien, clerk of said 2nd district court, do hereby certify that the foregoing is a true copy of the transcript of the judgment it purports to be, and of the record entries they appear to be, as
247 the same appears by the records of this court.

In testimony whereof I have hereunto set my hand and affixed the seal of said second judicial district court at Olympia, this 8th day of December, A. D. 1877.

[SEAL DIST. COURT.] R. G. O'BRIEN,
Clerk.

(Endorsed on back:) Calvin H. Hale et al., pl't'ff, vs. Duncan B. Fitch, def't. Copy of transcript of judgment of supreme court, and of records entries of 2nd district court, December term, 1877. Filed in supreme court this 31st day of May, A. D. 1878. R. G. O'Brien, clerk.

And thereafter, on the 31st day of May, 1878, plaintiffs file
248 their notice of appeal and writ of error to the supreme court of Washington Territory, in words and figures following, to wit:

TERRITORY OF WASHINGTON,
County of Thurston, Second Judicial District, ss:

In the district court of the second judicial district of Washington Territory, holding terms at Olympia for the counties of Thurston, Lewis, Mason, & Chehalis.

CALVIN H. HALE, HENRY WINSOR, CLANRICK Crosby, sr., & Nathaniel Crosby, jr., plaintiffs in error,
vs.
DUNCAN B. FINCH, DEFENDANT IN ERROR.

To Duncan B. Finch, the defendant above named, and R. G. O'Brien esquire, clerk of said court.

You will please take notice that the said plaintiffs above named appeal from the judgment of the said district court of the second judicial district of Washington Territory, holding terms at Olympia,
249 in the county of Thurston for the counties aforesaid, heretofore on the 7th day of November, 1877, rendered against them and in favor of the defendant in a certain civil action wherein Calvin H. Hale, Henry Winsor, Clanrick Crosby, sr., and Nathaniel Crosby were plaintiffs, and Duncan B. Finch was defendant, whereby and wherein it was adjudged and decreed by said district court that the said plaintiffs take nothing by their said action, and that the said defendand have and recover of and from the said plaintiffs the sum of thirty-nine and $\frac{95}{100}$ dollars, his costs taxed in said action, and that execution issue therefor.

And the said plaintiff hereby take their appeal and sue out their writ of error to remove the record, proceedings, order, decision and judgment in said action aforesaid to the supreme court of the Territory of Washington to the end that the same may be heard, that divers errors

as is alleged in said record, proceedings, orders and decisions and in the rendition of the judgment aforesaid appearing to the manifest prejudice of the plaintiffs in error may be corrected and that justice may
250 be done in the premises.

The plaintiff assigns the following grounds of error, namely:

First. The court erred in entertaining the motion to instruct the jury to find a verdict for the defendant.

Second. The court erred in sustaining said motion.

Third. The court erred in instructing the jury to find a verdict for the defendant.

Fourth. The court erred in rendering a judgment against the plaintiffs and in favor of the defendant.

The writ of error herein will be prosecuted at the next regular term of the supreme court of Washington Territory, which said term will commence to be held at Olympia, in the county of Thurston, in
251 said Territory, on the second Monday in July, 1878, the same being the 8th day of said month.

The said clerk of the district court aforesaid will make out and transmit to the clerk of said supreme court a certified copy of this notice, with the service therein, that the same may be filed in the office of the clerk of said supreme court, and that a writ of error may issue according to law and the rules and practice of the said supreme court.

Dated Olympia, May 31, 1878.

(Sig'd) WILLIAM STRONG AND
FRANK CLARK,
Attorneys for Plaintiff in Error.

I hereby accept service of the foregoing notice of appeal and writ of error this 31st day of May, A. D. 1878.

R. G. O'BRIEN,
Clerk District Court, Second Jud'l Dist. W. T.

252 TERRITORY OF WASHINGTON,
County of Thurston, ss:

I, William Billings, sheriff of said county of Thurston, do hereby certify that on this 31st day of May, 1878, I served the foregoing notice of appeal upon Duncan B. Finch, the defendant in error therein named, by delivering to Joseph S. Allen, attorney of said defendant Duncan B. Finch, personally, in person, at Olympia, in said county of Thurston, Territory of Washington, a true copy of the same.

Olympia, May 31, 1878.

WILLIAM BILLINGS,
Sheriff of Thurston County.

Fees, mileage, service, and return, $2.20—total, $2.20.

Received above fees of Wm. Strong, att'y for plaintiff.

WILLIAM BILLINGS,
Sheriff Thurston County.

253 *Certificate of clerk.*

TERRITORY OF WASHINGTON,
County of Thurston, ss:

In the district court of the second judicial district of Washington Territory, holding terms at Olympia for the counties of Thurston, Lewis, Mason, and Chehalis.

CALVIN H. HALE, HENRY WINSOR, CLANRICK Crosby, sr., & Nathaniel Crosby, plaintiffs,
v.
DUNCAN B. FINCH, DEFENDANT.

I, R. G. O'Brien, clerk of the district court of the second judicial district of Washington Territory, holding terms at Olympia for the counties of Thurston, Lewis, Mason, & Chehalis, do hereby certify the foregoing to be full, true, and correct copies of all original papers and entries on file and of record in my office in the above entitled cause; that the same constitute a full and complete exemplification of the
254 said record in the said cause, and of the whole thereof.

In witness whereof I hereunto set my hand and affix the seal of said court this 12th day of June, A. D. 1878.

[SEAL.] R. G. O'BRIEN,
Clerk District Court.

(Endorsed on back:) District court, second judicial district, Washington Territory, holding terms at Olympia. Calvin H. Hale et al., plaintiffs, vs. Duncan B. Finch, defendant.

Received from the clerk of the dist. court of second judicial district and filed June 12th, A. D. 1878.

R. G. O'BRIEN,
Clerk Supreme Court.

Strong and Clarke, att'y's for plaintiffs.

255 Here follows the proceedings had in the supreme court of Washington Territory, at its July term, 1878.

256 In the supreme court of Washington Territory, holden at Olympia, in Washington Territory, July term, 1876.

CALVIN H. HALE, HENRY WINSOR, CLANRICK Crosby, sr., and Nathaniel Crosby, plaintiffs in error,
vs.
DUNCAN B. FINCH, DEFENDANT IN ERROR.

Comes now the above-named defendant in error, by his counsel J. B. and J. S. Allen, and appearing specially and solely for the purposes of this motion moves to dismiss said cause from this court, because no writ of error was taken from the judgment or order appealed from or complained of within six months from the rendition thereof, as fully appears by the notice of suit in error, served in said cause, a copy of which notice of suit in error is appended to the transcript of the record of said cause on file herein.

257 (Endorsed on back :) Supreme court. Calvin H. Hale et al. vs. Duncan B. Finch. Motion to dismiss writ of error. Served July 9th, 1878. Wm. Strong, att'y for pl't'ff. Fled July 9th, 1878. R. G. O'Brien, clerk. J. P. and J. S. Allen, att'ys for defendant in error.

And thereafter on the same day came William Strong, esquire, attorneys for plaintiffs in error and files his affidavit and motion to amend in the words and figures following, to wit :

258 In the supreme court of the Territory of Washington, July term, 1878.

CALVIN H. HALE, HENRY WINSOR, CLANRICK Crosby, sr., and Nathaniel Crosby, plaintiffs in error,
vs.
DUNCAN B. FINCH, DEFENDANT IN ERROR.

I, William Strong, being duly sworn depose and say, that I am one of the attorneys of the plaintiffs in error in the above-entitled action, and prepared the notice of appeal filed herein ; and I do further say that in copying of said notice of appeal from the original draft I made a mistake in the same by writing the word "November" for December, in describing said judgment by its date; that there is no judgment between the parties hereto, except the judgment described in the transcript filed herein.

That said judgment was rendered on the 7th day of December, 1877, but in writing out said notice the date was by mistake written
259 "November" 7th, instead of December 7th, which I intended to write, and the mistake was not discovered until the motion this day filed to dismiss by the defendant in error.

WM. STRONG.

Subscribed and sworn to before me this 9th day of July, 1878.
R. G. O'BRIEN, *Clerk.*

Based upon the foregoing affidavit and the transcript herein, plaintiffs in error hereby move the court for leave to amend the notice of appeal in the above entitled cause, by striking out the word "November" where it occurs in line 7 in the copy of the said notice, on page 223 of the transcript filed in this cause, and inserting in its place the word "December."

WM. STRONG,
Att'y for Plaintiff in Error.

Service of the above motion admitted July 9th, 1878.
J. B. ALLAN,
Of Counsel for Defendant in Error.

260 (Endorsed on back :) In the supreme court of the Territory of Washington, July term, 1878. C. H. Hale et al., plaintiff in error, v. Duncan P. Finch, dfd't in error. Motion for leave to amend. Filed July 9th, 1878. R. G. O'Brien, clerk. Wm. Strong, att'y for pl'ff in error.

261 *Record entries, Supreme court W. T.*

TUESDAY, *July 9th*, 1878.

CALVIN H. HALE ET AT., PLAINTIFF IN ERROR,
vs.
DUNCAN B. FINCH, DEFENDANT IN ERROR.

Comes now the above named defendant in error by his counsel, J. B. and J. S. Allen, and, appearing specially and solely for the purposes of this motion, moves the court to dismiss said cause from this court; and comes the above named plaintiffs in error, by their counsel William Strong, and opposes said motion, and the court, having heard the argument of counsel, take the matter under advisement.

262 WEDNESDAY, *July 10th*, 1878.

* * * * * * *

CALVIN H. HALE ET AL., PLAINTIFFS IN ERROR,
vs.
DUNCAN B. FINCH, DEFENDANT IN ERROR.

Error to second judicial district holding terms at Olympia.

And now on this day this cause coming on for further hearing upon the motion of defendant in error to dismiss this cause, and the court having taken the matter under advisement, and being fully advised in the premises, said motion is denied; to which ruling of the court the defendant in error excepts; which said exception is allowed by the court.

263 *Record entries supreme court.*

MONDAY, *July 15th*, 1878.

CALVIN H. HALE, HENRY WINSOR, CLANRICK Crosby, sr., Nathaniel Crosby, plaintiffs in error,
vs.
DUNCAN B. FINCH, DEFENDANT IN ERROR.

This cause coming on to be heard on this 15th day of July, 1878, upon the transcript of the record of the district court of the second judicial district, holding terms at Olympia, is argued by William Strong, esquire, attorney for plaintiff in error, until the hour of adjournment.

* * * * * * *

TUESDAY, *July 16th*, 1878.

* * * * * * *

CALVIN H. HALE ET AL., PLAINTIFFS IN ERROR,
vs.
DUNCAN B. FINCH, DEFENDANT IN ERROR.

264 This cause coming on for further hearing is argued further by William Strong, esq., attorney for plaintiff in error, and J. P. Allen, esq., of counsel for defendant in error, until the hour of adjournment.

WEDNESDAY, *July* 17*th*, 1878.

CALVIN H. HALE ET AL, PLAINTIFF IN ERROR,
vs.
DUNCAN B. FINCH, DEFENDANT IN ERROR.

This cause coming on this day for further hearing, the argument of counsel proceeds; and the said argument being concluded, the court takes the matter under advisement.

And thereafter, on the 25th day of July, A. D. 1878, the court, with full bench in session, files its opinion in said cause in the words and figures following, to wit:

265 *Opinion.*

WASHINGTON TERRITORY, *ss*:

In the supreme court of the July term, 1878.

CALVIN H. HALE ET AL., PLAINTIFFS in error,
vs.
DUNCAN B. FINCH, DEFENDANT IN error.
} Error to second district.

The plaintiffs in error sold the steamer New World to the defendant by a bill of sale. The instrument contained a clause in these words: "And it is understood and agreed that this sale is upon this express condition, that said steamboat or vessel is not, within ten years from the first day of May, 1867, to be run upon any of the routes of travel on the rivers, bay, or waters of the State of California, or the Columbia River, or its tributaries; and that during the same period last aforesaid the machinery of the said steamboat shall not be run, or employed
266 in running, any steamboat or vessel or craft upon any of the routes of travel on the rivers, bays, or waters of the State of California, or the Columbia River and its tributaries."

The plaintiffs in error, assuming this clause to be, or contain, a covenant, sued the defendant in error in the district court of the second district for a breach of it, and prayed damages. Issues were made, a trial was had, and upon the conclusion of the evidence for the plaintiff, the defendant moved the court to instruct the jury to find for the defendant. The jury were accordingly so instructed. The plaintiffs excepted, and bring their writ to correct the supposed error committed in giving that instruction. It is not disputed but that the instruction was right, if the clause above recited is a condition and not a covenant. Whether it is oneor the other, or both, is the main question argued here. It seems to us decisive.

We are clear that this clause is a condition, and not a covenant.
267 There is no ambiguity, either latent or patent, in the language adopted by the parties to this bill of sale. The contract is evidently drawn with care, skill, and intelligence. We scrutinize it, and discover no reason to suspect that the parties to it mean anything other than what they really say. Emphatically they declare, "It is understood and agreed that this sale is upon this express condition." What is understood and agreed? Why, that the sale is upon a condition,

which the vendor goes on thereafter particularly to express. Certainly, a condition that is not understood and agreed upon by parties is no condition. A condition, then, that they explicitly take pains to state is understood and agreed upon by them as such, is conspicuously one.

We do not feel it incumbent upon us to cite authorities. The law is plain and elementary. The books are all one way. We believe no reported case can be found where words in themselves clearly importing a mere condition, and unassociated with other words, which qualify them, or render intended sense doubtful, have been held to impart a covenant.

268 It is urged by the plaintiffs in error that we ought to judge of the intent of the parties here by the surrounding facts. But the most important fact surrounding their intent, and tending to disclose it, are the words they have chosen to record it. Words so explicit are controlling always, unless mistake, or inadvertence or duress, imbecility, or some other extraordinary set of facts be present, which shows that they cannot be relied upon to reveal the concerted mind of the parties. But such extraordinary circumstances would need to be pleaded. They are not claimed in this case. Minds are presumed to act freely, intelligently, and accurately where the contrary does not appear.

It is not necessary here to look beyond the words the parties have employed; but were we to do so we should only be the more strongly constrained to the conclusion that they intended what they have said.

The charge of the judge in the district court was right. The remedy of the plaintiff's is against the vessel itself for a forfeiture, and not against the vendee personally for damages.

269 The judgment of the court below is therefore affirmed.

ROGER S. GREENE,
Asso. Justice.

We concur.

J. R. LEWIS,
Chief Justice.
S. C. WINGARD,
Asso. Justice, &c.

(Endorsed on back:) C. H. Hale et al. vs. Duncan B. Finch. Opinion by Greene, associate justice. Filed July 25, 1878. R. G. O'Brien, clerk.

And thereafter, on the same day, the following judgment and decree was entered of record, to wit:

270 *Judgment.*

CALVIN H. HALE, HENRY WINSOR, CLANRICK Crosby, sr., & Nathaniel Crosby, plaintiff' in error,
vs.
DUNCAN B. FINCH, DEFENDANT IN ERROR.

And now this cause having been brought on to be heard at this term of court upon the writ of error to the second judicial district of Washington Territory, holding terms at Olympia, and the transcript of the record of said cause from said court duly certified to this court, and the said cause having been argued by counsel both on behalf of said plaintiff in error and said defendant in error, and the court being fully advised in the premises, now, on motion of John B. Allen, attorney for said de-

fendant in error, it is adjudged and considered that the judgment and decision of said district court, to remove which the writ of error herein was sued out, be, and the same is in all things affirmed, and that said defendant in error, Duncan B. Finch, do have and recover of and
271 from the said plaintiff in error the costs of this action in the court below, taxed at one hundred nineteen and $\frac{95}{100}$ dollars, as well as his costs and disbursements in this court, taxed at one hundred and seventy-five $\frac{30}{100}$ dollars, and that execution out of this court therefor.

And thereupon, on the 30th day of September, A. D. 1878, plaintiffs in error, by their attorneys, Strong and Clark, files their notice for a writ of error in the words and figures following, to wit:

272 In the supreme court of Washington Territory, of the July term, 1878.

TERRITORY OF WASHINGTON,
County of Thurston, ss:

CALVIN H. HALE, HENRY WINSOR, CLANRICK Crosby, sr., and Nathaniel Crosby, jr., plaintiffs in error,
vs.
DUNCAN B. FINCH, DEFENDANT IN ERROR.

To Duncan B. Finch, the defendant above named, and R. G. O'Brien, esquire, clerk of said court:

You will please take notice that the said plaintiffs in error above named appeal from the judgment of the said supreme court of Washington Territory, holding terms at Olympia, for said Territory, heretofore, on the 25th day of July, A. D. 1878, rendered against them, and in favor of the defendant in error, in a certain civil action wherein
273 Calvin H. Hale, Henry Winsor, Clanrick Crosby, sr., and Nathaniel Crosby, jr., were plaintiffs in error, and Duncan B. Finch was defendant in error, whereby and wherein it was adjudged and decreed by said supreme court that the judgment and decision of said district court be, and the same is in all things affirmed, and that said defendant in error, Duncan B. Finch, do have and recover of and from the said plaintiffs in error the costs of this action in the court below, taxed at one hundred and nineteen and $\frac{95}{100}$ dollars, as well as his costs and disbursements in this court, taxed at one hundred and seventy-five and $\frac{30}{100}$ dollars, and that execution issue out of this court therefor.

And the said plaintiffs in error hereby take their appeal and sue out their writ of error to remove the record, proceedings, orders, decision, and judgment in said action aforesaid to the Supreme Court of the United States, to the end that the same may be heard, that divers errors, as is alleged in said record, proceedings, orders, and decision, and in the rendition of the judgment aforesaid appearing, to the manifest prejudice of the plaintiffs in error may be corrected, and that
274 justice may be done in the premises.

The plaintiffs in error assign the following grounds of error:

First. The court erred in sustaining the action of the court below in entertaining the motion to instruct the jury to find a verdict for the defendant.

Second. The court erred in sustaining the action of the court below sustaining said motion.

Third. The court erred in sustaining the action of said court in instructing the jury to find a verdict for the defendant.

Fourth. The court erred in sustaining the judgment of the court below rendered in favor of said defendant and against said plaintiffs.

Fifth. The court erred in rendering a judgment against the plaintiffs in error and in favor of the defendant in error.

275 The writ of error herein will be prosecuted at the next regular term of the Supreme Court of the United States, to be holden at Washington City, in the District of Columbia, which said term will commence to be held, at said Washington City, on the second Monday in October, 1878, the same being the 14th day of said month.

The said clerk of the supreme court aforesaid will make out and transmit to the clerk of said Supreme Court of the United States a certified copy of this notice, with the service thereon, that the same may be filed in the office of the clerk of said Supreme Court of the United States, and that a writ of error may issue according law and the rules of practice of the said Supreme Court.

WM. STRONG AND FRANK CLARK,
Attorneys for Plaintiffs in Error.

Dated, Olympia, W. T., September 30th, A. D. 1878.

I hereby accept service of the foregoing notice of appeal and writ of error this 30th day of September, A. D. 1878.

R. G. O'BRIEN,
Clerk Supreme Court Washington Territory.

276 TERRITORY OF WASHINGTON,
County of Thurston, ss :

I, William Billings, sheriff of Thurston County, in the Territory aforesaid, do hereby certify that I served the foregoing notice of appeal and writ of error on the above-named defendant in error, Duncan B. Finch, by leaving a duly certified copy thereof in the hands of J. S. Allen, esquire, one of his attorneys of record, at Olympia, W. T., this 3d day of October, A. D. 1878.

WM. BILLINGS,
Sheriff of Thurston County, W. T.

Fees: Serving notice, 1.00; mileage, 2 m., .20; making return, .20—$1.40.

277 United States of America to Duncan B. Finch, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Washington Territory, wherein Calvin H. Hale, Henry Winsor, Clanrick Crosby, sr., and Nathaniel Crosby, jr., are plaintiffs, and you are defendant, in error, to show cause, if any there be, why judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme

fendant in error, it is adjudged and considered that the judgment and decision of said district court, to remove which the writ of error herein was sued out, be, and the same is in all things affirmed, and that said defendant in error, Duncan B. Finch, do have and recover of and
271 from the said plaintiff in error the costs of this action in the court below, taxed at one hundred nineteen and $\frac{25}{100}$ dollars, as well as his costs and disbursements in this court, taxed at one hundred and seventy-five $\frac{30}{100}$ dollars, and that execution out of this court therefor.

And thereupon, on the 30th day of September, A. D. 1878, plaintiffs in error, by their attorneys, Strong and Clark, files their notice for a writ of error in the words and figures following, to wit:

272 In the supreme court of Washington Territory, of the July term, 1878.

TERRITORY OF WASHINGTON,
County of Thurston, ss:

CALVIN H. HALE, HENRY WINSOR, CLANRICK Crosby, sr., and Nathaniel Crosby, jr., plaintiffs in error,
vs.
DUNCAN B. FINCH, DEFENDANT IN ERROR.

To Duncan B. Finch, the defendant above named, and R. G. O'Brien, esquire, clerk of said court:

You will please take notice that the said plaintiffs in error above named appeal from the judgment of the said supreme court of Washington Territory, holding terms at Olympia, for said Territory, heretofore, on the 25th day of July, A. D. 1878, rendered against them, and in favor of the defendant in error, in a certain civil action wherein
273 Calvin H. Hale, Henry Winsor, Clanrick Crosby, sr., and Nathaniel Crosby, jr., were plaintiffs in error, and Duncan B. Finch was defendant in error, whereby and wherein it was adjudged and decreed by said supreme court that the judgment and decision of said district court be, and the same is in all things affirmed, and that said defendant in error, Duncan B. Finch, do have and recover of and from the said plaintiffs in error the costs of this action in the court below, taxed at one hundred and nineteen and $\frac{25}{100}$ dollars, as well as his costs and disbursements in this court, taxed at one hundred and seventy-five and $\frac{30}{100}$ dollars, and that execution issue out of this court therefor.

And the said plaintiffs in error hereby take their appeal and sue out their writ of error to remove the record, proceedings, orders, decision, and judgment in said action aforesaid to the Supreme Court of the United States, to the end that the same may be heard, that divers errors, as is alleged in said record, proceedings, orders, and decision, and in the rendition of the judgment aforesaid appearing, to the manifest prejudice of the plaintiffs in error may be corrected, and that
274 justice may be done in the premises.

The plaintiffs in error assign the following grounds of error:

First. The court erred in sustaining the action of the court below in entertaining the motion to instruct the jury to find a verdict for the defendant.

Second. The court erred in sustaining the action of the court below sustaining said motion.

Third. The court erred in sustaining the action of said court in instructing the jury to find a verdict for the defendant.

Fourth. The court erred in sustaining the judgment of the court below rendered in favor of said defendant and against said plaintiffs.

Fifth. The court erred in rendering a judgment against the plaintiffs in error and in favor of the defendant in error.

275 The writ of error herein will be prosecuted at the next regular term of the Supreme Court of the United States, to be holden at Washington City, in the District of Columbia, which said term will commence to be held, at said Washington City, on the second Monday in October, 1878, the same being the 14th day of said month.

The said clerk of the supreme court aforesaid will make out and transmit to the clerk of said Supreme Court of the United States a certified copy of this notice, with the service thereon, that the same may be filed in the office of the clerk of said Supreme Court of the United States, and that a writ of error may issue according law and the rules of practice of the said Supreme Court.

WM. STRONG AND FRANK CLARK,
Attorneys for Plaintiffs in Error.

Dated, Olympia, W. T., September 30th, A. D. 1878.

I hereby accept service of the foregoing notice of appeal and writ of error this 30th day of September, A. D. 1878.

R. G. O'BRIEN,
Clerk Supreme Court Washington Territory.

276 TERRITORY OF WASHINGTON,
County of Thurston, ss :

I, William Billings, sheriff of Thurston County, in the Territory aforesaid, do hereby certify that I served the foregoing notice of appeal and writ of error on the above-named defendant in error, Duncan B. Finch, by leaving a duly certified copy thereof in the hands of J. S. Allen, esquire, one of his attorneys of record, at Olympia, W. T., this 3d day of October, A. D. 1878.

WM. BILLINGS,
Sheriff of Thurston County, W. T.

Fees: Serving notice, 1.00; mileage, 2 m., .20; making return, .20—$1.40.

277 United States of America to Duncan B. Finch, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Washington Territory, wherein Calvin H. Hale, Henry Winsor, Clanrick Crosby, sr., and Nathaniel Crosby, jr., are plaintiffs, and you are defendant, in error, to show cause, if any there be, why judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme

Court of the United States, this 2d day of October, in the year of our Lord one thousand eight hundred and seventy-eight.

J. R. LEWIS,
Chief Justice of Washington Territory.
ROGER S. GREENE,
Associate Justice W. T.

278 TERRITORY OF WASHINGTON,
County of Thurston, ss:

I, William Billings, sheriff of Thurston County, in the Territory aforesaid, hereby certify that I served the foregoing citation on the said Duncan B. Finch, defendant in error therein named, by leaving in the hands of J. S. Allen, esquire, his attorney of record, a true copy of the same, certified by me to be such, on this 8th day of October, A. D. 1878.

WILLIAM BILLINGS,
Sheriff of Thurston County, W. T.

Fees:

Serving citation	1.00
Copying "	40
Mileage "	20
Return "	20
	$1.80

Returned and filed October 8th, 1878.

R. G. O'BRIEN,
Clerk Supreme Court W. T.

279 *Bond as security for costs.*

In the Supreme Court of the United States.

CALVIN H. HALE, HENRY WINSOR, CLANRICK Crosby, sr., & Nathaniel Crosby, jr., plaintiffs in error,
vs.
DUNCAN B. FINCH, DEFENDANT IN ERROR.

Know all men by these presents that we, Calvin H. Hale, Henry Winsor, Clanrick Crosby, sr., and Nathaniel Crosby, jr., as principals, and E. N. Ouimette and Robert Frost, as sureties, of Thurston County, Washington Territory, are held and firmly bound unto the said Duncan B. Finch, defendant, in the sum of two hundred dollars, to be paid to the said Duncan B. Finch, his heirs, executors, or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals,
280 and dated this 30th day of September, 1878.

Whereas the above-named Calvin H. Hale, Henry Winsor, Clanrick Crosby, sr., and Nathaniel Crosby, jr., hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of Washington Territory at the July term, 1878, thereof.

Now, therefore, the condition of this obligation is such that if the above-named Calvin H. Hale, Henry Winsor, Clanrick Crosby, sr., and Nathaniel Crosby, jr., shall prosecute the said writ of error to effect

and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise in full force and virtue.

CALVIN H. HALE. [SEAL.]
HENRY WINSOR,
Pr. FRANK CLARK, *Att'y.* [SEAL.]
CLANRICK CROSBY, SR.,
Pr. FRANK CLARK, *Att'y.* [SEAL.]
NATHANIEL CROSBY, JR. [SEAL.]
E. N. OUIMETTE. [SEAL.]
ROBERT FROST. [SEAL.]

Sealed and delivered in the presence of—
JOHN P. TWEED.
R. G. O'BRIEN.

281 Examined and approved this 2d day of October, A. D. 1878.

J. R. LEWIS,
Chief Justice Supreme Court Washington Territory.
ROGER S. GREENE,
Associate Justice W. T.

Filed October 6th, 1878.

R. G. O'BRIEN,
Clerk Supreme Court W. T.

(Indorsement on cover:) No. 325. Calvin H. Hale, Henry Winsor, Clanrick Crosby, sr., and Nathaniel Crosby, jr., plaintiffs in error, vs. Duncan B. Finch. Washington Terr'y sup. court. Filed 1st November, 1878.

FILED
OCT 29 1881
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1881.

No. ~~[illegible]~~.

CALVIN H. HALE, HENRY WINSOR, CLARNICK CROSBY, Sr., and NATHANIEL CROSBY, Jr.,

PLAINTIFFS IN ERROR,

vs.

DUNCAN B. FINCH,

DEFENDANT IN ERROR.

BRIEF

OF

JOHN H. MITCHELL,

FOR PLAINTIFFS IN ERROR.

Judd & Detweiler, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1881.

No. 325.

CALVIN HALE *et al.*, PLAINTIFFS IN ERROR,

vs.

DUNCAN B. FINCH, DEFENDANT IN ERROR.

BRIEF ON PART PLAINTIFFS IN ERROR.

STATEMENT.

This is an action to recover the sum of $79,000 damages, alleged to have been sustained by the plaintiffs in error, who were plaintiffs in the court below, by reason of a breach upon the part of the defendant of his covenant with plaintiffs, made November 23, A. D. 1867, wherein he covenanted, on his purchase on that date from the plaintiffs of the steamer New World, and as a part of the consideration of such purchase, that said steamboat should not, within ten years from the first day of May, A. D. 1867, be run upon any of the routes of travel on the rivers, bays, or waters of the State of California, or the Columbia River or its tributaries; and that during the same period the machinery of said steamboat should not be run, or employed in running, any steamboat or vessel, or craft, upon any of the routes of travel on the rivers, bays, or waters of the

State of California, or the Columbia River or its tributaries.

Issues of fact were joined in the District court, and the case tried by a jury. At the close of the testimony on both sides defendant's attorneys moved the court to instruct the jury to find for the defendant, which motion was allowed by the court, and the following charge was given to the jury:

"The jury are instructed to find a verdict for the defendant."

Record, 72.

Whereupon the jury found for the defendant.

Judgment was rendered on this verdict in favor of the defendant for costs, and on error to the supreme court of the Territory of Washington the proceedings and judgment of the district court were affirmed; hence this writ of error at plaintiffs' instance.

Before stating an assignment of the errors relied upon, and to the end that the Court may be the better advised in the premises, it is deemed advisable to submit the following

STATEMENT OF FACTS.

May 1, 1864, the California Steam Navigation Company, a corporation organized under the laws of the State of California, and then, and long prior thereto, engaged in the business *solely* of navigating the rivers, bays, and waters of that State, by transporting for hire passengers and freight on said several routes, sold one of its steamboats, called the New World, then lying at the Port of San Francisco, to the Oregon Steam Navigation Company, a corporation then existing under the laws of the State of Oregon, and then, and long prior thereto, engaged *solely* in transporting for hire, freight and passengers on the several water routes of travel in the State of Oregon and on the Columbia river.

That the consideration of this sale was the payment of $75,000 cash, and a covenant on the part of the Oregon Steam Navigation Company in the following words. This covenant is contained in a separate agreement from the bill of sale, but of same date:

"That they (the Oregon Steam Navigation Company, their successors and assigns) will not run, or employ, or suffer to be run or employed, the said steamboat (New World) upon any of the routes of travel on the rivers, bays, and waters of the State of California, for the period of ten years from the first day of May, 1864." * * * "That the machinery of the said steamboat, New World, shall not be run, or employed in running, any steamboat, vessel, or craft upon any of the routes of travel, or on the rivers, bays or waters of the State of California for the period of ten years from the first day of May, 1864, and with the further covenant, that, in case of breach of the above covenant, to pay to the said California Steam Navigation Company the sum of $75,000 in gold coin as actual liquidated damages." (See Record, page 58.)

The Oregon Steam Navigation Company took said steamboat, New World, to Portland, Oregon, and for a time employed her in transporting freight and passengers on the Columbia river and tributaries, and subsequently, to wit: on the 18th day of February, A. D. 1867, sold said steamer to the plaintiffs in error in this action for the sum of $75,000, gold coin, and, for the further consideration of an agreement and undertaking, then and there made in writing (of even date with the bill of sale, February 18, 1867,) with the Oregon Steam Navigation Company, by the plaintiffs in error herein, and one S. D. Howe, and one A. R. Elder, as their sureties, in which it was covenanted and agreed by plaintiffs in error and their said sureties as follows:

"That the said Winsor, C. Crosby, N. Crosby, Jr., and Hale, for themselves, their successors, and assigns, have agreed, and do hereby covenant and agree, in consideration

of the premises, that they will not run, or employ, or suffer to be run or employed, the said steamboat, New World, upon any of the routes of travel on the rivers, bays or waters of the State of California, *or the Columbia river and its tributaries, for the period of ten years from the first day of May,* 1867, * * * and the said Winsor, C. Crosby, N. Crosby, and Hale have further covenanted and agreed that the machinery of the said steamboat, New World, shall not be run, or employed in running, any steamboat, vessel or craft upon any of the routes of travel on the rivers, bays or waters of the State of California, or the Columbia river and its tributaries, for the period of ten years from the first day of May, 1867. * * *" And the further covenant as to payment of liquidated damages in the sum of $75,000 in case of breach; this part of the covenant following in form, words and figures precisely the similar covenant in the agreement between the Oregon Steam Navigation Company and the California Steam Navigation Company above quoted. (Record 60, 61.)

The bill of sale from the Oregon Steam Navigation Company to plaintiffs of same date of agreement last cited, which was in form to plaintiff Winslow, but in fact for the use and benefit of all the plaintiffs in error, contained the following clause:

"*And it is understood and agreed that this sale is upon the express condition that said steamboat or vessel is not within ten years from the first day of May,* 1867, *to be run upon any of the routes of travel on the rivers, bays, or waters of the State of California, or the Columbia river and its tributaries; and that during the same period last aforesaid the machinery of the said steamboat shall not be run or employed in running any steamboat or vessel or craft upon any of the routes of travel on the rivers, bays, and waters of the State of California, or the Columbia river and its tributaries.*" (Record, 47.)

That at the date of this sale to plaintiffs in error they, the plaintiffs in error, were engaged solely in the navigation of the waters of Puget Sound, in the territory of Washington, and were in nowise engaged in the navigation of the waters

of Oregon, or of those of the territory of Washington, set out and described in their covenant and agreement with the Oregon Steam Navigation Company, nor in the navigation of any of the waters of the State of California.

That immediately after said sale to the plaintiffs in error they took said steamer New World to the waters of Puget Sound and used the same in transporting freight and passengers on said waters.

Subsequently, on the 23d day of November, 1867, the plaintiffs in error, acting by and through one of their number, C. H. Hale, in whose name, for convenience, the legal title to said steamer New World was then vested, but the actual ownership of which was in the plaintiffs in error jointly, and which facts were well understood by defendant in error, sold and delivered said steamer New World to Duncan B. Finch, the defendant in error. And as much may depend in determining this case on the construction to be given to the two writings containing the agreements and stipulations of the parties, they are here given in *hæc verbæ*.

BILL OF SALE.

Exhibit G.

To all to whom these presents shall come, greeting:

Know ye, that I, Calvin H. Hale, of Olympia, in the Territory of Washington, sole owner of the steamboat or vessel called the New World, now lying at the port of Olympia, Washington Territory, of the burden of five hundred and thirty and $\frac{67}{100}$ tons, or thereabouts, for and in consideration of the sum of fifty thousand dollars, lawful money of the United States of America, to me in hand paid before the sealing and delivery of these presents, by Duncan B. Finch, of the same place, the receipt whereof I do hereby acknowledge, and am therewith fully satisfied, contented, and paid; have bargained and sold, and by these presents do bargain and sell unto the said Duncan B. Finch, his executors, administrators, and assigns, the whole of the said steamboat or vessel; together with her engines, boilers, machinery,

the mast, bow-sprit, sails, boats, anchors, cables, and all other necessaries thereunto appertaining and belonging. The certificate of the registry of which said steamboat is as follows, to wit:

Permanent No 15.

(On the margin:) J. A. Graham, actg. asst. register.

In pursuance of an act of the Congress of the United States of America entitled "An act concerning the registering and recording of ships or vessels," approved December 31st, 1792, and of "An act to regulate the admeasurement of tonnage of ships and vessels of the United States," approved May 6, 1864, Calvin H. Hale, of Olympia, Washington Territory, having taken or subscribed the oath required by the said act, and having sworn that he is a citizen of the United States, and the true and only owner of the ship or vessel called the New World, of Olympia, W. T., whereof Henry Winsor is at present master, and is a citizen of the United States, as he hath sworn, and that the said ship or vessel was built at the city of New York, in the year 1849, as appears by permanent register No. 14, issued at Port Townsend, district of Puget Sound, March 4th, 1867, now surrendered, change of owners.

And the said register having certified that the said ship or vessel has two decks, no mast, and that her length is 218 feet; under tonnage deck, 301 tons $\frac{01}{10}$; her breadth, 25 feet, between decks, above ditto, 229$\frac{67}{10}$ tons; her depth, 8 feet; enclosures, and an upper deck, in her height, 7 feet, and that she measures five hundred and thirty tons and sixty-seven hundredths; that she is a steamboat; has a round stern, and no head. And the said Calvin H. Hale, having agreed to the description and admeasurement above specified, and sufficient security having been given, according to the said act, the said steamboat has been duly registered at the port of Port Townsend, district of Puget Sound.

Given under my hand and seal, at the port of Port Townsend, this 7th day of March, in the year one thousand eight hundred and sixty-seven.

[L. S.] (Signed) W. E. BARNARD,
Deputy Collector.

To have and to hold the said , of said steamboat New World, her engines, boilers, machinery, tackle, apparel,

furniture, and appurtenances thereunto belonging, unto him, the said Duncan B. Finch, his executors, administrators, and assigns, to the sole and only proper use, benefit, and behoof of him, the said Duncan B. Finch, his executors, administrators and assigns forever; and I, the said Calvin H. Hale, have, and by these presents do promise, covenant, and agree, for myself, my heirs, executors, and administrators, to and with the said Duncan B. Finch, his heirs, executors, administrators, and assigns, to warrant and defend the whole of said steamboat New World, her engines, boilers, machinery, and all the other before-mentioned appurtenances, against all and every person and persons whomsoever.

And it is understood and agreed that this sale is upon this express condition, that said steamboat or vessel is not within ten years from the first day of May, 1867, to be run upon any of the routes of travel, on the rivers, bays, or waters of the State of California or the Columbia River or its tributaries, and that during the same period last aforesaid the machinery of the said steamboat shall not be run, or be employed in running, any steamboat or vessel or craft upon any of the routes of travel on the rivers, bays, or waters of the State of California, or the Columbia River and its tributaries.

In testimony whereof, I, the said Calvin H. Hale, have hereunto set my hand and seal this twenty-third day of November, in the year of our Lord one thousand eight hundred and sixty-seven.

C. H. HALE. [SEAL.]

Signed, sealed, and delivered in presence of—
ELWOOD EVANS.
B. F. DENNISON.

TERRITORY OF WASHINGTON,
County of Thurston, ss:

On this twenty-third day of November, in the year one thousand eight hundred and sixty-seven, before the undersigned, a notary public in and for said Territory, duly commissioned and sworn, personally appeared the above-named Calvin H. Hale, to me personally known to be the identical individual who signed and executed the foregoing bill of sale, and in due form of law acknowledged to me that he

executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal, at Olympia, W. T., in the day and year last above written.

[SEAL.] ELWOOD EVANS,
[5 c. int. rev. stamp.]

Notary Public.

[U. S. int. rev. stamp, fifty dollars, cancelled.]

(The following endorsements are on the foregoing:) Calvin H. Hale v. Duncan B. Finch. Exhibit G. Joseph H. Houghton, clerk.

DISTRICT OF PUGET SOUND,
Port of Port Townsend:

Received this 26th day of November, 1867, and recorded in book B of records of registered vessels, on page 26.

EDW. S. DYER,
Recording Clerk.

Record, 53.

ARTICLES OF AGREEMENT.

Exhibit H.

[Int. rev. 5 c. stamp, cancelled.]

Articles of agreement between Duncan B. Finch, of the one part, and Calvin H. Hale, of the other part, both of the town of Olympia, Washington Territory, as follows, viz:

Whereas the said Calvin H. Hale, in consideration of the sum of fifty thousand dollars, has this day executed, in favor of the said D. B. Finch, a bill of sale of the steamer New World, and assigned the mail contract for carrying the mails on Puget Sound, together with the post-office drafts for the remainder of said mail service; which consideration money is to be paid and discharged by said Duncan B. Finch in manner and form as hereinafter recited; now, therefore, it is covenanted, agreed, and concluded by and between the said parties to these presents, for themselves, their executors, administrators, and assigns, in manner and form following, that is to say:

The said D. B. Finch, for himself, his executors, administrators, and assigns, doth covenant and agree—

First. That he will give due notice by advertisement to all creditors of, or persons legally claiming against the said steamer New World, to present to him, within sixty days, their said claims with proper vouchers, or approved by said Calvin H. Hale, and he, the said D. B. Finch, will pay the same.

Second. That he, the said D. B. Finch, does hereby assume and agree to pay, discharge, and satisfy six certain promissory notes, bearing date the 18th day of February, 1867, for five thousand dollars each, held by the Oregon Steam Navigation Company, and secured by a mortgage upon said steamer New World, together amounting in principal and interest, up to this date, to the sum of thirty-two thousand two hundred and eighty-eight & $\frac{57}{100}$ dollars ($32,288.57.)

Third. That should the two foregoing assumed classes of liabilities not amount to forty thousand dollars ($40,000) then the said D. B. Finch hereby agrees to pay to the said Calvin H. Hale the difference between the said sum and the aggregate of said liabilities of the said steamer New World paid and assumed by said D. B. Finch.

Fourth. The payment of the remaining ten thousand dollars, consideration hereinbefore recited, shall remain in abeyance until the said D. B. Finch shall have had time to communicate with George S. Wright, and should said Wright assent to the said Calvin H. Hale acquiring and holding an eighth ($\frac{1}{8}$) interest in the two steamboats Eliza Anderson and New World in lieu of the payment of said ten thousand dollars, then a bill of sale, to said Calvin H. Hale, for such eighth interest in each of said steamboats shall be a full payment and discharge of the said sum. And until the said George S. Wright shall have signified his willingness or objection to the above condition, the said D. B. Finch hereby covenants and agrees to pay to the said Calvin H. Hale a dividend equal to one-eighth of the net earning of the steamers Eliza Anderson and New World, upon Puget Sound, and upon refusal to convey said ($\frac{1}{8}$) eighth interest, then to pay the just and full sum as aforesaid, of ten thousand dollars. And the said Calvin H. Hale, for himself, his executors, and administrators, in consideration of the premises, hereby covenants and agrees that

he will promptly, and on the receipt from time to time of drafts from the United States Post-Office Department for said mail services on Puget Sound, by virtue of the contract this day assigned to Duncan B. Finch, transfer and deliver to said Finch all of said drafts, to the end that the said D. B. Finch shall receive the pay for said mail service. And the said Calvin H. Hale further covenants and agrees that he will accept the aforesaid consideration of fifty thousand dollars in the manner and form as hereinbefore covenanted and agreed to be paid. It is further agreed by and between the parties that wherever the word "dollars" is used in this agreement, it is expressly understood that it is to mean gold coin of the United States of America.

In witness whereof we have hereunto set our hands and seals, at Olympia, this 23d November, A. D. 1867.

D. B. FINCH. [SEAL.]
C. H. HALE. [SEAL.]

In presence of us—
ELWOOD EVANS.

Record, 54, 55.

It is admitted that subsequent to the date of the sale to defendant in error, and soon thereafter, he caused and permitted the said steamer New World to be taken to San Francisco, and she was, by his consent, taken from Puget Sound to the port of San Francisco, in the State of California, on or about the first day of October, 1868, and before May 1, 1874; and from on and after the first day of November, 1868, up to the first day of May, 1874, he, Finch, defendant in error, and without the consent, as it is claimed, of the plaintiffs in error, (in reference to this, however, there was an issue of fact,) and against their protest, caused, suffered and permitted the steamer New World to run upon the routes of travel on the rivers, bays, and waters of the State of California, contrary to and in violation of the several covenants and agreements contained in the writings of sale from the California Steam Navigation Company to the Oregon Steam Navigation Company, from the Oregon Steam Navigation Company to the plaintiffs in error, and from

plaintiffs in error to the defendant in error, as heretofore specially set out.

At the date of the sale by plaintiffs to defendant in error neither the plaintiffs in error nor the defendant in error were engaged in any manner whatsoever in the navigation of any of the rivers, bays, or waters of the State of California, or of the State of Oregon, or of the Columbia river or its tributaries; but all were engaged in navigating the waters of Puget Sound, in Washington Territory, and adjacent waters.

In April, A. D. 1870, the Oregon Steam Navigation Company instituted an action against the plaintiffs in error in the United States district court for the second judicial district of Washington Territory for the purpose of recovering $75,000 damages for a breach of covenant on the part of plaintiffs in error in not preventing the steamer New World from running on the rivers, bays, and waters of the State of California until after May 1, A. D. 1874. This action was defended by plaintiffs in error, and successfully, in the district and supreme courts of Washington Territory, said courts holding that said covenant was in restraint of trade and against public policy, and an action could not be maintained for its breach. On error, however, to the Supreme Court of the United States it was held, at the October term, A. D. 1873, that the covenant was not in restraint of trade or against public policy. The decision of the supreme court of Washington Territory was reversed.

See The Oregon Steam Navigation Company, plaintiffs in error, *vs.* Henry Winsor, Clanrick Crosby, Nathaniel Crosby, Jr., Calvin H. Hall, Samuel D. Howe, and Alfred R. Elder, defendants in error; 20 Wallace, 65, Oct. Term, 1873.

Subsequently, on the 23d day of November, 1874, in pursuance of further proceedings in accordance with the decision of this court, a final judgment was rendered in the above-entitled cause in the said district court for the Territory of Washington in favor of said Oregon Steam Navigation Company, and against these plaintiffs in error and their sureties aforesaid, for the sum of seventy-five thousand dollars, gold coin of the United States, together with costs and disbursements to be taxed, which judgment was afterwards and prior to the commencement of this suit, paid in full by these plaintiffs in error, and full payment and satisfaction thereof acknowledged of record by the Oregon Steam Navigation Company, on the 13th day of April, A. D. 1875.

Record, 67.

This action is instituted by the plaintiffs in error against Finch, the defendant, for the purpose of recovering the damages they have suffered by reason of the breach of the covenant made by Finch, wherein it was stipulated among other things that said steamer New World should not, within ten years from the first day of May, A. D. 1867, be run upon any of the routes of travel on the rivers, bays, or waters of the State of California.

The action was commenced by filing complaint August 11, 1875; summons issued and served on the defendant the same date.

Record, 87–8.

The amended complaint in this action sets out the facts as just detailed in legal pleadable form, sets out the covenants and avers the breach, and concludes as follows:

"Whereupon they pray that they may have and recover of the defendant the said sum of seventy-nine thousand dollars in gold coin, and their costs and disbursements herein."
Record, 10–13.

The amended and final answer is—

First. In the main a general denial, except that it admits that "on the first day of November, 1869, and thereafter at various times the said steamboat New World *was* run upon routes of travel and on said rivers, bays, and waters of the State of California aforesaid," but "denies that said steamboat was run on any of them contrary to or in violation of the supposed promise or agreement of the defendant."

Second. It pleads the statute of frauds and perjuries as follows:

"And for a further and separate answer and defense, the defendant avers that the supposed promise and agreement in the said complaint mentioned in the 7th paragraph thereof was, and is, an agreement that by its terms was not, and is not, to be performed in one year from the making thereof, and such agreement, contract or promise was not, nor was, any note or memorandum thereof in writing, and signed by this defendant, or by any other person by him thereunto lawfully authorized, according to the form of the statute, in such case made and provided."

Third. It avers a waiver of the breach of the covenant on the part of the plaintiffs in error in the following words:

"And for a further and separate answer and defense to the said complaint the defendant alleges that the said steamer New World, was taken to San Francisco and run upon the routes of travel on the bays and waters of the State of California by the leave and license of the said plaintiffs to the said defendant for that purpose, first given and granted, to wit: at Olympia, in the County of Thurston, on, to wit, the first day of July, A. D. 1868."

Fourth. The plea, *non assumpsit infra sexannus*, is made as follows:

"And for a further and separate answer and defense this defendant avers that the said supposed cause of action in the said complaint alleged did not accrue to the said plaintiffs within six years next before the bringing of this suit; and he pleads the second subdivision of section 27 of the act to regulate the practice and proceedings in civil actions in bar of this action."

Fifth. Concludes with a further plea of the statute of limitations as follows:

"And for a further and separate answer and defense this defendant alleges that action has not accrued to said plaintiffs for any matter in that behalf alleged in the complaint within *three years* next before the bringing of this suit; and he pleads in bar of this action the third subdivision of section 28 of the act to regulate the practice and proceedings in civil actions."

Record 31-33.

The plaintiffs' reply to this amended answer is, in substance and legal effect, as follows:

First. Deny that the promise and agreement agreed upon was or is an agreement that by its terms or otherwise was not, and is not, an agreement to be performed in one year from the making thereof.

Second. The plaintiffs aver that said promise or agreement was, and is, in writing, and was, and is, signed by the defendant.

Third. A denial that plaintiffs ever, at any time, gave any license to defendant or any one, or in any manner consented to the running of said steamboat on the waters of the State of California.

Fourth. Deny that the cause of action did not accrue to plaintiffs within six years before the commencement of said action.

Fifth. Avers, in answer to the plea, that cause of action had not occurred within *three years*; "that this action is founded upon a contract in writing," *and* "that this action is founded upon a liability which does arise out of a written instrument.

And plaintiffs, in further response to the pleas of the Statute of Limitations, say in their reply:

Sixth. "And, for a further and separate reply to the said separate answer and defense in said Article IV of the amended answer set forth and stated, plaintiffs aver that on or about the 10th day of July, 1871, said defendant did depart from and reside out of the Territory of Washington, to wit, in the State of California and elsewhere without the Territory of Washington continually for the period of four years and upward, to date of commencement of this action, and that during said period he was absent from said Territory, and residing out of the limits of the same, for more than three years;" *and*,

Seventh. "And, for a further and separate answer and defense in the said Article V of said amended answer set forth and stated, plaintiffs aver that on or about the 10th day of July, 1871, defendant did depart from the Territory of Washington, and from and after said time, to wit, the 10th day of July, 1871, has resided out of said Territory, to wit, in the State of California and elsewhere without the limits of said Territory of Washington continuously for the period of more than four years prior to the commencement of this action, and that during the period from and after the 10th day of July, 1871, and the commencement of this action, said defendant has been absent from this Territory and residing without the limits thereof for the period of more than three years."

On the trial in the district court for Washington Territory on issues joined as above indicated, the plaintiffs offered in evidence the following record-evidence, all of which was admitted by the court:

1st. Duly certified copy of articles of incorporation of the

California Steam Navigation Company, of date February 22, A. D. 1854.

Record, 42.

2d. Duly certified copy of articles of incorporation of the Oregon Steam Navigation Company, of date October 18, A. D. 1862.

Record, 43.

3d. Duly certified copy of supplemental articles of incorporation of the Oregon Steam Navigation Company, dated November 7, A. D. 1868.

Record, 44.

4th. Original memorandum of agreement between the Oregon Steam Navigation Company and the California Steam Navigation Company, containing covenants relative to the sale of the steamer New World by the latter to the former, of date May 2, A. D. 1864.

Record, 58.

5th. Bill of sale of steamer New World from the Oregon Steam Navigation Company to Henry Winsor, one of the plaintiffs in error.

Record, 46.

6th. Memorandum of agreement between Henry Winsor, Clarnick Crosby, Nathaniel Crosby, Jr., and Calvin H. Hall, plaintiffs in error, and S. D. Howe and A. R. Elder, sureties, and the Oregon Steam Navigation Company, of date February 18, A. D. 1867.

Record, 48.

7th. Duly certified copy of record of mortgage of steamer New World from Henry Winsor, one of the plaintiffs in error, to the Oregon Steam Navigation Company to secure

part of purchase price of said steamer, together with certified copy of record of satisfaction of same.

Record, 49.

8th. Original bill of sale of steamer New World from Henry Winsor, plaintiff in error, to Calvin H. Hale, plaintiff in error, dated March 5, A. D. 1867.

Record, 52.

9th. Bill of sale of steamer New World from Calvin H. Hale to Duncan B. Finch, defendant in error, dated November 23, A. D. 1867.

Record, 54.

10th. Original copy of articles of agreement between Duncan B. Finch, defendant in error, and Calvin H. Hale, one of the plaintiffs in error, dated November 23, A. D. 1867, in reference to certain claims against the steamer New World, and also manner of payment of purchase money and assignment of certain mail contracts held by Finch, and the proceeds of which were to be turned over to Hale.

Record, 56.

11th. Duly certified copy of amended complaint in the case of the Oregon Steam Navigation Company, plaintiff *vs.* Henry Winsor, C. Crosby, Nathaniel Crosby, Jr., Calvin H. Hale, S. D. Howe, and A. R. Elder, defendants, in the United States district court of the second judicial district of Washington Territory, November term, A. D. 1869.

Record, 58–62.

12th. Duly certified copy of demurer to the aforesaid amended complaint; also, certified copy of record of court sustaining said demurer and dismissing said action.

Record, 63–64.

13th. Record of remittance and entry of judgment in

supreme court of Washington Territory, July 15, A. D. 1874, reversing former judgment of that court in case the Oregon Steam Navigation Company *vs.* Henry Winsor *et. al*, in accordance with the decision of the Supreme Court of the United States.

Record, 64.

14th. Record of district court of the United States for the second judicial district, Washington Territory, in the case, The Oregon Steam Navigation Company *vs.* Henry Winsor *et al.*, of date November 23, A. D. 1874, being record of final judgment against plaintiffs in error herein, and their sureties, for the sum of $75,000 gold coin of the United States, together with costs and disbursements.

Record, 65.

15th. Record of payment and satisfaction of the above judgment by plaintiffs in error, of date April 13th, A. D. 1875.

Record, 67.

This concluded the record evidence on the part of plaintiffs, who then called the following-named witnesses, who testified briefly as follows, and whose evidence was admitted:

Capt. J. C. Ainsworth, testified:

"That in May, 1864, and prior thereto, the California Steam Navigation Company were owners of the steamboat New World, and were engaged in navigating the waters of California, carrying freight and passengers for hire, with said steamboat New World, and many other steam and other vessels. That at same time the Oregon Steam Navigation Company had from 12 to 20 steamers engaged in navigating the waters of the Columbia River and its tributaries, and about this time bought steamer New World to run from Portland to Cascades; that this company continued to own said steamer New World till February 18th, 1867, then sold the said steamboat to plaintiffs in this action.

Consideration paid by plaintiff was steamer Josie McNear, $5,000 coin, and eight notes for $5,000.00 each. Capt. Finch paid some of these notes. Josie McNear was taken for $30,000.00.

Cross-examined by defendant's counsel:

"The California Steam Navigation Company was running on Sacramento River to Sacramento, and San Joaquin to Stockton. Oregon Steam Navigation Company was doing the principal business at this time on the Columbia River and its tributaries, and I considered the California Steam Navigation Company were doing the principal business on the inland waters of the State of California. The Oregon Steam Navigation Company purchased the steamer New World because the company wanted her."

Record, 57.

CALVIN H. HALE testified:

"I was one of the owners of the steamer New World by purchase from the Oregon Steam Navigation Company. Plaintiff bought the New World to carry the mail from Olympia to Victoria and way ports. We paid steamer Josie McNear, valued at $30,000, $5,000 coin, and our notes, eight in number, for $5,000 each, secured by mortgage on the boat, for her. Capt. Finch and myself had several talks about sale to Finch. At the time of the sale to Finch the title was in me, but Henry Winsor, Clanrick Crosby, N. Crosby, and myself were real owners. I told Capt. Finch all about it. Capt. Finch knew we were under liabilities to the O. S. N. Company if the steamer should go to California to run. I informed him we were under bonds in sum of $75,000 not to run on waters of Oregon or California; he said he was willing to take bill of sale in same way with same clause."

Record, 57.

DUNCAN B. FINCH, defendant in error, testified:

"I left Washington Territory 7th or 8th of July, 1871; my family was with me; we were absent about one year from the Territory; returned in July, 1872; went away again in October, 1872, and was absent till April, 1874;

returned and remained till October, 1874; then left and was absent till May, 1875."

Cross-examined:

"Testified this was my home; I was away on a visit; have resided in Olympia for 13 years; have claimed the right to vote here and nowhere else for 13 years. Was on a visit to my parents in the east; left my furniture here; when I left for California second time my son was sick; my family consisted of wife, son, and myself; was detained in San Francisco; stopped at Russ House; went east after sickness was over; returned to San Francisco in fall of 1873, and came up here in spring of 1874; I have never had the intention of changing my residence since I came here 13 years ago; I left property and an agent here when I left."

Re-direct:

"Before July, 1867, was engaged steamboating with steamers Olympia, Wilson G. Hunt, and Eliza Anderson, running from Olympia to Victoria and way ports; gave up this business to Starr when I left in July, 1871. My principal business was dealing in money, drafts, and trading. When I left I took steamer Olympia, and all my family; had only a room for residence in Olympia; left that in hands of Mrs. Huntington; my wife attended to paying for rooms; I did not pay Mrs. Huntington nor any one; have no personal knowledge of the payment since 1871; took my principal property with me when I left; I'd taken a subsidy for not running the Eliza Anderson here—$1,500 a month; took subsidy in San Francisco for not running Olympia; I now board at the hotel here; we never kept house prior to 1871; I was under a doctor's treatment about a year; when I came here in 1872, I intended to make my home here; my family then consisted of my boy, niece, wife, and self."

Record, 68, 69.

John E. Higgins testifies:

"I am residing in Olympia; am a shipwright; in winter of 1868 I saw the steamer New World in San Francisco; saw her there in 1869; in August, '69, I went on her from

San Francisco to S. Vallejo; she was then carrying freight and passengers for Cal. & Pacific Railroad."

Record, 69.

The plaintiffs here rested.

Whereupon the defendant, Finch, offered in evidence the following on his part, which was received by the court:

1st. Original copy of articles of agreement between Duncan B. Finch and Calvin H. Hale, being the same put in evidence by plaintiffs of date November 23, A. D. 1867, relative to mail contracts, &c., &c., and copied in full in this brief as number 10 of record evidence, page — of brief.

Record, 69, 70.

2d. Receipt from C. H. Hale to D. B. Finch for $4,000 for purchase price of certain interests in steamers New World and Eliza Anderson, dated March 26, 1868; also, another receipt for $244.43, of date March 31, A. D. 1868, from C. H. Hale to D. B. Finch, being balance in full for liquidation of all outstanding claims against steamer New World, as per terms of agreement.

Record, 70.

The defendant, Duncan B. Finch, then being called and sworn in his own behalf, referring to the agreement above quoted, (Record, 69, 70,) testified as follows:

"This agreement contained terms of contract; I did not know the parties were under bond. Hale didn't tell me so or any one else. Hale didn't tell me others were owners; told me he could give me clear title. The payment of dividends were made under the contract. These books that I have are receipt books; the following are receipts of those dividends:

One receipt dated Dec. 6, 1867, for $131.

Receipt	Jan'y 4, 1868,	$\frac{1}{8}$	net earnings,		$208.
"	February 8, 1868,	$\frac{1}{8}$	"	"	172.79.
"	March 7, 1868,	$\frac{1}{8}$	"	"	204.
"	April 4, 1868,	$\frac{1}{16}$	"	"	178.02.

"In March I bought ½ of Capt. Hale's interest = $\frac{1}{16}$.

"Hale knew the steamer New World was going to California, and that it was going to be sold to Ryder. Hale never objected to the steamer going to California or to its being sold to Ryder. He received the earnings of the New World after she left Puget Sound; have a receipt dated October 2, 1868, relating to New World only. It is for $295.78, for going to wreck of steamer Suwannee, and thence to San Francisco in California. I have receipts from Hale for net earnings of steamer Eliza Anderson, as follows:

May 14, 1868	$158 68
June 5, 1868	182 53
July 10, 1868	99 82
Aug. 7, 1868	280 88
Sept. 5, 1868	140 25
Nov. 7, 1868	130 86
Dec. 5, 1868	203 21
Jan'y 8, 1869, mail pay (c'y)	136 12
" 9, 1869	120 99
" 29, 1869, Sept. qr.	153 25
Febr'y 5, 1869	129 09
Mch. 12, 1869	114 86
Sept. 11, 1869	30 10
" 11, 1869, mail pay (c'y)	430 99

"Hale's interest terminated June 30, 1870. I bought Hale out then and give him $5,000.00. Hale knew when New World left here she was going to San Francisco. He made no objections to her going there to run. He was pleased. I told him of her sale to Ryder. I don't know that he asked me in regard to payments. The New World was a river boat, and was not fit for ocean service.

"Cross-examined:

"San Francisco is the first port of entry in California to which all vessels going there must report. Capt. Hale didn't know of contract to go to wreck of Suwanee. After going to wreck New World came to Port Townsend. I knew the receipt was partly for that time. The receipts were none of them for earnings of the New World in California waters. Mr. Wright didn't convey, or consent, or refuse, or decline to convey any interest in New World to Capt. Hale. I can't name any particular time when Capt.

Hale consented to her being run on the waters of California. He did on Anderson several times. Can't remember any one being present. He talked of her being sold in California. Don't remember talk of her being sold to go to Amoor River. I didn't ever ask him if I might run her on waters of California. He never told me I might. Judge Dennison, my counsel, told me this was a clean bill of sale."

Record, 71.

The defendant having rested, Capt. Hale was recalled by plaintiffs, and testified as follows:

"I never consulted or said to anybody that the steamer New World might be run in California waters. I never received earnings of New World knowing they were for anything but Puget Sound trade. I never received a cent for earnings of New World when she went to wreck save for going and bringing the material to Port Townsend."

Record, 72.

Here the plaintiff rested.

Both parties having rested, the defendant's counsel moved the court to instruct the jury to find a verdict for the defendant. This motion was allowed by the court. The counsel for plaintiffs requested that the jury be instructed in writing. Whereupon the court instructed the jury as follows:

"The jury are instructed to find a verdict for the defendant."

Record, 72.

To which instruction the plaintiffs, by their counsel, then and there excepted, which was allowed by the court.

Record, 72.

Whereupon the jury returned the following verdict:

"We, the jury, * * * find for the defendant."

Record, 72.

To which verdict plaintiffs excepted, and exception allowed; and judgment was entered accordingly.

Record, 72.

On writ of error to the supreme court of Washington Territory the following grounds of error were assigned:

1st. That the court erred in entertaining the motion to instruct the jury to find a verdict for the defendant.

2d. The court erred in sustaining said motion.

3d. The court erred in instructing the jury to find a verdict for the defendant.

4th. The court erred in rendering a judgment against plaintiffs and in favor of the defendant.

Record, 78.

The supreme court of Washington Territory affirmed the judgment and proceedings of the district court, and for the reasons stated in the following

OPINION.

The plaintiffs in error sold the steamer New World to the defendant by a bill of sale. The instrument contained a clause in these words: "And it is understood and agreed that this sale is upon this express condition, that said steamboat or vessel is not, within ten years from the first day of May, 1867, to be run upon any of the routes of travel on the rivers, bay, or waters of the State of California, or the Columbia River, or its tributaries; and that during the same period last aforesaid the machinery of the said steamboat shall not be run, or employed in running, any steamboat or vessel or craft upon any of the routes of travel on the rivers, bays or waters of the State of California, or the Columbia River and its tributaries."

The plaintiffs in error, assuming this clause to be, or contain, a covenant, sued the defendant in error in the district court of the second district for a breach of it, and prayed damages. Issues were made, a trial was had, and upon the conclusion of the evidence for the plaintiff, the defendant

moved the court to instruct the jury to find for the defendant. The jury were accordingly so instructed. The plaintiffs excepted, and bring their writ to correct the supposed error committed in giving that instruction. It is not disputed but that the instruction was right if the clause above recited is a condition and not a covenant. Whether it is one or the other, or both, is the main question argued here. It seems to us decisive.

We are clear that this clause is a condition, and not a covenant. There is no ambiguity, either latent or patent, in the language adopted by the parties to this bill of sale. The contract is evidently drawn with care, skill and intelligence. We scrutinize it, and discover no reason to suspect that the parties to it mean anything other than what they really say. Emphatically they declare, "It is understood and agreed that this sale is upon this express condition." What is understood and agreed? Why, that the sale is upon a condition, which the vendor goes on thereafter particularly to express. Certainly, a condition that is not understood and agreed upon by parties is no condition. A condition, then, that they explicitly take pains to state is understood and agreed upon by them as such is conspicuously one.

We do not feel it incumbent upon us to cite authorities. The law is plain and elementary. The books are all one way. We believe no reported case can be found where words in themselves clearly importing a mere condition, and unassociated with other words, which qualify them, or render intended sense doubtful, have been held to impart a covenant.

It is urged by the plaintiffs in error that we ought to judge of the intent of the parties here by the surrounding facts. But the most important fact surrounding their intent, and tending to disclose it, are the words they have chosen to record it. Words so explicit are controlling always, unless mistake, or inadvertence or duress, imbecility, or some other extraordinary set of facts be present, which shows that they cannot be relied upon to reveal the concerted mind of the parties. But such extraordinary circumstances would need to be pleaded. They are not claimed in this case. Minds are presumed to act freely, intelligently and accurately where the contrary does not appear.

It is not necessary here to look beyond the words the parties have employed; but were we to do so we should

only be the more strongly constrained to the conclusion that they intended what they have said.

The charge of the judge in the district court was right. The remedy of the plaintiffs is against the vessel itself for a forfeiture, and not against the vendee personally for damages.

The judgment of the court below is therefore affirmed.

ROGER S. GREENE,
Associate Justice.

Record, 82–83.

In pursuance of this opinion, judgment was entered by the supreme court of the Territory, July 25, A. D. 1878, affirming the proceedings and judgment of the district court.

From this judgment the case is now here on writ of error.

ASSIGNMENT OF ERRORS.

First. The court erred in sustaining the action of the district court in instructing the jury as follows: "The jury are instructed to find a verdict for the defendant."

Second. The court erred in sustaining the action of the district court in entertaining the motion to instruct the jury to find for the defendant.

Third. The court erred in sustaining the action of the district court in sustaining said motion.

Fourth. The court erred in sustaining the judgment of the district court, rendered in favor of said defendant and against said plaintiffs.

Fifth. The court erred in rendering a judgment against the plaintiffs in error and in favor of the defendant in error.

Sixth. The court erred in not reversing the proceedings and judgment of the court below, and in not directing the district court to submit the case to the jury.

BRIEF OF ARGUMENT.

It will be observed that but one question was considered by the supreme court of Washington Territory in affirming the judgment of the district court, namely, as to the nature and effect of a certain clause in the bill of sale of the steamer New World to the defendant in error. Whether it is a covenant or a condition, or both, or neither, the court holding it is a condition and *not* a covenant. Should this honorable court concur in this view of the clause in question, upon due consideration of all the facts, it would, as a matter of course, be decisive of the case; if, upon the contrary, a different view should be taken, then it may become necessary to consider every other material question raised by the record.

Assuming this court will *not* concur with the court below in its construction of this writing, before approaching this main question, attention is attracted to the other questions involved. These, however, need to be but stated, as it is apprehended the defendant in error will not, in any event, insist on any of them.

POINT FIRST.

Is the contract in issue one in restraint of trade, and, therefore, against public policy?

This question is answered in the negative by the opinion of this court (Bradley, justice,) in the case of the Oregon Steam Navigation Company *vs.* Winsor *et al.*, hereinbefore referred to. (20 Wallace, 67.)

The *facts* in the case at bar are, in all respects, so far as it is necessary to consider the facts in applying the rule of law on this subject, *precisely* similar to those stated in the case cited. The subject-matter is identical; the Territory and waters upon which the restraint is imposed, and the length

of time during which the restraint was to operate are the same. The *sole* difference between the cases consists in the fact that the defendants in the former case are the plaintiffs here, while the defendant in this case is a third party. In each case the *party* upon whom the restraint was intended to operate was a resident of Washington Territory, engaged in navigating the waters of Puget Sound and adjacent waters and neither of whom was engaged in navigating either the waters of the State of California or of the Columbia river

In the case of the Oregon Steam Navigation Company *vs.* Winsor *et al.*, the court, (opinion by Mr. Justice Bradley,) said:

"It is a well-settled rule of law that an agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable and there be a consideration to support it. (Chitty on Contracts, 576.) In order that it may not be unreasonable the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made. (Id., and Tindall, C. J., in Horner *vs.* Groves, 7 Bingham, 743.) A contract, even on good consideration not to use a trade anywhere in England, is held void in that country, as being too general a restraint of trade; but a contract not to use a trade at a particular place, if it be founded on a good consideration, and be made for a proper and useful purpose, is valid. (2 Williams' Saunders, 156, note.) Of course a contract not to exercise a trade generally would be obnoxious to the rule, and would be void."

O. S. N. Co. *vs.* Winsor *et al.*, 20 Wall., 67.
1st Story on Contracts, sec. 680, p. 654.
Roller *vs.* Ott, 14 Kansas, 615.
Dean *vs.* Emerson, 102 Mass., 480.
McClurg's Appeal, 58 Penn. St. Rep., 251.
Dunlop *vs.* Gregory, 10 N. Y. Rep., 241.
Beard *vs.* Dennis, 6 Ind., 200.
Thomas *vs.* Miles, 3 Ohio St. Rep., 274.

There is, moreover, nothing lacking in point of consideration to invalidate the stipulation of restraint in the contract under consideration.

Courts will not in such cases enter into the question whether the consideration was commensurate in value with the restraint imposed; where a consideration, recognized by law as being valuable, is paid, the law very properly allows the parties to judge for themselves of the sufficiency in value of such consideration for their contracts.

Hubbard *vs.* Miller, 27 Mich., 15.
Hubbard *vs.* Miller, 15 American Rep., 153.

In the above case the court says:

"And there is no reason for holding that, without the restraint contracted for, complainant would have been willing to purchase for the price he gave; nor can we say that the vendors could have sold at that price without such stipulation. In fact, we must infer that, in their opinion, they could not have done so without it, or they would not have given it. It is clear, at all events, that they thought the sale with the stipulation an advantageous one, or they would not have made it. The contract must, therefore, be held fair, reasonable and valid."

In the above case the complainant and defendant were merchants residing in a Michigan town. Each kept well-driver's tools and fixtures, and each ~~were~~ was engaged in the business of well-driving. The complainant purchased from the defendant all his well-driving tools and fixtures, paying him the cost price, with 5 per cent. added for freight; the defendant agreeing in the bill of sale as follows:

"In consideration of the above sale, I agree not to keep well-driver's tools or fixtures, and not to engage in the business of well-driving after this date.

("Signed) GEO. W. MILLER."

Besides, in this case the question of the illegality of this contract as being in unlawful restraint of trade is not raised

in the pleadings; nor was it raised either by the defendant in error or the court in the court below, and therefore will not be considered here.

Could it, however, properly be raised for the first time here, by applying to this case the well-settled doctrine of the law, as recognized by the authorities cited, it is clear the contract under discussion is not open to this objection, and hence for no such reason was the district court justified in instructing the jury to find for the defendant.

POINT SECOND.

Another question, however, is perhaps properly presented by the record, the answer to which in the affirmative would justify the action of the district court in instructing the jury to find in favor of the defendant; and also the judgment of the supreme court of Washington Territory, although it was not considered by the latter in affirming the judgment of the district court. It shall therefore receive consideration. It arises under the Statute of Frauds and Perjuries.

Is the agreement in question, and the breach of which is the occasion of this action, an agreement that, by its terms, was not to be performed in one year from the making thereof? And is it a fact that such agreement was not in writing signed by the defendant or by any other person by him thereunto lawfully authorized according to the requirements of the statute of frauds and perjuries? And was it the duty of the district court to so decide, submitting nothing to the jury?

These inquiries are answered in the negative.

The statute of Washington Territory on this subject, Act January 19, A. D. 1863, is as follows:

"SEC. 2. In the following cases specified in this section, any agreement, contract, and promise shall be void unless such agreement, contract, or promise, or some note or memorandum thereof be in writing and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized. That is to say: 1st. Every agreement that, by its terms, is not to be performed in one year from the making thereof."

General Laws Washington Territory, page .

This statute is not, so far as the questions involved in this action are concerned, materially different from the old English statute of 29 Car. II, nor from the statutes under which the following adjudications have been made.

What constitute the contract in this case? What writing or writings evidence the agreement of the parties? The answer is clear—the *two* writings, to wit: 1st. The bill of sale of steamer New World, of date November 23, 1867.

Record, .

2d. The agreement of *same date* entered into between Hale and Finch, providing for the manner of the payment of the purchase money, assignment of mail contracts, mail pay, &c., and which writing is signed by the defendant.

These two writings, executed on the same date, by the same parties, having reference to the same subject-matter, should be construed as *one*.

A contract may be contained in several instruments, which, if made at the same time, between the same parties, and in relation to the same subject-matter, will be held to constitute one contract.

2 Parsons on Contracts, page 503.

Construing these writings together, therefore, as *two parts* of *one* agreement, all question of the statute of frauds is at once dissipated, as in that case the agreement is in writing, signed by the defendant, thus taking the case out of the operation of the statute.

But aside from the proposition last submitted, that these *two* writings should, for every and all purposes, be considered as *one*, the signing of the agreement (Record, 55, 56, 57,) by defendant Finch is a sufficient signing of a writing covering this agreement to take the case out of the operation of the statute.

Schouler, in his work on personal property, in treating of this subject, says:

"That the writing which renders the bargain enforceable need not have been intended by the defendant as a statute memorandum is a plain inference from the decided cases, which constantly show that the party sued, so far from drawing up a memorandum for the purpose of establishing the oral contract, was unwittingly led into making such written recognition of the bargain as enabled the other to hold him to it, and with such clear proof of a bargain actually entered into, it would *promote* fraud instead of *checking* it for the courts to rule otherwise."

Schouler's Personal Property, vol. 2, page 517.

Again, same page, Schouler says:

"In making the oral contract of sale enforceable under circumstances which establish such *admission* or *recognition* on the part of a defendant, *the latest cases side strongly with the plaintiff who seeks a remedy, more so than formerly.*"

See also—

Story on Sales, sec. 272.
Bailey *vs.* Sweeting, 9 C. B., (N. S.,) 843.
Justice *vs.* Lang, 42 New York, 493.

Nor is the note or memorandum which the statute requires addressed of necessity to the enforcing party or his agent, but a *third* person may be its recipient.

2 Schouler, page 517.

This authority clearly establishes the rule that any *recognition* in writing of the oral agreement, signed by the defendant, whether executed at the time or subsequent to the

date of such agreement, whether addressed to the plaintiff or his agent, or to a third person, or to the defendant's agent, is sufficient to take the case out of the statute.

"Gibson *vs.* Holland," says Schouler, "decided in 1865, is the leading case on this point, wherein it was ruled (upon the analogy of chancery precedents) that a note or letter addressed to the seller, or to his *own agent*, which contained directions to carry the agreement into execution was sufficient to render the contract enforceable against him."

2 Schouler on Personal Property, 517.
Gibson *vs.* Holland, L. R. C., p. 1.

And further:

"As the whole memorandum may be of *subsequent date* to the oral bargain, so too the several papers which sometimes constitute a memorandum need not all be contemporaneous."

"The memorandum," says Hoar, J., "may be supplied by documents and letters written at various times, and if they all appear to have relation to it, and if coupled together they contain by *statement or reference* all the essential points of the bargain, it is sufficient."

2 Schroeder, page 518.
Hoar, J., in Lerned *vs.* Wannemaker, 9 Allen, 412.

So also:

"Since the written memorandum may be made up of two or more papers which bear a mutual relation, a signature which governs the whole by *suitable reference* may suffice, though actually placed only upon one of the papers, as in the case of a memorandum which is shown by a correspondence or by the defendant's letter referring to an invoice or bill of parcels."

2 Schouder, page 351.

Conceding, therefore, for the argument, that the bill of sale, if it may be so spoken, without a contradiction of terms, was an *oral* agreement, and not in writing signed by

the defendant, it is clear there was such a full and emphatic *recognition* of the contract by the writing of the same date, signed by both plaintiff and defendant, as to take the case, in view of the authorities quoted, out of the statute.

The first clause of this writing is in these words:

"Whereas the said Calvin H. Hale, in consideration of the sum of fifty thousand dollars, has this day executed, in favor of said D. B. Finch, a bill of sale of the steamer New World," &c.

Record, 55, 56.

What stronger recognition in writing could be desired?

In addition to all this it is respectfully submitted that the statute of frauds cannot be made to apply as a defence in opposition to the enforcement of one or more covenants in a contract, where such contract has been performed in a substantial and material part by both parties, though in the absence of such part performance the contract would be within the statute. Contracts under which acts have been done which would not have been done but with a view of carrying the contract into effect, are considered as out of the statute. And in this, reference is had to contracts *other* than those the specific performance of which are, by reason of *part performance*, enforced by decrees in courts of chancery.

Wilkinson *vs.* Scott, 17 Mass., 249.

In the above case, which was an action to recover money alleged to be due as part purchase money for the sale of certain lands, and in reference to which money no writings existed, and the defendant plead as a defence the statute of frauds. The court said:

"It is not a case within the statute of frauds, because it is not a contract for the sale of lands. That contract was executed and finished by the delivery of the deed. This is only a demand for money arising out of that contract."

So, in the case under consideration, it is not within the statute of frauds, because it is not a contract which, by its terms, is not to be performed within a year. The contract was executed and finished by the execution of the bill of sale, the delivery of the boat, the payment of the fifty thousand dollars in money; and this action is only a demand for money damages arising out of a failure upon the part of defendant to keep *one* of the *several covenants* of a contract, the existence of which no one questions, and which, in the main, *has been executed by both parties.*

For this reason, therefore, the case is *not* within the statute of frauds. To hold that it is would be to promote fraud instead of repressing it.

POINT THIRD.

The pleadings in this case also raised an issue as to the statute of limitations.

See Article IV of amended answer.

Record, 33.

"And for a further and separate answer and defence this defendant avers that the said supposed cause of action in the said complaint alleged did not accrue to the said plaintiffs within six years next before the bringing of this suit, and he pleads the second subdivision of section 27 of the act to regulate the practice and proceedings in civil actions in bar of this action."

Also Article V of amended answer, same page record, as follows:

"And for a further and separate answer and defence this defendant alleges that action has not accrued to said plain-

tiffs for any matter in that behalf alleged in this complaint within three years next before the bringing of this suit, and he pleads in bar of this action the third subdivision of section 28 of the act to regulate the practice and proceedings in civil actions."

The plaintiffs, in reply to the foregoing Article IV of defendant's amended answer, in Article IV of such reply say:

"And to the separate answer and defence in Article IV of said amended answer the plaintiffs say that it is not true, and they deny that said cause of action in the complaint alleged did not accrue to the plaintiffs within six years next before the bringing of this action; and they aver that said cause of action accrued to the plaintiffs less than six years next before the commencement of said action."

Record, 38.

Also in Article V of reply find:

"And for a further and separate reply to said separate answer and defence in said Article IV of the amended answer set forth and stated, plaintiffs aver *that on or about the 10th day of July*, 1871, *said defendant did depart from and reside out of the Territovy of Washington, to wit, in the State of California and elsewhere without the Territory of Washington continuously for the period of four years and upward to date of commencement of this action; and that during said period he was absent from said Territory and residing out of the limits of the same for more than three years.*"

Record, 38.

And to Article V of amended answer plaintiffs, in Article VI of reply, replied as follows, (see same page, printed record:)

"And to the separate answer and defence in Article V of said amended answer set forth and stated, plaintiffs aver that this action is founded upon a contract in writing."

And further in Article VII of reply:

"And for a further and separate reply to said separate answer and defence in said Article V of said amended an-

swer set forth and stated, plaintiffs aver that this action is founded upon a liability which does arise out of a written instrument."

The second subdivision of section 27 of the act to regulate the practice and proceedings in civil actions in Washington Territory, approved November 10, 1873, in prescribing periods within which actions can be commenced after the cause of action shall have accrued, says:

"Within six years," * * * "an action upon a contract in writing, or liability, express or implied, arising out of a written agreement."

Subdivision 3, section 28, same act, provides:

"Within three years," * * * "an action upon a contract or liability, express or implied, which is *not* in writing, and does not arise out of any written instrument."
General Laws of Washington Territory, p.

While section 37 of the same act provides as follows:

"If when the cause of action shall accrue against any person who shall be out of the Territory or concealed therein, such action may be commenced within the terms herein respectively limited after the return of such person into the Territory, or the time of such concealment; and if after such course of action shall have accrued, such person shall depart from and reside out of this Territory, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limited for the commencement of such action."
General Laws Washington Territory, Sec. 37, p.

Without stopping to inquire whether six years had or had not elapsed after the cause of action in this case had accrued, and before the commencement of the action, it is, for the purpose now before this Court, enough to know that an issue was raised by the pleadings as to the absence of the defendant from the Territory a sufficient length of time to take the case out of the second subdivision of section 27

of the statute, and to bring it within the provisions of section 37 just quoted.

Upon this issue testimony was properly offered and received on both sides. (Record, 68, 69.) And it was for the jury to determine that issue of fact from this testimony; therefore the court below was not justified, so far as the question of the statute of limitations is concerned, in instructing the jury to find for the defendant.

And in reference to the issue raised by Article V of amended answer, and Articles VI and VII of reply, the evidence clearly showed that the action was founded upon a contract in writing; and, therefore, *that* issue should have been found by the court in favor of plaintiffs.

POINT FOURTH.

Upon the issue raised by Article III of amended answer, (Record, 33,) and Article III of reply, (Record, 37,) as to the alleged waiver of the breach of condition, so called, by a license given by plaintiffs in error to defendant, authorizing the running of said steamer New World in California waters, it is only necessary to say that there was, upon this point, conflicting testimony, and the court should have submitted the question to the jury. There was, therefore, in this issue, as presented by pleadings and evidence, nothing fatal to the whole case to justify the court in instructing the jury to find for the defendant.

Record, 68.

POINT FIFTH.

Consideration will now be given to the main question, and the *only* one considered by the court below, to wit:

Should the stipulation in the bill of sale, imposing a limited restraint in the future use of the steamer New

World, be, in view of the language used, the subject-matter, and of all the surrounding circumstances and contemporary facts, construed as a covenant on the part of the defendant in error, for the breach of which he may be rightfully held responsible in an action for damages, or as a mere condition subsequent in the contract of sale, the failure of which works a forfeiture, or is a cause of forfeiture, giving only a right of action to the defendants in error to recover back the steamer.

The court below held to the latter view; and herein it is respectfully insisted there was *manifest error.*

It is submitted that in giving interpretation to this contract the court will consider—

1st. The language employed;

2d. The subject-matter; and

3d. All the surrounding circumstances; turning upon the written document all the light which the parties enjoyed when the contract was executed.

In the case of Nash *vs.* Town, 5th Wall., 689, this court, in considering this subject, said:

"The courts in the construction of contracts look to the language employed, the subject-matter, *and the surrounding circumstances.* They are never shut out from the same light which the parties enjoyed when the contract was executed, and in that view they are entitled to place themselves in the same situation as the parties who made the contract, in order that they may view the circumstances as *they* viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described."

Again, in the case of Reed *vs.* Insurance, 5th Otto, p. 23, this court used the following language:

"Although a written agreement cannot be varied by addition or subtraction, by proof of the circumstances out of

which it grew, and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject-matter, *and the standpoint of the parties in relation thereto.*"

"It is well settled," said the court in Wilson *vs.* Troup, 14 American Decisions, (2 Cowen, 195,) 458, "that in the construction of all contracts the situation of the parties and the subject-matter of their transactions may be taken into consideration in determining the meaning of any particular sentence or provision. Extraneous evidence is admissible so far as to ascertain the circumstances under which the writing was made, and the subject-matter to be regulated by it. (Sumner *vs.* Williams, 8 Mass., 214; Fowler *vs.* Bigelow, 10 Mass., 384; Whallon *vs.* Kauffman, 19 Johns., 104.")

Prof. Taylor, in his Treatise on Evidence, section 1082, says:

"Whatever be the nature of the document under review, the object is to discover the intention of the writer as evidenced by the words he has used; and, in order to do this, the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject-matter. With this view, extrinsic evidence must be admissible of *all the circumstances* surrounding the author of the instrument."

Again he says:

"It may, and indeed often does, happen that, in consequence of the surrounding circumstances being proved in evidence, the courts give to the instrument thus relatively considered an interpretation very different from what it would have received had it been considered in the abstract. But this is only just and proper, since the effect of the evidence is not to vary the language employed, but merely to explain the sense in which the writer understood it."

Taylor on Evidence, sec. 1085.

The same rule is laid down by Professor Greenleaf in his Evidence.

1 Greenleaf, sec. 277.

In the case of Reed *vs.* Insurance Company, 5 Otto, page 23, above quoted, a policy of insurance on a vessel at and from Honolula *via* Baker's Island, to a port of discharge in the United States, contained the following suspension clause:

"The risk to be suspended while vessel is at Baker's Island loading."

Mr. Justice Bradley, in delivering the opinion of the court in that case, said:

"This case upon the merits depends solely upon the construction to be given to the clause in the policy, namely: the risk to be suspended while vessel is at Baker's Island loading.

"And turns upon the point whether the clause means while the vessel is at Baker's Island *for the purpose of loading*, or while it is at said island *actually loading*. If it means the former, the company is not liable; if the latter, it is liable. A *strictly literal construction* would favor the latter meaning. *But a rigid adherence to the letter often leads to erroneous results and misinterprets the meaning of the parties.* That such is not the sense in which the parties in this case used the words is manifest, we think, *from all the circumstances of the case.*"

The court, after quoting at length and with approval from Greenleaf and Taylor on Evidence, as above, as to the importance of considering *surrounding circumstances* in giving construction to a contract, proceed as follows:

"Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensible as that of the language in which the instrument is written. A reference to the actual condition of things at the time, as they appeared to the parties themselves, *is often necessary to prevent the court, in construing their language, from falling into mistakes and even absurdities.*"

Finally, in concluding the opinion in that case, the court say:

"And availing ourselves *of the light of the surrounding circumstances in this case*, as they appeared, or must be supposed to have appeared, to the parties at the time of making the contract, we cannot doubt that the meaning of the words which are presented for our consideration is that the risk was to be suspended while the vessel was at Baker's Island *for the purpose of loading*, whether actively engaged in the process of loading or not. Taking this clause in *absolute literality* the risk would only be suspended when loading was *actually* going on.

Again, *previous and contemporary transactions and facts* may be very properly taken into consideration to ascertain the subject-matter of a contract *and the sense* in which parties may have used particular terms:

Browley *vs.* United States, 6 Otto, 168.

See also on same point:

Washington, Alexandria and Georgetown *vs.* Steam Packet Co., 13 Peters, 89.
United States *vs.* Grundy, 3 Cranch, 337.
Hollingshead *vs.* Fry, 4 Dall., 345.
Slater *vs.* Emerson, 19 How., 224.
Browden *vs.* United States, 12 Ct. Claims, 164.
Peck *vs.* United States, 14 Ct. Claims, 84.

In view, therefore, of this well-settled rule of construction, let the stipulations of the contract in question be construed in the light of surrounding circumstances under which the agreement was made.

What were these surrounding circumstances? What the previous and contemporary transactions and facts?

They are to be found in part in the history of the several sales and transfers of the steamer New World, and the causes which led to the partial restraints from time to time,

in the use of the steamer, as incorporated in these several transfers. The evident purpose of each subsequent stipulation on this point being to protect the vendor against all damage which might result from a breach of the original covenant on the part of the Oregon Steam Navigation Company, made May 1, A. D. 1864, with the California Steam Navigation Company, to the effect that said Oregon Steam Navigation Company would not run or employ, or suffer to be run or employed, the said steamboat New World upon any of the routes of travel on the rivers, bays, or waters of the State of California for the period of ten years from the said first day of May, A. D. 1864, &c.

The Oregon Steam Navigation Company was bound by this covenant, hence, when it sold the steamer to these plaintiffs in error, February 18, A. D. 1876, it incorporated a similar covenant in its bill of sale, enlarging it, it is true, so as to include in the waters the navigation of which by it were restrained, those of the Columbia river and its tributaries, and extending the time of this restraint to ten years from May 1, 1867, with the further precaution, it is true, to obtain the signatures of sureties for faithful performance. So, also, the plaintiffs in error, when, on November 23, A. D. 1867, they sold said steamer to the defendant in error, did so with full knowledge of the existence of the covenants in the two former transfers, and of the obligation they were under to the Oregon Steam Navigation Company to prevent the use of said steamer on California waters, and of the damages to which they would be subjected in case said covenants were broken. Is it not reasonable to suppose, therefore, that under such circumstances the purpose of the plaintiffs in error was that the defendant in error, on the purchase of said steamer, should occupy toward his vendor *precisely* the same relation in reference to the use of said steamer, and be subject to the same penalty, and none other, in the event of its use in violation of the terms of the contract, that plaintiffs in error occupied in relation to their vendor, the Oregon

Steam Navigation Company, and to which they were subject; and in the light of these several transactions, and of the situation of the parties at the date of the sale and transfer to the defendant in error does it require a strained construction to interpret the restraining clause in question as a covenant upon the part of the defendant, although in its "*absolute literality*" and form it would read as a condition? It would seem not. On the contrary, in the light shed upon the language used by these surrounding circumstances, these previous and contemporary facts, would it not require a *forced construction* to hold this a mere *condition subsequent*, the failure of which would work a right of forfeiture?

Aside, therefore, from all those extremely delicate distinctions which abstractedly considered determine the line of separation that divides covenants from conditions, and dependent and independent covenants from each other, and which will be considered later, and looking at the whole contract, including the contemporaneous agreement in reference to the manner of the payment of the purchase money, the mail contracts, &c., and considering the same as *one contract*, as it will hereafter be shown they should be, and in the light of the *then* situation of the parties, the subject-matter, and the previous and contemporaneous facts and circumstances, together with the fact that as a principle of law no *formal words* will of themselves create a condition, and the further well-recognized rule that *courts will not favor forfeitures*, but will construe words of *proviso* and *condition* into *words of covenant*, when such is the apparent intention of the parties; it would seem the fair and reasonable construction of the language used, would declare it to be a personal covenant and agreement on the part of the vendee to the effect that said steamer should not be run on the waters designated for the term mentioned, and for the breach of which he is personally liable in damages. In other words, that in view of all the circumstances suggested, both of fact and law, these words, which in the cold abstract,

in their naked *literality*, are perhaps *terms of condition* should be construed to be *words of covenant.*

WHAT IS A COVENANT?

But what does it require to constitute a covenant, and the breach of which makes the party violating it responsible personally in damages? What are the essential requisites to a condition subsequent, the failure of which works a right of forfeiture; and what are the clearly distinctive differences that separate the one from the other?

A covenant is the agreement or consent of two or more, by deed in writing, sealed and delivered, whereby either or one of the parties doth promise to the other that something is done already or shall be done afterwards.

Sheppard's Touchstone, 161.

The word "*covenant*" is not necessary to make a covenant. (1 Roll. Abridg., 518.) Any words which show the parties agreement to the performance of a future act being effectual for that purpose.

1 Leon, 324.
1 Ch. Cases, 294.

No particular technical words are necessary to make a covenant.

1 Burr, 290.
1 Ves., 516.

The principle is laid down by Chief Baron Comyns in his digest, title covenant, (A. 2,) that "any words in a deed which show an agreement to do a thing make a covenant."

Rawle on Covenants for Title, 471, note.
Williams *vs.* Burrell, 1 C. B., 402.

In any instrument under seal *any* expression importing that something is to be done, as "it is agreed," "it is de-

clared," "it is understood," &c., &c., would amount to a covenant, and bind the party who was intended to do the act.

Hollis *vs.* Carr, 2d Mod., 86.
Sheppard's Touchstone, note, 161.

Again Sheppard, in his Touchstone, pages 161, 162, says:

"There need not be any formal words, as 'covenant,' 'promise,' and 'the like,' to make a covenant on which to ground an action of covenant, for a covenant may be had by any other words and upon any part of an agreement in writing in whatsoever words it be set down for anything to *be* or *not* to be done, the party to or with whom the promise or agreement is made may have his action upon the breach of the agreement."

Again, Parsons on Contracts, in his second volume, fifth edition, page 510, states it thus:

"No precise form of words is necessary, even in a *specialty*. The words of *recital in a deed* will constitute an *agreement between the parties*, on which an action of covenant may be maintained."

So also, "words of *proviso* and *condition* will be construed into *words of covenant*, when such is the apparent intention and meaning of the parties."

2 Parsons on Contracts, 511.
Huff *vs.* Nickum, 27 Maine, 106.
Clapham *vs.* Moyle, 1 Lev., 155.
1 Keble, 842.
Sheppard's Touchstone, 122.

The report in full, in 1st Kebler's Reports, 842, of the case of Claphane *vs.* Mayle, decided by the King's Bench in 1665, during the reign of Charles the III, is as follows:

"On marriage agreed on between the defendant and one Mary Ingram, £1500 was by articles to be paid at several days to the plaintiff, and he to convey several lands and an

office to the defendant: *Proviso*, That the defendant, out of the first three years' profits, should pay £500 to the plaintiff; and now the plaintiff brings debt on this proviso, covering profits above the value received, and that the marriage took effect; to which the defendant demurred because this proviso is in the nature of a defeasance or condition. But the court inclined it was only a covenant and debt lieth, and this being by way of purchase, is well enough."

Parsons, in his work on the Law of Contracts, volume 2, page 511, in treating of this subject, says:

"And words of proviso *and condition* will be construed into *words of covenant* when such is the apparent intent and meaning of the parties."

"There are," says Lord Bacon, "no precise technical words required in a deed to make a stipulation a condition precedent, *or* subsequent; neither doth it depend on the circumstance whether the clause is placed *prior* or *posterior* in the deed, so that it operates as a *proviso* or *covenant;* for the *same words* have been construed to operate as either the one or the other, according to the nature of the transaction."

2 Bacon's Abr., 292.
3 Peters, 374.
Thompkins *vs.* Elliott, 5 Weald, 456.

In Halham *vs.* The East India Company, the court, Ashmead, J., said:

"The same words have been construed to operate as either a *proviso* or *covenant, according to the nature of the transaction.* The merits, therefore, of the question must depend on the *nature of the contract*, and the acts to be performed by the contracting parties, and *the subsequent facts disclosed on the record which have happened in consequence of this contract.*"

Langdell's Select Cases on Contracts, page 795.

Again, if the clause in question in the writing under consideration is, as the court below held, in a rather summary

and take-it-for-granted kind of a manner, a condition subsequent, absolute, pure, and simple, and not a covenant or agreement, then the *sole* remedy is a forfeiture. And in this connection the attention of the court is attracted to the well-settled doctrine: that *forfeitures are not favored by the courts.*

This court said in the case of Philadelphia, Wilmington, and Baltimore R. R. Co. *vs.* Howard, 13 Howard, 339:

"*The law leans strongly against forfeiture*, and it is incumbent on the party who seeks to enforce one to show plainly his right to it."

Kent, in his Commentaries, vol. 1, 128-129, says:

"Conditions subsequent, involving forfeiture, are not favored in law, and are construed strictly because they tend to destroy estate and are odious."

They are not assignable by the granter, and can only be reserved for the benefit of the granter and his heirs, and no others can take advantage of a breach of them.

4 Kent, 122, 127.
2 Blackstone's Com., 154.
Nicoll *vs.* The New York and Erie R. R. Co., 12 N. Y., (2 Kernan,) 131.
Underhill *vs.* Saratoga and Washington R. R. Co., 20 Barb., 466.

A court of equity will never lend its aid to divest an estate for the breach of a condition subsequent.

4 Kent, 130.

Parsons on Contracts, 2d vol., 525–6 uses this language:

"It is sometimes of great importance to determine whether there be a condition in a contract or an instrument. If, for instance, a deed contain a grant on condition, the grant is void, and the estate may never vest or be forfeited. *A condition of this sort is not favored*, and would not be readily implied. *But stipulations or agreements may be implied upon the breach of which an action may be brought.*"

So in the case of Paschall *vs.* Passmore, 15 Penna. State Rep., 295–307, the supreme court of the State of Pennsylvania said:

"Where the language of an agreement can be resolved into a covenant, the judicial inclination is so to construe it, and hence it has resulted that certain features have ever been held essential to the constitution of a condition. In the absence of *any* of these it is not permitted to work the destructive effect the law otherwise attributes to it."

See also 2 Parsons, 511—*note.*

So Professor Story, in his work on the law of sales, in speaking of conditions precedent and subsequent, says:

"No precise words are necessary to constitute a condition precedent or a condition subsequent, and if there be any question in this respect, it is to be determined by the intention of the parties as indicated by all the circumstances of the particular case. *The exact meaning of the terms used may be warped so as to harmonize them with the manifest intention of the parties.*"

Story on Sales, page 238, sec. 252.

Neither does it follow because a clause in a deed or an instrument in writing may be properly or *necessarily* a *condition*, either precedent or subsequent, that therefore no action will lie for the recovery of damages for a failure to perform it, and for the following reason:

A clause in a deed or an instrument *may* be both a *condition* and a *covenant*, with a choice of remedies, action for forfeiture or for damages to the feoffer or vendor, in case of failure to comply with the requirements of the clause.

2 Bacon's Abr., (Conditions,) p. 287.
Sheppard's Touchstone, p. 121.

In such a case the party complaining may treat it as a covenant or condition at his option, but not both.

Coke on Littleton, 203.
Roll Abridg., 408.
2 Bacon Abridg., 287.
8 Dals.

In 2 Bacon Abridg. it is said, page 287:

"If a man make a lease for years by indenture, *provided always*, and it is covenanted and agreed between the parties that the lessee shall not alien, this is both a condition *and* a covenant."

And further:

"That the lessor may take it as a covenant *or* condition, but not as both."

In the case at bar, while it is respectfully insisted in view of all the circumstances proper to be considered, the clause in question should be construed as a covenant and *not* as a condition, yet in no event should it, if *not* so interpreted, be construed otherwise than as a stipulation or covenant *and* condition, and that the plaintiffs in error, having selected *that* remedy most favorable to the defendant in error, namely, action for damages for breach of the covenant, instead of proceedings to declare a forfeiture for failure to perform the condition, should be permitted to pursue it; and they are of course, in such event, bound by it.

But it has been said that *certain words* import a condition which without words of *re-entry* in cases of real estate or of rescission and forfeiture in contracts relating to personal property, will, in case of breach, work a forfeiture while *other terms* will *not* have this effect without words of re-entry or similar words; but to these rules of construction there are exceptions.

Sheppard in his Touchstone, 121, states the old general rule as follows:

"Know therefore, that for the most part conditions have conditional words in their frontispiece, and do begin therewith, and that amongst these words there are those words that are most proper, which in and of their own nature and efficacy without any addition of other words of re-entry in the conclusion of the condition, do make the estate conditional, as *proviso ita quod*, and *sub-conditione*, and therefore, if "A" grants lands to "B," to have and to hold to him and his heirs, *provided that*, or *so as*, or *under this condition*, that B do pay to A ten pounds at Easter next; this is a good condition and the estate is conditioned without any more words. But there are other words as *si*, *si contingent*, and the like, that will make an estate conditional also, *but then they must have other words joined with them*, and added to them in the close of the condition, as that *then* the *grantor shall re-enter*, or that *then* the estate shall be void, or the like."

1 Sheppard's Touchstone, page 121.

The above is the broadest and most favorable statement to the defendant in error, that can possibly be made of the rule relating to conditions, and of the terms that will create a condition, either with or without words of re-entry or rescission, but this is by no means an unbending rule, nor free from exceptions, as will be seen from the same authority and from others.

Sheppard, proceeding in Vol. I, page 122, Touchstone, says:

"But here note that the words *proviso*, *ita quod*, and *sub conditione*, albeit, they be the most proper words to make conditions *yet they do not always make the estate by the deed to be conditional, but sometimes do serve for other purposes*, for the word *proviso* hath divers operations besides, for sometimes it doth serve for and work a qualification or limitation, and *sometimes it doth serve to make and work a covenant only*."

And further—

"And thus it may be also a condition *and* a covenant, as if the words run thus, *provided always*, and the feoffee, &c., doth covenant, &c., that neither he nor his heirs shall do such an act; this is *both* a condition *and* a covenant."

And concluding says—

"If the words in the close or conclusion of a condition be thus: that the land shall return to the feoffer, &c., or that he shall take it again and turn it to his own profit, or that the land shall revert, or that the feoffer shall *recipere* the land; these are either of them good words in a condition to give a re-entry as good as the word '*re-enter*,' and by *these words the estate will be made conditional.*"

1 Sheppard's Touchstone, 125.

But the true sensible rule it would seem as recognized by modern courts, is to be found in 2 Parsons on Contracts, page 526, as follows:

"Mutual contracts sometimes contain a condition, the breach of which by one party permits the other to throw the contract up and consider it as altogether null. Whether a provision shall have this effect, for which purpose it must be construed *as an absolute condition*, is sometimes a question of extreme difficulty. It is quite certain, however, that no precise words are now requisite to constitute a condition, *and perhaps that no formal words will constitute a condition*, if it be obvious from the whole instrument, that this was *not* the intention or understanding of the parties."

Again, page 527:

"It would be difficult, and perhaps impossible to lay down rules which would have decisive influence in determining this vexed question. Indeed, *courts seem to agree of late that the decision must always depend upon the intention of the parties, to be collected in each particular case from the terms of the agreement itself and from the subject-matter to which it relates; it cannot depend on any formal arrangement of the words, but on the reason and sense of the thing as it is to be collected from the whole contract.*"

2 Parsons on Contracts, page 527.

Glaholm *vs.* Hays, 2 Man. & G., 266.

Per Lord Ellenborough in Richie *vs.* Atkinson, 10 East, 295.

Northampton Gas Light Co. *vs.* Parnell, 15 C. B., 630; 29 Eng. L. and E., 231.

Schouler in his work on personal property, vol. 2, page 273, in discussing this subject says—

"As to conditions generally. The modern rule on the subject of conditions in contracts, and the only one, however indefinite and unsatisfactory it may be, which appears to reconcile the numerous conflicting cases under this head, is that the *mutual interest* of the parties, as shown by the *facts in any given case*, must ultimately prevail, a principle which runs throughout the whole subject of property transfer in chattles by sale as our preceding chapters indicate."

In the case of Ritchie *vs.* Atkinson, 10 East. Rep., 295, Lord Ellenborough discusses with clearness and force, the subject of conditions precedent and subsequent in contracts, and the case throws light on the one under consideration.

The facts of that case and decision of the court were as follows:

"The master and the freighter of a vessel of 400 tons mutually agreed in writing that the ship being in every way fitted for the voyage, should with all convenient speed proceed to St. Petersburg, and there load from the freighter's factors a *complete* cargo of hemp and iron, and proceed therewith to London, and deliver the same on being paid freight for hemp £5 per ton, for iron 5*s.* per ton, &c.: *Held* that the delivery of a *complete* cargo was *not* a condition precedent, but that the master might receive freight for a short cargo at the stipulated rates per ton, the freighter having his remedy in damages for such short delivery."

Lord Ellenborough said:

"The rule was well laid down by Lord Mansfield in Boone *vs.* Eyre, 1 H. Blac., 273, that where mutual cove-

nants go to the whole of the consideration on *both sides*, they are mutual conditions, the one precedent to the other; but where the covenants go only to a *part*, then a remedy lies on the covenant to recover damages for the breach of it, but it is *not* a condition precedent. If the delivery of a *complete* cargo were a condition precedent to the recovery of any freight, no doubt the defendant would be entitled to require the strictest performance of it, but the question is whether it be a condition precedent, and that depends not on any formal arrangement of the words, but on the reason and sense of the thing as it is to be collected from the whole contract; whether of two things reciprocally stipulated to be done, the performance of the one does in sense and reason depend upon the performance of the other."

The facts and findings of the court in the case just cited of Boone *vs.* Eyre, opinion by Lord Mansfield, were as follows:

"Covenant on a deed whereby the plaintiff conveyed to the defendant the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of five hundred pounds, and an annuity of 160 pounds per annum for his life, and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and that the defendant should quietly enjoy.

"The defendant covenanted *that the plaintiff well and truly performing all and everything therein contained on his part to be performed*, he, the defendant, would pay the annuity. The breach assigned was the non-payment of the annuity. *Plea*, that the plaintiff was not, at the time of making the deed, legally possessed of the negroes on the plantation, and so had not a good title to convey."

The plea was held not good.

In Woodworth *vs.* Payne, 30 American Reports, (74 N. Y., 196,) 298: A deed of land for church purposes contained a stipulation that if the seats of any church thereon should be rented or sold the land should revert. The land, with the church erected thereon, was sold, under judicial

proceedings, to pay debts of the church. *Held*, not a breach of the condition; and the Court, Miller Justice, in delivering the opinion, said:

"*Conditions in grants are not favored in law*, and hence they must be clearly expressed, (Craig *vs.* Wells, 11 N. Y., 315.) They are, also, to be *construed with great strictness*, because they tend to destroy estates, and the vigorous exaction of them is a species of *summum gus*, and in many cases hardly reconcilable with conscience."

4 Kent Com., 130.

This opinion was delivered less than three years ago.

Much light is thrown on the question under discussion by a consideration of the authorities on the general subject of what constitutes dependent and independent covenants in contracts, and the effect of the various kinds of conditions, and here attention is called to this general rule:

Courts incline to consider covenants and promises independent rather than dependent to save forfeitures, and the burden is on him who alleges dependency.

Platt on Covenants, page 35.

Slater *vs.* Emerson, 19 Howard, 231.

If the clause under consideration is a condition and not a covenant, then clearly it is a condition *subsequent* and not a condition *precedent*. It is what the old writers call a *resolutory* condition, or one which is added to a contract, not to suspend its obligation until the condition is performed, but to make it cease when it is accomplished, in contradistinction to a *suspensive* condition, or condition *precedent*, the office of which is to suspend the obligation until the condition is null.

Pothier Traité des Obligations, *No.* 224. (Evans' Translation.)

In giving construction to this clause, therefore, and in

arriving at the *mutual intent* of the parties, it is important to bear in mind the *kind* of condition this *necessarily is*, if it be a condition at all, and the *effect* the law gives to it, and the peculiar and important function it must necessarily perform under the law; for the parties must be presumed to have contracted with due reference to all these.

In case of a conditional sale of personal property where the condition is *precedent* or *suspensive*, the title of the property does not pass until the performance of the condition; whereas, if it be a condition *resolutory* or *subsequent*, as it must certainly be in this case if condition at all, then the title *does* pass, and the effect of a breach is to re-invest the title, or rather it constitutes a cause of action for that purpose.

A condition precedent is an element in the creation of an obligation; a condition subsequent is one of the means by which an obligation is extinguished.

Langdell's Cases on Contracts, Part II, sec. 30, p. 1001.

In cases of conditions precedent no estate can vest until the condition be performed, but in cases of condition subsequent the estate, or interest, vests in the first instance, subject to be divested on non-performance or breach of the condition.

Frey on Specific Performance, page 387 and note.
Wells *vs.* Smith, 2 Edw. Ch. Rep., p. 78.
Chipman *vs.* Thompson, Walker's Ch., p. 405.

"A condition subsequent," says Tomlin, in his Law Dictionary, page 385, "is when the estate is executed, but the *continuance* of such estate depends on the breach or performance of the condition."

Pothier Traité des Obligations, No. 224.

There is therefore in the sale of either real or personal

property—with condition subsequent — no estate, title, or interest whatever left in the grantor, or vendor; nothing, except as the court in Nicoll *vs.* The New York and Erie R. R. Co., 2d Kernan, 132, said:

"Simply a possibility *of a reverter*, not even a possibility coupled with an interest, but a *bare possibility alone.*"

Another consideration not to be lost sight of is—that while it may be true, that in the case of real estate where the evidence of transfer and title, is always a matter of public record, of which all purchasers must take notice, a purchaser would take an estate subject to all conditions, whether precedent or subsequent; in the case of *personal* property held by a vendee, subject to a condition subsequent, a purchaser would, if he had acted in good faith at least, and without notice, take it free from such condition. So that in the case under consideration, the defendant Finch could and *did* sell and transfer the steamer New World to a third party, and that party took it, possession and title, free from the alleged conditions, and plaintiffs have no right or power whatever to enforce a forfeiture against such third person, even though the clause in question be held to be a condition.

Is it reasonable, therefore, to conclude that the plaintiffs, in the light of these authorities, would thus voluntarily place themselves in this helpless and remediless condition, especially when the stipulation—as it evidently did in view of the obligation plaintiffs were under to the Oregon Steamship Company—constituted so great a proportion of the consideration for the sale of the steamer?

The court will look to these consequences, as the parties are presumed to have considered them, in giving construction to this contract.

In view, therefore, of the several propositions stated, let the contract under consideration be examined and construed.

And, first, let it be borne in mind, that the *two* writings, to wit, the bill of sale of the New World, from Hale to Finch, of date November 23, A. D. 1867, and the agreement of the same date between Finch and Hale relating to the mail contracts, the manner of payment of the purchase money of the steamer New World, and wherein the sale is fully recited, should be construed as constituting *one* contract.

A contract, as hereinbefore stated, may be contained in several instruments, which, if made at the same time between the same parties in relation to the same subject-matter, will be held to constitute one contract.

2 Parsons on Contracts, p. 503.

Taking into consideration these two writings as a *whole*, leaving out of consideration for the time being the several previous sales of the steamer New World, and the then existing obligations of the plaintiffs in error in reference to it, much is found in the writings themselves to negative the idea that this was a conditional sale; and, from a careful examination and consideration of the *whole* of the writings, a very different complexion is given to the words of the alleged condition than is worn by these words when considered alone, and in the abstract. And the first thing that attracts attention, and which in a bill of sale should go far to negative the idea of a conditional sale, is the total absence of all words looking to a rescission of the contract, or a forfeiture of the steamer in the event of a breach of the alleged condition.

Again the recital in the contract of same date of bill of sale contains no intimation that the sale is a conditional one, or that the steamer is at all in any event to be liable to *revert* to the vendor; on the contrary, this writing proceeds at length to state additional engagements and covenants of

the parties in reference to *the manner of payment of the purchase money*—the transfer of the mail contracts; the payment of the claims against the steamer New World, the negotiations with Geo. S. Wright in reference to the purchase of a certain interest in the steamer Eliza Anderson, all of which strongly negative the claim that the parties intended the sale to be a conditional one or anything else than an *absolute* and *unconditional* sale and transfer, but with the stipulation and agreement on the part of the vendor as a part of the consideration of the sale, that the *use* of the steamer should for a limited time have a partial restriction.

But not only so, there is in the *very words* of the alleged condition itself a negation of all idea of condition, rescission, forfeiture, &c.; and this is found in the clause which contemplates the possible wearing out or destruction of the hull of the steamer New World, and for this or other reasons, the possible transfer of her *machinery* to another vessel before the expiration of the ten years included in the restriction.

The whole clause of the alleged condition is in the following words:

"And it is understood and agreed that this sale is upon this express condition, that said steamboat or vessel is not within ten years from the first day of May, 1867, to be run upon any of the routes of travel on the rivers, bay, or waters of the State of California or the Columbia river or its tributaries; *and that during the same period last aforesaid, the machinery of said steamboat shall not be run, or employed in running, any steamboat, or vessel, or craft, upon any of the routes of travel on the rivers, bay or waters of the State of California, or the Columbia river and its tributaries.*"

Record, 55.

Is it possible the parties to this sale, when they employed the foregoing language, relative to the use of the *machinery* of this steamer, separate and apart from the *hull* of the steamer, and at the distant period of *any time within ten years*,

for one moment contemplated a rescission of the sale and a forfeiture of the steamer, in the event of such use contrary to the provisions of the alleged condition? Most assuredly not. The whole clause taken together aside from any other consideration, repudiates such a construction as a libel upon the common sense of the vendors.

Parties will be presumed, as has been stated, to have contracted with an eye open to the probable results that are to flow from the stipulations of their contracts; with the hull destroyed or gutted of its machinery, with that machinery in third hands and imbedded in the bowels of another "steamboat, vessel, or craft" in the possession of and owned by a third party, in the waters of a distant State, all of which is contemplated as possible by the very terms of the writing, of what value would the remedy of *forfeiture* be to the vendor eight, nine, or ten years subsequent to the date of the sale? The fact, therefore, that the parties to this contract stipulated with reference to a possible destruction of this steamer, a commingling of its machinery with other property, and its becoming a part of it, and of *other machinery* with *it*, shows it would seem, conclusively, that the parties to this sale never contemplated a forfeiture, and should work a qualification of the mere technical words of condition which appear in the beginning of the clause; and the whole clause taken together should be construed to be what the parties at the time unquestionably intended it to be—a covenant and *not* a condition.

Where the *strict* construction of a contract would work great injustice, and produce results that could not reasonably have been intended by the parties, it will be construed *not* by its *literal terms*, but according to its *spirit and meaning*.

Bickford *vs.* Cooper & Co., 41 Penna. St. Rep., 142.

Besides, as directly applicable to this particular point as to the effect of these *subsequent words* relative to the machinery of the steamer in this alleged conditional clause, on

the technical words of condition in the beginning of said clause, attention is attracted to the following statement of Mr. Baron Parke in case of Dawson *vs.* Dyer, 5th Barn. & Ad., 584–'7. In that case counsel for a contrary purpose cited the case of Simpson *vs.* Titterell, Cro. Eliz., 242; but Baron Parke said:

"The reason given there is against you; for it is said by the court 'that a proviso always implies a condition, if there be not words subsequent which may change it into a covenant,' which establishes that *subsequent words* may give the meaning, by showing what is the real intention of the parties."

In the case of Stovers *vs.* Curling, 3 Bingham's New Cases, 355, which was a case where the master of a ship had bound himself to the performance of a great many terms and conditions, and the owner covenanted that, on the performance of the terms and conditions, he would pay the plaintiff a certain proportion of the net profits of the adventure, the court of common pleas was of the opinion that the performance of the terms and conditions was *not* a condition precedent; and Chief Justice Tindal, after referring to Boone *vs.* Eyre, as the leading case on the subject, said:

"Courts of justice are more anxious to discover and be governed by the *intention of the parties* than to follow the *strict and technical form* of words used in the instruments."

The court below in giving interpetation to this contract seems to have considered *only* the technical and formal words, "*it is understood and agreed that this sale is upon this express condition*," and omitted a careful consideration and comparison not only of each and all the provisions of the alleged conditional clause, but also of all the other provisions of the contract, the circumstances under which it was made, and the previous and contemporary transactions and facts.

"It is not necessary here," says the supreme court of

Washington Territory, " to look beyond the words the parties have employed " meaning the *technical, formal, conditional* words, " this sale is upon this express condition," seemingly forgetting the well settled doctrine of the law as recognized in Parsons on Contracts, 2 vol., page 526, to the effect—

That no *formal words* will constitute a condition, if it be obvious from the whole instrument, that this was not the intention or understanding of the parties.

That *forfeitures* are not favored by the courts is clearly evidenced by the very few cases reported in the books where deeds and contracts have been declared conditional and forfeitures have followed.

In most cases of this character to be found in the books, the *conditional* deeds and contracts have related to real estate, and the conditions have imposed restrictions as to the use of the premises either for immoral or disagreeable purposes, such as the keeping of bawdy houses, the sale or manufacturing of intoxicating liquors, the erection of tanneries or slaughter-houses, or the erection of buildings to obstruct ancient lights on adjoining lands owned by the vendor, or the placing of windows in buildings to be erected that will unpleasantly and annoyingly overlook the vendor's reserved premises; and in nearly every reported case words of re-entry or *reverter* have occurred in the deed, and in *no* case have the courts declared a forfeiture unless it clearly appeared from the whole writing, and all the circumstances that the parties *intended* the contract to be absolutely conditional, and that a forfeiture or cause of action for forfeiture *should* follow on the breach of such condition.

For instance, in the case of Cowell *vs.* Springs Company, decided by this Court, and reported in 10 Otto, 56: A sold and conveyed to B certain lands; the conveyance con-

tained a condition that intoxicating liquors should never be manufactured, sold, or otherwise disposed of as a beverage in any place of public resort on the premises. But in that case, aside from the conditional terms used in the conditional clause, there was the following express stipulation :

" *That in case this condition is broken by the grantee, his assigns, or legal representatives, this deed shall become null and void, and the title to the premises conveyed shall revert to the grantor, and that the grantee, in accepting the clause, agreed to this condition.*"

The Court held, in this case, that ejectment would lie on breach of condition.

So in case of Plumb *vs.* Tubbs, 41 New York, 442.

Again, in the case of Grey *vs.* Blanchard, 8 Rich., 283, which will doubtless be quoted by the defendant in error as a controlling authority in favor of the view taken by the court below, there were not only apt words of condition in the conveyance but *all the circumstances of the sale*, the character of the restrictions imposed, and the conveyance, as a whole, indicated, in the most unqualified manner, that the parties to the deed intended that the sale should be a conditional one. In that case, the demandant sold defendant a piece of land in fee simple with this condition :

" Provided, however, this conveyance is upon the condition that no windows shall be placed in the north wall of the house aforesaid, or of any house to be erected on the premises within thirty years from the date hereof."

The land thus sold had a dwelling house on it at the time of the sale, and adjoining it on the north his sister owned a piece of land with a dwelling house on it facing to the south, and the court held that the above clause was a condition and not a covenant; and the purchaser having violated the conditions by making windows in the north

wall of the house, the court further held that such breach worked a forfeiture of the estate and gave the demandant a right to re-enter.

That was a case, therefore, where the injury resulting from a breach of the condition was a *continuing one*, and one *that could not be compensated in damages;* it was nothing less than an unwarranted invasion of the privacy of the private apartments of the sister of the vendor by placing windows in an adjacent house directly facing and overlooking these apartments, and all of which the vendor and brother was *determined* to guard against, and *did* provide against as he had a perfect right to do when he sold and conveyed his premises. The language of this conveyance taken as a whole is this: The premises are yours just so long as you do not, by placing windows in the northern wall of the house, invade the privacy of my sister's home. Should you do this thing, the premises are no longer yours, but *ipso facto* revert to me. That this was the *intention* of the parties to this transaction, is confirmed more strongly by the surrounding circumstances, the facts of the case, and the nature and remediless character of the injury intended to be guarded against, than by the terms employed in the conditional clause of the conveyance.

The case, therefore, is, aside from the fact that it relates to real estate, far from being controlling in the case at bar.

In conclusion, were it proper to consider the equities of the case, it would be apparent they are wholly with the plaintiffs in error, as it is conceded the defendant violated the terms of his contract—whether the clause in question be called *condition* or *covenant*—by selling the steamer to Ryder, with the understanding and agreement it was to run on the forbidden waters; thus at one and the same time violating the plain terms of his contract and placing the vessel beyond the reach of plaintiffs, both as to jurisdiction and ownership, and thus leaving them wholly remediless; this upon

the assumption that the *sole* remedy of plaintiffs in error is, as stated in the opinion of the court below,—

"Against the vessel itself for a forfeiture, and not against the vendee personally for damages."
Record, 83.

In view of all the circumstances, it is respectfully submitted the defendant is not in a position to invoke either law or equity as a means of protection against a just responsibility for the consequences of his own acts in ruthlessly violating the terms of his agreement, while plaintiffs in error stand in all respects *rectus in curia.*

JOHN H. MITCHELL,
Counsel for Plaintiffs in Error.

FILED
NOV 7 1881
JAMES H. McKENNEY, CLERK

Supreme Court of the United States.

OCTOBER TERM, 1881.

NO. 79.

CALVIN H. HALE, HENRY WINSOR, CLARNICK CROSBY, Sr., and NATHANIEL CROSBY, Jr.,

Plaintiffs in Error,

Vs.

DUNCAN B. FINCH,

Defendant in Error.

BRIEF

OF

ELBRIDGE G. LAPHAM,

For Defendant in Error.

Journal Book and Job Print, Canandaigua, N. Y.

Supreme Court of the United States.

October Term, 1881.

No. 79.

CALVIN HALE ET AL., *Plaintiffs in Error*,

vs.

DUNCAN B. FINCH, *Defendant in Error.*

BRIEF ON THE PART OF THE DEFENDANT IN ERROR.

ADDITIONAL STATEMENT OF FACTS.

The following statement of facts in addition to that contained in the brief of the counsel for the plaintiffs in error, is deemed essential to a full understanding of the case.

The first bill of sale of the steamer in question by the California Steam Navigation Company to the Oregon Steam Navigation Company was not given in evidence, and is not printed in the bill of exceptions. The fact of the sale was stated orally by the plaintiff Hale. An express covenant not to run said steamer in the prohibited waters, signed in behalf of the purchaser, was put in evidence by the plaintiffs, and a copy is contained in the bill of exceptions. (See record page 58.)

The bill of sale by the Oregon Steam Navigation to Henry Winsor was put in evidence and contains a condition in nearly the same words as that in the bill of sale by said Hale to the defendant. (See record page 47.)

Notwithstanding this an express covenant, signed by the purchaser and others, was given to the said company. (See record page 48-9.)

On the sale to the plaintiff Hale by said Winsor of the said steamer, there is no such condition and no separate covenant by said Hale with said Winsor.

The bill of sale by said Hale to the defendant in error contains the condition in question, is under seal, not signed by the defendant. (See record pages 54 and 55.)

A mutual agreement under seal was executed between the parties relating to the use to be made of said steamer and the Eliza Anderson. (Record pages 69 and 70.)

The steamer New World was taken to San Francisco in the winter of 1868. (Record page 69.) The plaintiff Hale received his share of the net proceeds on the 2d of October, 1868, of her trip to a wrecked steamer and thence to San Francisco. (Record page 71.) The plaintiffs claim to recover the amount of a judgment against them by the Oregon Steam Navigation Co. upon their express covenant aforesaid $75,000 and four thousand dollars costs of the litigation. They were prosecuted in April, 1870. They demurred to the complaint and had judgment in their favor, which was affirmed in the Territorial court, but reversed in this court. McFadden, Dennison and Hewitt were their attorneys of record. The mandate of this court was filed on the 13th July, 1874. On the 24th November, 1874, one Evans entered his appearance for the defendants (the plaintiffs in this action), and moved to withdraw the answer filed in said action which was done, and judgment, by default (by the

consent of the plaintiffs), was taken against them. (Record page 58 to 66.) This was without any notice to the defendant or any opportunity for him to defend and was confessedly by collusion between the parties to the record. Satisfaction was procured by the plaintiffs, giving three notes, on the 13th April, 1875. There was no proof of damages other than this record and satisfaction.

This action was commenced on the 11th of August, 1875. (Record page 8.) The complaint alleges the steamer New World was taken to San Francisco in violation of the alleged covenant in October, 1868. The defendant has pleaded the statute of limitations as a bar. The territorial law is copied in the brief of the plaintiffs, (Page 37.) The plaintiff's reply to this defence is that the defendant had removed from and resided out of the Territory for more than three years. Upon this issue the only witness was the defendant called by the plaintiff. He testified he had been a resident and voter in the Territory for thirteen years prior to the time he testified April, 1876. There is no conflict in the evidence on this question. The plaintiffs did not request the court to submit this question or any other question of fact to the jury, nor was any objection made to the form or as to the time of the defendant's request for instructions to the jury to render a verdict for the defendant. (Record page 72.)

I will follow the order observed by the counsel for the plaintiffs in the discussion of the points relied on by the defendant.

BRIEF OF ARGUMENT.

Point First.

The alleged agreement is in restraint of trade and void as being againt public policy. The case differs from that referred to by the plaintiff's counsel and reported in 20th Wallace, 67. In that case the plaintiff was engaged in navigating the prohibited waters, and had vast interests to protect by the covenant it had taken. Not so in this case. The plaintiffs had no interests to protect in the waters of San Francisco. If they desired a covenant of indemnity from the defendant against their being made liable for a breach of their covenant with the Oregon company it would have required an entirely different instrument from the one claimed. Their covenant with the California Co. prohibited the use of the steamer for ten years from the first day of May, 1864, so that the limitation would have expired on the first of May, 1874. The covenant upon which it prosecuted the plaintiffs in this action, was as stated in the record to protect it against its covenant with the California Company which expired in 1874.

The bill of sale containing the clause in question prohibits the use of the steamer for ten years from the first of May, 1867, or three years longer than the plaintiffs had any interest to protect in California waters. The cases in which restraints of this character limited to one locality have been upheld, are where the party taking the agreement has an interest in the trade or business at the place or within the territory to which the prohibition applies. A sells to B his store and goods, and as part of the consideration agrees not to engage in the same business at the same place for the period of ten years. Such

an agreement will be upheld as upon good consideration, and as not an illegal restraint upon trade. But suppose A should say to B, "If you will pay me $5,000 I will agree with you not to engage in mercantile business in Washington for the period of ten years," B having no interest in such business himself, will it be claimed such an agreement is valid? If so, B might make the same agreement with every other person desiring to engage in such business, and what would Washington do for merchants? This alleged agreement thus prohibiting the use of the "New World" for three years longer than the plaintiffs were bound to guard against the use, if otherwise valid as a covenant, would be void as an unreasonable restraint for the period of three years upon the use to be made of the defendant's property.

The plaintiffs' counsel is in error in saying this point was not made in the court below. It was elaborately argued in the 8th point of the defendant's counsel.

Beside, the case in 20th ~~Otto,~~ Wallace, was decided upon demurrer and the Court only decided the restriction might be shown to be good, and that the plaintiff should be allowed to show as matter of fact that the case was free from the legal presumption of its invalidity.

No proof was offered on the trial of this action except the successive bills of sale and agreements. They demonstrate that the two great corporations had so restricted the use of the steamer in question that it is wholly excluded from the only cities of importance on the Pacific coast, from all the inland waters of two States and a large part of the Territory of Washington. No such restriction as is shown in this case has ever been upheld by the courts. The Oregon Company agreed not to run said steamer within ten years in the rivers, bays, harbors or waters of California. When it sold to Winsor he was

required to give a covenant not to run said steamer in said waters *or in the waters of the Columbia river and its tributaries.* If this could be legally done the defendant might on a sale by him, take an agreement that the said steamer should not be run for ten years in any of the waters of California, or the Columbia river and its tributaries, or in Puget Sound, and so on by successive sales the prohibition might be extended till the "New World" would be left on dry land.

Again, when Winsor, the vendee of the Oregon Company, sold to Hale, the vendor of the defendant, no covenant or condition as to the prohibited waters was given. We submit this breaks the chain by which it is sought to attach the alleged covenant in the bill of sale to the defendant to the original covenant between the California and Oregon companies.

That such a restriction as is shown in this case is void, we cite:

2 Comyn on Con., 455.
Pierce v. Fuller, 8 Mass., 223.
Nobles v. Bates, 7 Cowen, 307.
Pyke v. Thomas, 4 Bibb, 488.
Ross v. Sadgbeer, 21 Wendell, 167.
19 Pickering, 51; 5 Duer, 76; 3d Iowa, 598; 10 New York, 241; 13 Allen, 370; 18 Ohio State, 190; 40 California, 251; 45 do., 152; 36 do., 357; 11 Kansas, 602.

Point Second.

The alleged agreement is void under the statute of frauds and perjuries. It is not signed by the defendant. It could not be fully performed in less than ten years.

The statute is quoted by plaintiffs' counsel in his points. (Page 31.) It is no answer to this point to refer to the agreement between Hale and Finch as a recognition of the agreement claimed. That recites no such agreement, and, as we shall hereafter see, the fact that it does not is conclusive on the question as to the nature of the contract. The clause in question is a condition inserted by Hale in his bill of sale, and one he had a right to insert if he elected to do so. The case cited by plaintiffs' counsel (17 Mass., 249) by no means supports the proposition that a part performance takes the case out of the operation of the statute. The action was to recover the consideration for the sale of lands. A valid deed had been given, the requirement of the statute complied with, and the vendor sued the purchaser for part of the purchase money. It has been decided such an action may be maintained even if the deed recite the consideration money has been paid.

That this alleged contract is void we cite:

Brown on Stat. Frauds, sections 279, 280, 282, and 283.

Lockwood v. Barnes, 3 Hill, 129.

Wilson v. Martin, 1 Denio, 605.

Drummond v. Burrell, 13 Wendell, 308.

That part performance or performance on one side does not relieve the case from the operation of the statute we cite:

Brown on Statute of Frauds, Sec. 451.

Brodwell v. Getman, 2 Denio, 87.

The only relief in such cases is in a court of equity.

Point Third.

The defence of the Statute of limitations is sustained by the facts and the law, and justified the instruction given to the jury.

The Statutes on the subject are quoted by plaintiff's counsel in his brief. (See page 37.)

1st. The bill of sale containing the alleged covenant is not signed by the defendant. If bound by it at all it is by an inference of law from his acceptance of the bill with the recital in it. His promise would be a parol promise only.

Angell on Limitations, Sec. 77.
Gale v. Nixon, 6 Cowen, 448.

On such a contract suit must have been brought within three years.

Coleman v. Second Av. R. R. Co., 38 N. Y., 204.

2d. The cause of action accrued when the boat began to run, February, 1868.

Angell on Limitations, Secs. 42, 111, 136.
Wilcox v. Exer's of Plumer, 4 Peters, 172.
Fish v. Folley, 6 Hill, 54.

3d. Even if the limitation be six, instead of three, years, the proof is clear that more than that time elapsed between the breach of the contract and the commencement of the action; from February, 1868, to August, 1875. Seven years and a half.

The plaintiff averred that the defendant resided out of the Territory more than three years. He called the defendant to show such was the case. Defendant testified he had not resided out of the State for thirteen years. He was the only witness. Upon the facts stated, the question of residence was one of law.

Angell on Limitations, Sec. 200, and note.

Whitton v. Wass, 109, Mass., 40.
Callenton v. Hailey, 6 Gray, 517.
Langdon v. Dowd, 10 Allen, 433.
Buchanan v. Thompson, 38 Maine, 171.

There was not, as claimed in plaintiff's points, evidence on both sides, nor any question for the jury; nor did the plaintiffs request that the question should be submitted to the jury. In the absence of such request plaintiffs can not be heard to claim there was any question of fact for the jury.

Grazzer v. Stellwagen, 25 N. Y., 315.
Schroff v. Bauer, 42 How. Pr., 348.

Point Fourth.

The proof did not support the plaintiffs' complaint. The agreements between Hale and defendant are specialties under seal, and Hale is the only person who can maintain the action.

The law of the Territory, Sec. 5, of the act to regulate the practice in civil actions, approved November 8th, 1877, is as follows:

Sec. 5. "An executor or administrator, or guardian of a minor, or lunatic, a trustee of an express trust, or a person authorized by Statute, may sue without joining the person for whose benefit the suit is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another."

This contract having been made in the name of Hale, and it being conceded he was the legal owner by the transfer to him from Winsor, the action cannot be maintained in the name of the plaintiffs.

Point Fifth.

There was no proof of damage in this case. No actual damage was shown. The judgment introduced in favor of the Oregon Co. did not bind or conclude the defendant. The parties were in collusion in procuring the judgment and in having the entry of satisfaction. It was done by giving notes having a long time to run. They have paid nothing, except, perhaps, the expense of the litigation, and that cannot be charged to the defendant, as he was given no opportunity to defend. It is unnecessary to cite cases in support of this point.

This brings us to the consideration of the point upon which the court below based its decision, and by reason of which the points we have already discussed, though presented, were not commented on in the Territorial Court.

Point Sixth.

Was the clause in the bill of sale in question a condition only, or is it a covenant by the defendant, upon which he may be prosecuted in an action at law for damages? The District Court decided it was only a condition, and in that we think the decision was clearly right.

The counsel for plaintiffs, in his argument upon this point, starts with a reference to the cases in 5th Wallace and 5th Otto (page 39 of his brief). Both these are cases of contracts made by the party sought to be charged, and both contracts contained ambiguous words requiring explanation. In the language of these cases, the doctrine is expressly affirmed that a "written agreement

can not be varied by proof of the circumstances out of which it grew and which surrounded its adoption." The error which runs through the whole of the argument of the learned counsel, is in the assumption that the courts may take into consideration the surrounding circumstances ~~on~~ or the situation of the parties in all cases, whatever may be the form of the contract. Such is not the language of the books nor the dictate of good sense. Parties have a right to make their own contracts. If, by mistake, they are made differently from the intention of the parties, the remedy, and only remedy, is to resort to the proper action to correct the mistake, and to so reform the contract that it will express the real agreement made. It is only a mistake as to the facts that is susceptible of such correction. A mistake as to the legal effect of the words used cannot be corrected, even in a Court of Equity. Parties are presumed to know the law, and are bound by the terms of their agreement when they are free from ambiguity. When it is said that the courts will endeavor to give effect to the intention of the parties, only this is meant, that—

First, The intent must be determined from the language used by interpreting words in their ordinary significance.

Second, Where the language is ambiguous, or rendered difficult of application to the subject matter, resort may be had to the surrounding circumstances.

This rule is founded in reason, and settled by authority. Courts cannot make contracts, but can only enforce them as actually made.

Blacksmith v. Fellows, 7 N. Y., 416.

Gray v. Blanchard, 8 Pickering, 284.

It is also well settled that a written contract cannot in law be varied by parol evidence or by proof of entrinsic facts.

Greenleaf's Ev., Vol. 1, Sec. 276 and 277.
Brandon Man. Co. v. Morse, 48 Vermont, 322.
2 Kent's Com., 777.

So the rule is clear, and without exception, that when the language used is free from ambiguity nothing remains but for the courts to enforce contracts if they are lawful. In such cases there is no room for construction.

2 Parsons on Con.,	page	500.
Sedgewick on Const. Law,	"	231.
Scott v. Reed, 10 Peters,		524.
Hawly v. Brumagim, 33 Cal.,		398.
Moran v. Prother, 23 Wallace,		501.

In this case the plaintiff Hale has inserted in his bill of sale apt words to constitute a condition subsequent.

"It is understood and agreed that this sale is upon *the express condition*," &c. Where is there any ambiguity or doubt as to the meaning of these words? Any attempt to pervert their meaning or to convert them into a covenant by the vendee would be an attempt to substitute a new agreement for the one made by the parties.

If we should look to the surrounding circumstances in this case no light is thrown upon the interpretation to be given to this language. It needs none. Like the sun it shines without borrowed light.

The defendant testified he knew nothing of the previous bonds or covenants, or that any other parties were interested. Hale said he could give a clear title. (Record, page 71.)

By the language employed in this case the boat itself instead of a bond or personal liability was mes made the security to keep the same from the prohibited waters. The question here is not whether this was a wise change. The parties have chosen to do it and the agreement stands as the reason for the act.

The plaintiff doubtless preferred the right reserved to forfeit the steamer to any personal liability of the defendant. The court below say: "It is not necessary here to look beyond the words the parties have employed; but were we to do so we should only be the more strongly constrained to the conclusion that they intended what they have said."

The sale was clearly on condition.

Mead v. Ballard, 7 Wallace, 290.
Austin v. Cambridgeport Parish, 21 Pick., 215.
Gray v, Blanchard, 8 Pick., 380.
Post v. Wiel, 15 N. Y. Sup. Court Rep., 420.

The effect of a breach of this condition was a forfeiture, assuming the same is legal. No damages result from the breach.

Hogeboom v. Hale, 24 Wend., 148.
Brigham v. Shattuck, 10 Pick., 306.

The rule applies to contracts relating to personal property as well as to lands.

Clapp v. Stoughton, 10 Pick., 463.
Merrill vs. Emes, do. 507.
Hubbard v. Bliss, 12 Allen, 590.
Knox et al. v. Aerkins, 15 Gray, 529.
Morrill v. Dayfield, 30 Maine, 157.
do 91.

The breach of a condition creates no personal obligation, and no promise is to be inferred by reason of such breach.

Palmer vs. Fort Plain Plank road, 11 N. Y. 376.
Livingston vs. Stickles, 8 Paige Chanc, 402.
Stuyvesant vs. Mayor of N. Y., do 415.
Belmont vs. Coman, 22 N. Y., 438.
Taylor vs. Cedar Rapids & St. Paul Railroad

Company, 25 Iowa, 382.

Culver vs. Sisson, 3 Comstock, 264.

Whether the parties intended this as a condition, must be determined by the words they have employed. If the language imports a condition the Court must so construe it. The Court cannot go outside in order to arrive at the intention of the parties.

Potter's Dwarris on Stat., 181 to 183.

Jackson vs. Lewis, 17 Johnson, 476.

1st Hilliard on real property, Sec. 27, page 382.

The plaintiff's counsel quotes largely from the opinion in 5 Ottto supra as though it admitted of a general application to all contracts. The true meaning of what is said in that case is best determined by referring to the facts of the case. An insurance company had excepted from the risk the vessel insured, "while at Baker's Island loading." The interpretation properly given was to the extent that the suspension covered the period while the vessel was at the place named for the purpose of being loaded.

If in this case the plaintiff Hale had intended to release all claim to the steamer in any event he would, it is fair to assume, have required the defendant to give security as he had been required to give security to the Oregon Company. The fact that he exacted no such security, and no bond, proves almost conclusively that he relied on the condition as the best security he could have. Especially would he have so provided as he actually entered into an agreement with the defendant signed and sealed by both parties in which as had been previously done by him, a covenant would have been proper if a personal liability was contemplated. If the clause in question had recited that it is agreed the defendant shall not run or suffer to be used the steamer in

the prohibited waters the reasoning of the learned counsel would be quite applicable, but when it is said, "it is understood and agreed that *this sale is upon the express condition*," what room is left for construction. The express language is that the sale is on condition. This is the language of the vendor. The rule that language so employed shall be construed against the party using it is well settled.

The rule that conditions subsequent which would work a forfeiture are not favored is one for the protection of grantees and vendees. The vendor cannot invoke its aid to enable him to pursue a remedy forbidden by the terms of his contract.

The rule that conditions subsequent which work a forfeiture of the estate are not favored in law, is for the protection of the grantee or vendee, and not for the protection of the grantor or vendor. It applies with more force to conveyances of land than to sales of personal property.

In case of a sale of personal property no provision for re-entry is requisite, and all the counsel for the plaintiffs has said upon that subject, citing cases of the conveyance of lands, is inapplicable to this case.

Nor is this case to be governed by any of the rules which apply to the case of mutual covenants or agreements. In this the language is that [illegible] a[illegible] who, as I have already said, had the [illegible] v[illegible] ~~for~~ any condition to the sale he chose to [illegible] e[illegible]

The position taken by the plaintiffs' counsel, that the defendant could sell this steamer to a third person, and that such person would take the same divested of the condition, is not founded on reason or supported by authority. On the contrary, save when a record is required as notice, the vendor of a chattel can give no better title than he possesses.

The case in 41 N. Y., 442, cited in the plaintiffs' points (page 63), is a very strong case in support of the doctrine for which we are contending.

The proviso, or condition in that case, annexed to a grant of lands, was to the effect that there should be no manufacture or sale of intoxicating liquors upon the premises sold. The action was ejectment for a breach of this condition, and the plaintiff recovered. In the opinion written by Justice Hunt, now of this court, he says:

"He (the plaintiff) imposes a condition, that no intoxicating liquor, in whatever form, or to whatever extent, shall be sold upon the premises granted. If faithfully observed, this condition would certainly produce the result desired by the grantor. Whether this plan is wise or unwise is not for us to say. No man is bound by law to be wise."

See, also, Gilbert v. Petelor, 38 N. Y., 165, cited in the opinion of Judge Hunt.

Grey v. Blanchard, 8 ~~Rich, 238~~. Pick 283

This last case is cited by plaintiffs' counsel as one upon which the defendant will doubtless rely (page 63 of points.)

Assuming as claimed, that the object of Hale was to protect himself against his contingent liability, yet it was entirely for him to decide whether he would do it by making the sale conditional or by requiring the defendant to enter into a covenant with sureties, as he had done with his vendors. He, in express words, chose the formhr, and he must be concluded by his election.

The argument that the nature of the property transferred shows the parties intended a covenant, and not a condition, does not seem to me to have any force. Money is loaned upon such property instead of personal security. It is not unreasonable to suppose the plaintiff placed more reliance on the steamer worth the full amount of

his contingent liability than on Finch personally, who is not shown to have been worth anything aside from his property in the steamer. The right to take it at once for breach of the condition was far more valuable to the plaintiff than a resort to judgment and execution, which it might require years to accomplish. It is true the plaintiff could not retake the steamer till after forfeiture, nor could he sue the defendant till then.

In conclusion, I beg to repeat that the general course of the decisions and the well settled rules of law are, that when the terms of a contract are clear and unambiguous, no evidence outside is allowable to control or vary their meaning; that when it is said the courts will act upon the evident intention of the parties, that is to be determined primarily from the language employed; that it is the duty of courts to enforce contracts as the parties have made them, and not by construction, or by reference to the surrounding circumstances, to make a new or different contract for them.

If, by mistake, this contract was not made as the parties intended, the remedy of the pla[illegible] reform it or correct the mistake, and [illegible] as he intended it should be made, u[illegible] corrected by a direct proceeding for that purpose.

We submit the judgment of the Territorial Court should be affirmed.

E. G. LAPHAM,
Counsel for the Defendant in error.

H-271

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~385.~~ 139

THE NATIONAL BANK OF GLOVERSVILLE, PLAINTIFF IN ERROR,

vs.

JAMES H. JOHNSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED DECEMBER 6, 1878.

SUPREME COURT OF THE UNITED STATES

No. 385.

THE NATIONAL BANK OF GLOVERSVILLE, PLAINTIFF IN ERROR,

vs.

JAMES H. JOHNSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the supreme court of the State of New York, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said court of appeals, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between James H. Johnson and the National Bank of Gloversville, wherein a right & privilidge was claimed under a statute of the United States, and the decision was against such right & privilidge, a manifest error hath happened, to the great damage of the said the National Bank of Gloversville, as by his complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, and then under your seal, distinctly & openly, you send the record & proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with
2 the writ, so that you may have the same at Washington on the second Tuesday of October next, in the said Supreme Court, to be then & there held, that the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 25th day of September, in the year of our Lord one thousand eight hundred & seventy-eight.

[SEAL.] CHARLES MASON,
Clerk Circuit Court of the United States for the northern district of New York.

Allowed by—

WARD HUNT,
Asso. Just. Sup. Ct U. S.

3 United States of America, to James H. Johnson, greeting:

You are hereby cited and admonished to appear at a Supreme Court of the United States, to be holden at Washington on the second Tuesday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of New York, in the county of Fulton, wherein the National Bank of Gloversville is plaintiff in error and you are defendant in error, to show cause, if any there be, why a judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Ward Hunt, associate justice of the Supreme Court of the United States, this 25th day of September, in the year of our Lord one thousand eight hundred and seventy-eight.

WARD HUNT.

On this 1st day of October, in the year of our Lord one thou-
4 sand eight hundred and seventy-eight, personally appeared Frank Eggleston before me, the subscriber, Edward N. Spencer, and makes oath that he delivered a true copy of the within citation to James H. Johnson.

FRANK EGELSTON.

Sworn to and subscribed the 1st day of October, A. D. 1878.
[SEAL.] E. N. SPENCER,
Notary Public, Fulton Co., N. Y.

5 Know all men by these presents that we, Abram D. Brower, James H. Burr, Levi T. Marshall, John Green, E. B. Munson, and James McKee, of the county of Fulton, in the State of New York, are held and firmly bound unto James H. Johnson, of the county of Fulton, in the State of New York, in the full and just sum of twelve thousand dollars, to be paid to the said James H. Johnson, his certain attorney, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 23rd day of September, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas lately, at a term of the court of appeals of the State of New York, in a suit depending in said court, between James H. Johnson, plaintiff, and The National Bank of Gloversville, defendant,
6 a judgment was rendered against the said National Bank of Gloversville, defendant, and the said defendant having obtained a writ of error, and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed by the said James H. Johnson having been issued citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said National Bank of Gloversville, defendant, shall prosecute its writ of error to effect and answer all damages and costs if it failed to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

A. D. BROWER. [SEAL.]
J. H. BURR. [SEAL.]
L. T. MARSHALL. [SEAL.]
7 JOHN GREEN. [SEAL.]
E. B. MUNSON. [SEAL.]
JAS. McKEE. [SEAL.]

Sealed and delivered in presence of—
EUGENE P. SHOVE.

UNITED STATES OF AMERICA,
Northern District of New York, ss:

On this 23 day of September, A. D. 1878, before me, personally appeared Abram D. Brower, James H. Burr, Levi T. Marshall, John Green, E. B. Munson, and James McKee, to me known to be the same persons described in, and who executed the foregoing bond, and who severally acknowledge that they executed the same.

EUGENE P. SHOVE,
Notary Public in and for Fulton Co., N. Y.

UNITED STATES OF AMERICA,
Northern District of New York, ss:

8 Abram D. Brower, James H. Burr, Levi T. Marshall, John Green, E. B. Munson, and James McKee, being severally sworn, each for himself, says that he is a resident of the county of Fulton, in the northern district of New York, and that he is a freeholder, and that

he is worth the sum of ten thousand dollars over and above all debts and liabilities which he owes or has incurred exclusive of property exempt by law from levy and sale under execution.

A. D. BROWER.
J. H. BURR.
L. T. MARSHALL.
JOHN GREEN.
E. B. MUNSON.
JAS. McKEE.

Sworn to before me this 23 day of September, A. D. 1878.

E. P. SHOVE, *N. P.*

Approved by—

WARD HUNT,
Asso. Just. Sup. Ct U. S.

9 At a general term of the supreme court of the State of New York held in and for the third judicial department of said State, at the town hall, in the village of Saratoga Springs, on the 9th day of September, A. D. 1877.

Present: Hon. William S. Learned, presiding justice; Hon. Douglass Boardman, Hon. Augustus Bockes, associate justices.

JAMES H. JOHNSON
against
THE NATIONAL BANK OF GLOVERSVILLE.

Judgment affirmed, with costs.
Opin. by Bockes. A copy.

J. W. HORTON, *Clerk.*

10 Supreme court.

JAMES H. JOHNSON
ag'st
THE NATIONAL BANK OF GLOVERSVILLE

Judgment Oct. 3, 1877, at h. m., m.

The appeal of the defendant from the judgment entered in this action on the third day of July, 1877, having been duly brought on to be heard at the general term of this court, and said judgment having been in all things affirmed, with costs, and the order of affirmance having been duly filed and entered, it is now, on motion of C. M. Parke, esq., attorney for the plaintiff, adjudged that said judgment appealed from be and the same is hereby in all things affirmed, and that the plaintiff, James H. Johnson, recover of the defendant, the National Bank of Gloversville, the sum of eighty-one dollars *dollars* and eighty cents costs and disbursements, and have execution therefor.

W. S. McKIE, *Clerk.*

11 Supreme court.

JAMES H. JOHNSON, PL'FF & RESP'D'T,
against
THE NATIONAL BANK OF GLOVERSVILLE,
DE'F'T & APP'LL'T.

Take notice that the defendant hereby appeals to the court of appeals

of the State of New York from the judgment of the general term of the supreme court entered in this action on the 3d *third* day of October, 1877, in the clerk's office of Fulton County, for $81.80 costs, and affirming the judgment entered in this action on the third day of July, 1877, for $5,876.71, and from every part thereof.

Yours, &c.,

H. S. PARKHURST,
Att'y for Def't & App'll't.

To C. M. PARKE, Esq.,
Att'y for Pl'ff & Resp'd't.
W. S. MCKIE,
Clerk of Fulton Co.

12 STATE OF NEW YORK,
County of Fulton, Clerk's Office, ss:

I, William S. McKie, clerk of said county, and also clerk of the supreme court, do hereby certify that I have compared the annexed copies of order of general term, judgment roll, and notice of appeal, with the original thereof filed in this office, and the same are correct transcripts from and of the whole of said originals.

In testimony whereof I have hereunto set my hand and affixed my official seal this 12th day of October, 1877.

[SEAL.] W. S. MCKIE, *Clerk.*

13 Supreme Court.

JAMES H. JOHNSON, PL'FF & RESP'D'T,
ag'st
THE NATIONAL BANK OF GLOVERSVILLE,
def't & app'l't.

An appeal from the judgment entered in this action on the third day of October, 1877, having been taken to the court of appeals, and the record remitted from that court being filed, it is now, on motion of C. M. Parke, esq., attorney for the plaintiff and respondent, adjudged that the said judgment appealed from be, and the same is hereby, in all things affirmed; and it further adjudged that the respondent, James H. Johnson, recover of the appellant, The National Bank of Gloversville, the sum of one hundred and six dollars costs and disbursements of appeal to the court of appeals, and have execution therefor.

W. S. MCKIE, *Clerk.*

Filed Sept. 20, 1878—10¾ h. a. m.

14 STATE OF NEW YORK,
County of Fulton, ss:

I, William S. McKie, clerk of the supreme court of the State of New York, do hereby certify that the foregoing is a true copy of the judgment, record, and all proceedings and papers in the case of James H. Johnson against The National Bank of Gloversville, on filed in the office of the clerk of the county of Fulton.

Witness my hand and official seal this 2d day of October, A. D. 1878.

[SEAL.] W. S. MCKIE,
Clerk of the Sup. Ct.

15 State of New York, in the Supreme Court.

JAMES H. JOHNSON, RESPONDENT,
against
THE NATIONAL BANK OF GLOVERSVILLE,
appellant,

CASE AND EXCEPTIONS ON APPEAL.

H. S. Parkhurst, attorney for appellant.
C. M. Parke, attorney for respondent.

16 Supreme Court.

JAMES H. JOHNSON PL'FF,
against
THE NATIONAL BANK OF GLOVERSVILLE,
def't.

Supreme court, county of Fulton.

To the above-named defendant:

You are hereby required to answer the complaint of the plaintiff in this action, which will be filed with the clerk of the county of Fulton, at Johnstown, N. Y., and to serve a copy of your answer on me, at my office in Gloversville, New York, within twenty days after the service hereof upon you, exclusive of the day of service. If you fail to so answer said complaint, the plaintiff will apply to the court for the relief demanded in the complaint.

C. M. PARKE,
Plaintiff's Attorney.

17 Supreme court, county of Fulton.

JAMES H. JOHNSON, PL'FF,
against
THE NATIONAL BANK OF GLOVERSVILLE,
def't.

The above-named plaintiff, James H. Johnson, complains of the said defendant, The National Bank of Gloversville, and alleges:

First. That before the 1st day of November, 1874, the said defendant had become, then was, and ever since has been, and still is, a corporation or body corporate, by and under the name of *the* The National Bank of Gloversville, duly organized and existing under and by virtue of Title LXII of the Revised Statutes of the United States, entitled "National Banks," and then did, and has ever since continued doing, business as such corporation under the laws aforesaid, and has its banking house and place of business at Gloversville, in the county of Fulton and State of New York, at which place the business and transactions hereinafter mentioned took place.

Second. That the said "The National Bank of Gloversville" was, during the period above referred to, allowed by and under the Revised Statutes of the United States, to take, receive, reserve and charge on any loan or discount made, or on any note, bill of exchange, or other

evidence of debt, interest at the rate of seven per centum per annum and no more, and said defendant, during the period, and at the times hereinafter mentioned, was not allowed to take, charge, reserve or receive more than the said rate.

Third. That, during the time, commencing on the 1st day of
18 November, 1874, and continuing until the 7th day of February, 1876, the said James H. Johnson made and obtained divers loans and discounts of the said defendant, and delivered to the defendant, procured the same to be discounted by the defendant, divers notes, bills of exchange, and other evidences of debt, made or endorsed by the said James H. Johnson, at divers times and dates during the time aforesaid, and in divers different amounts, in the aggregate amounting to the sum of one hundred and sixty thousand eight hundred and sixty-three dollars and sixty cents; and that said defendant, by a corrupt and usurious agreement between it and the said James H. Johnson, reserved, charged, took and received of said James H. Johnson, and the said James H. Johnson allowed and paid to defendant, upon each and every and all of the said several loans and discounts and upon each and every and all of said several notes, bills of exchange and evidence of debt, at a rate of interest exceeding seven per centum per annum, to wit, at rates varying from twelve to fifteen per centum per annum, reckoning the time said several loans, discounts, notes, bills of exchange and other evidences of debt had to run, over and above all and every current rate of exchange upon each and every bill of exchange upon which a loan was made by said defendant, or which was purchased or discounted by said defendant as aforesaid, which were payable at another place than that of the purchase or sale or that where the loan or discount was made, and took, charged, received and reserved the same in advance in each case and upon each, every and all the said notes, bills of exchange and other evidences of debt for the time the same severally had to run, and the said James H. Johnson paid to said defendant the said illegal rate of interest, so knowingly charged, reserved, taken and received as aforesaid by the said defendant contrary to the provisions of sections 5197 and 5198 of the Revised Statutes of the United States.

19 That the amount of illegal interest so paid and knowingly reserved, charged, taken and received by the said defendant and paid by the said James H. Johnson between the first day of November, 1874, and the seventh day of February, 1876, upon the loans, discounts, notes, bills of exchange and other evidences of debt aforesaid, was the sum of seven thousand seven hundred and ninety-five dollars and fourteen cents, and by reason of the facts above set forth and by and under the provisions sections 5197 and 5198 of the Revised Statutes of the United States, the defendant became liable to pay and the plaintiff is entitled to recover of said defendant the sum of twice the amount of the interest so knowingly taken, reserved, charged and received, and paid to it as aforesaid, being the sum of fifteen thousand five hundred and ninety dollars and twenty eight cents.

Wherefore the plaintiff demands judgment against the defendant for the sum of fifteen thousand five hundred and ninety dollars and twenty-eight cents with interest thereon from the seventh day of February, 1876, besides the costs of this action.

C. M. PARKE,
Plaintiff's Attorney.

FULTON COUNTY, *ss:*

James H. Johnson, being duly sworn, says that he is the plaintiff in the above entitled action; that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

J. H. JOHNSON.

Subscribed and sworn to before me this 17th day of January, 1877.

W. H. VAN NESS,
Justice of the Peace.

20 Supreme court, County of Fulton.

JAMES H. JOHNSON, PL'FF,
against
THE NATIONAL BANK OF GLOVERSVILLE, DEF'T.

The defendant, The National Bank of Gloversville, answering the complaint of the pl'ff, denies the same and each and every allegation thereof except what is hereinafter expressly admitted.

II. The defendant admits its incorporation as stated in the complaint.

III. The defendant, further answering the complaint herein, alleges that if the defendant has received more than seven per cent. upon any bills, notes, checks, or other evidences of debt of the plaintiff, it has been upon commercial paper, or paper which the plaintiff represented as commercial at the time of the discount, which the defendant discounted by purchase. Wherefore the defendant asks that the complaint of the plaintiff be dismissed with costs.

H. S. PARKHURST,
Def't's Att'y.

FULTON COUNTY, *ss:*

James M. Wood, being duly sworn, says that he is the cashier of the defendant, and that he has read the foregoing answer, and that the same is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters, he believes it to be true. That the reason this verification is not made by the defendant is that the defendant is a corporation, to wit, a banking association, and this deponent is the managing officer thereof, to wit, cashier.

J. M. WOOD.

Sworn to before me this 12th day of February, 1877.

HUBERT A. WOOD,
Notary Public.

21 Supreme court.

JAMES H. JOHNSON, PL'FF,
against
THE NATIONAL BANK OF GLOVERSVILLE, DEF'T.

To H. S. PARKHURST,
Defendant's Attorney:

You will take notice that the following is a bill of particulars of the plaintiff's claim in the above-entitled action, except such sums of interest as were paid by check or currency:

Date.	Time.	Maker.	Am't note.	When disc'ted.	Am't of disc't.	Forf't.
1874.				1874.		
Oct. 1st	4 mo.	Kent & Stevens	$1,200 00	Nov. 5th	$37 20	74 40
" 10th	2 "	Mason & Campbell	610 50	" "	7 70	15 40
" 13th	4 "	E. Unkart & Co	603 00	" "	22 00	44 00
Nov. 1st	2 "	G. C. Wood	100 00	" "	2 10	4 20
" 1st	2 "	Gillette & Lefevre	485 47	" 11	8 62	17 24
Oct. 1st	4 "	A. O. Brown	267 84	" 18	6 14	12 28
Nov. 15	5 "	E. M. Barnum	897 46	" "	46 95	93 90
" 15	4 "	E. M. Barnum	963 37	" "	40 77	81 54
" 2	3 "	W. R. & R. D. Burr	1,995 50	" "	54 50	109 00
" 1	4 "	J. & W. S. Tooker	525 69	" "	19 25	38 50
" 10	4 "	Boonville Glove Co	108 39	Dec. 1st	3 24	6 48
Sept. 12	4 "	" " "	436 80	" "	8 74	17 48
Nov. 15	5 "	A. O. Brown	583 11	" "	29 11	58 22
" 15	6 "	A. O. Brown	583 11	" "	35 00	70 00
Oct. 15	4 "	A. Kline	1,222 16	" "	36 66	73 32
Sept. 1	4 "	Mason & Campbell	400 00	" "	8 40	16 80
Nov. 1	4 "	Kent & Stevens	938 94	" "	28 94	57 88
Dec. 1	4 "	Kent & Stevens	673 88	" "	27 60	55 20
Nov. 1	4 "	J. H. Farthing	700 66	Dec. 9th	21 00	42 00
Dec. 7	4 "	J. Wooster & Sons	986 62	" "	39 42	78 84
Dec. 7	3 "	J. Wooster & Sons	260 00	" 12	7 80	15 60
Nov. 1	4 "	Geo. E. Wright & Co	232 00	" "	6 34	12 68
Dec. 15	6 "	E. M. Barnum	1,475 87	" 19	88 56	177 12
" 15	5 "	Clark & Bellinger	675 25	" "	33 75	67 50
" 24	4 "	Kent & Stevens	1,000 00	" 26	40 00	80 00
" 1	6 "	J. H. Brown	609 38	" "	33 50	67 00
Nov. 1	4 "	W. R. & R. D. Burr	255 42	" "	5 95	11 90
Dec. 10	4 "	J. & W. S. Tooker	139 88	" "	4 88	9 76
22						
Dec. 24	1 mo.	V. B. Whipple	384 00	Dec. 26	3 84	7 68
" 26	4 "	V. B. Whipple	392 11	" "	16 00	32 00
1875.				1875.		
Jan. 4	6 "	W. R. & R. D. Burr	750 40	Jan. 4th	45 75	91 50
1874.						
Dec. 26	4 "	W. R. & R. D. Burr	875 43	" "	35 00	70 00
1875.						
Jan. 4	1 "	Mason & Campbell	400 00	" "	4 00	8 00
" 2	4 "	S. M. Johnson	2,000 00	" 2	82 00	164 00
" 4	1 "	G. Honeywell	74 77	" 5	77	1 54
" 4	1 "	W. A. Barber	117 58	" "	1 27	2 54
" 4	1 "	W. H. Van Vranken	187 59	" "	2 10	4 20
1874.						
Dec. 1	4 "	W. R. & R. D. Burr	1,050 64	" "	42 00	84 00
" 13	3 "	H. C. Day	1,500 00	" "	21 58	43 16
" 13	2 "	H. C. Day	1,500 00	" "	12 83	25 66
1875.						
Jan. 15	4 "	C. M. Coe	370 00	Jan. 12th	16 00	32 00
" 5	4 "	Geo. E. Wright & Co	187 66	" "	7 52	15 04
" 9	6 "	Geo. E. Wright & Co	1,015 15	" "	61 85	123 70
1874.						
Dec. 1	4 "	Kent & Stevens	794 91	" 13	23 84	47 68
1875.						
Jan. 7	6 "	" "	674 71	" "	40 71	81 42
" 5	4 "	J. H. Farthing	200 00	" "	8 00	16 00
1874.						
Dec. 22	4 "	C. H. Furness	91 75	" "	3 50	7 00

Date.	Time.	Maker.	Am't note.	When disc'ted.	Am't of disc't.	Forf't.
1875.				1874.		
Jan. 19	5 mo.	N. J. Brockway & Co	443 80	Jan. 23	22 19	44 38
" 15	6 "	" " "	481 67	" "	28 90	57 80
Feb. 1	6 "	" " "	481 67	" "	31 30	62 60
Jan. 18	6 "	A. Kline	600 00	" "	42 00	84 00
Mch. 18	6 "	" "	689 57	" "	55 16	110 32
Feb. 18	6 "	" "	600 00	" "	36 00	72 00
Jan. 22	2 "	F. W. Helwig	817 56	" "	17 16	34 32
" 9	6 "	J. H. Farthing	447 18	" "	26 83	53 66
Feb. 1	4 "	W. R. & R. D. Burr	1,437 46	Feb. 9	57 48	114 96
Jan. 1	6 "	Thos. Rowles	475 00	" "	23 75	47 50
Feb. 1	4 "	W. H. Rowles	385 33	" "	15 33	30 66
" 1	4 "	A. O. Brown	279 00	" "	11 16	22 32
" 1	6 "	L. Fay	290 25	" "	17 40	34 80
" 1	6 "	Kent & Stevens	1,313 60	" "	78 60	157 20
23						
Feb. 9	6 "	Parsons & Smith	500 00	" "	30 50	61 00
Mch. 1	6 "	J. H. Brownell	723 45	Feb. 17	53 45	106 90
Feb. 15	4 "	H. A. Kasson	458 31	" "	18 78	37 56
" "	5 "	McDougal & Pool	99 04	" "	5 04	10 08
" "	4 "	A. Kline	1,250 00	" "	51 00	102 00
" 23	4 "	Lyke & Robertson	241 31	" 24	9 88	19 76
" "	4 "	N. J. Brockway & Co	639 56	" "	26 24	52 48
" 10	4 "	C. M. Coe	126 67	" "	4 51	9 02
" 24	4 "	E. Hulburt	661 07	" "	27 10	54 20
" 1	6 "	Lyke & Robertson	423 23	Mch. 1	21 58	43 16
" 24	3 "	J. H. Farthing	10 84	" "	32 52	65 04
" 15	5 "	D. Haggart	292 15	" "	14 60	29 20
" 9	6 "	E. A. M. Smith	364 58	" "	21 87	43 74
Mch. 1	6 "	J. H. Brown	947 32	" "	56 82	113 64
Feb. 15	6 "	Lyke & Robertson	370 75	" "	22 24	44 48
" 1	6 "	Kent & Stevens	186 12	Mch. 10	11 12	22 24
Mch. 15	6 "	Lyke & Robertson	433 87	" "	26 03	52 06
Feb. 17	4 "	B. G. Shults	250 00	" "	10 00	20 00
" 12	4 "	Henry Moore	529 69	" "	21 18	42 36
" "	5 "	W. H. Rowles	503 18	" "	25 15	50 30
Mch. 1	6 "	H. T. Cole	314 13	" "	18 84	37 68
" 9	2 "	J. & W. S. Tooker	526 54	" "	10 52	21 04
" 10	6 "	F. W. Helwig	705 30	" "	42 30	84 60
" 11	6 "	J. Wooster & Sons	710 74	" 22	24 64	49 28
" 22	6 "	J. Wooster & Sons	843 16	" "	50 58	101 16
" 17	6 "	H. M. Leonard	288 46	" 18	17 46	34 92
" 5	6 "	C. McDougal	457 85	" "	27 85	55 70
" 18	4 "	W. B. Whipple	690 47	" "	28 30	56 60
" "	4 "	F. W. Helwig	973 87	" "	39 93	79 86
" 29	4 "	J. Lebenheim	1,560 07	" 29	64 03	128 06
" 27	6 "	J. H. Brownell	322 78	" "	19 68	39 36
Feb. 15	4 "	Wm. Easterly	86 90	" "	2 58	5 16
Mch. 1	4 "	Wm. Easterly	146 16	" "	4 76	9 52
Apr. 1	6 "	J. C Leonard & Son	1,141 68	" "	70 78	141 56
Apr. 1	6 "	Geo. E. Wright & Co	102 56	Apr. 7	6 18	12 36
Apr. 15	6 "	A. Kline	480 18	April 7th	30 81	61 62
" 1	4 "	Geo. E. Wright & Co	164 13	" "	6 56	13 12
" 1	4 "	J. & W. S. Tooker	500 00	" "	20 00	40 00
" 5	4 "	J. H. Farthing	864 21	" "	34 56	69 12
Mch. 29	5 "	Frank Panley	325 24	" "	16 26	32 52
Apr. 15	6 "	Thos. H. Rowles	1,088 00	" 17	66 37	132 74
" 15	4 "	J. & W. S. Tooker	622 15	" "	25 45	50 90
24						
Apr. 15	4 mo.	A. O. Brown	$608 00	Apr. 17	$25 00	$50 00
M'ch 20	5 "	N. J. Brockway & Co	400 00	" "	16 00	32 00
Apr. 10	5 "	N. J. Brockway & Co	344 30	" "	17 20	34 40
" 15	6 "	F. W. Helwig	796 49	" "	48 59	97 18
M'ch 15	4 "	A. O. Brown	347 71	May 1st		
May 1	6 "	F. W. Helwig	1,111 91	" "		
Apr. 1	6 "	J. C. Johnson	707 98	" "		
" 1	4 "	I. B. Whipple	479 33	" "		
" 23	4 "	J. Lebenheim	700 00	" "		
" 29	6 "	S. Hulett	510 13	" "		
" 5	4 "	C. M. Coe	208 60	" "		
" 10	5 "	W. R. & R. D. Burr	1,144 61	" "		
" 29	5 "	W. R. & R. D. Burr	1,144 62	" "		

Date.		Time.		Maker.	Am't note.	When disc'ted.		Am't of disc't.	Forf't.
1875.						1874.			
May	1	4	mo.	J. H. Farthing	331 45	May	1st		
Apr.	30	2	"	I. B. Whipple	395 92	"	"		
May	1	6	"	J. H. Brownell	596 90	"	"	357 96	715 92
"	"	4	"	B. G. Shults	333 12	"	15		
Apr.	15	4	"	Henry Moore	62 85	"	"		
"	1	4	"	Busby & Weare	112 28	"	"		
May	1	4	"	J. & W. S. Tooker	649 85	"	"		
"	1	3	"	Chas. McCoy	115 34	"	"		
"	15	4	"	Clark & Bellinger	169 77	"	"		
"	10	5	"	A. Lyke & Co	202 05	"	"		
Apr.	30	3	"	J. H. Farthing	275 00	"	"	69 22	138 44
May	18	2	"	C. M. Coe	170 00	"	18		
"	17	4	"	Clark & Bellinger	690 00	"	"		
"	18	4	"	J. H. Farthing	1,146 35	"	"	77 88	155 76
"	10	5	"	Lyke & Robertson	195 00	"	"		
Apr.	19	6	"	Ireland Bros	466 15	"	"		
"	28	6	"	F. W. Helwig	1,370 34	"	"	111 02	222 04
May	18	4	"	H. C. Day	2,000 00	May	20	46 45	92 90
June	1	4	"	H. C. Day	2,000 00	May	26		
May	20	6	"	J. H. Hale	600 00	"	"	83 84	167 68
"	10	4	"	Wm. Easterly	107 40	June	3		
June	1	6	"	J. C. Leonard & Son	371 91	"	"		
"	"	4	"	Geo. E. Wright & Co	411 18	"	"		
"	2	6	"	Parsons & Smith	463 94	"	"		
				Foster & Barnum	486 28	"	"		
June	1	1	"	J. & W. S. Tooker	682 76	"	"		
May	5	5	"	Moore & Pecham	843 16	"	"		
"	21	6	"	J. Wooster & Sons	931 45	"	"	195 72	391 44
"	6	4	"	J. M. Johnson	2,000 00	June	7	47 82	95 64
25									
June	1	3	mo.	L. Fay	$297 46	June	9th		
"	9	3	"	Clark & Bellinger	200 00	"	"		
"	7	3	"	W. H. Rowles	200 00	"	"		
"	"	3	"	A. O. Brown	279 00	"	"		
"	1	2	"	W. R. & R. D. Burr	428 19	"	"		
June	1	3	"	A. O. Brown	583 11	"	"		
May	20	2	"	W. R. & R. D. Burr	936 25	"	"	$65 51	$131 02
					265 00	June	9		
May	15	2	"	Jas. Shirlock	122 28	"	"		
"	8	4	"	Newton & Sloan	227 55	"	"		
June	4	4	"	N. J. Brockway & Co	341 37	"	"		
Apr.	20	6	"	C. McDougall	201 17	"	"		
June	5	2	"	W. R. & R. D. Burr	984 20	"	"		
Apr.	13	4	"	A. J. Lowry	241 29	"	"		
May	20	4	"	C. M. Coe	126 23	"	"		
June	14	4	"	W. R. & R. D. Burr	588 63	"	"		
May	10	4	"	Geo. Geary	182 40	"	"		
June	15	4	"	Henry Moore	542 71	"	"	115 71	231 42
"	21	4	"	Frank Pauley	98 90	June	28		
May	21	5	"	Philip Pauley	117 10	"	"		
June	4	4	"	D. M. D. Selmser	160 12	"	"		
Apr.	7	4	"	L. Heacock	177 38	"	"		
				Mason & Campbell	217 89	"	"		
May	20	4	"	A. Liswell	576 32	"	"		
June	4	4	"	N. J. Brockway & Co	1,052 31	"	"	87 30	174 92
"	28	6	"	J. Wooster & Sons	2,441 71	"	30	148 96	297 60
July	1	6	"	E. Hulburt	939 97	July	3		
				Jno. Richardson	101 66	"	"		
July	1	6	"	J. C. Leonard & Son	409 09	"	"		
"	3	4	"	J. & W. S. Tooker	429 48	"	"		
"	2	6	"	F. W. Helwig	439 87	"	"		
June	15	6	"	A. Kline	851 43	"	"		
July	15	6	"	A. Kline	851 44	"	"	231 71	463 42
"	7	4	"	W. H. Rowles	96 63	"	"		
"	7	4	"	Raymond & Hillock	77 79	"	"		
"	1	4	"	E. W. Squires	113 75	"	"		
"	1	4	"	Geo. E. Wright & Co	497 85	"	"		
"	8	4	"	I. B. Whipple	480 15	"	"	49 34	98 68
"	14	4	"	I. B. Whipple	702 00	"	15		
"	13	2	"	C. M. Rowell	89 27	July	15		
June	20	4	"	Wm. Windsor	78 87	"	"		
July	13	4	"	J. W. Place	121 88	"	"		

Date.	Time.	Maker.	Am't note.	When disc'ted.	Am't of disc't.	Forf't.
1874.				1874.		
26						
June 20	4 mo.	Geo. Geary	$123 29	July 15th		
July 1	4 "	Geo. Hewitt	173 14	" "		
June 7	6 "	Busby & Weare	205 29	" "	$58 48	$116 96
July 21	6 "	F. W. Helwig	257 25	" "		
" 20	4 "	W. R. & R. D. Burr	314 50	" "		
" 20	4 "	A. O. Brown	406 00	" "		
" 7	6 "	C. McDougall	423 81	" "		
" 19	4 "	I. B. Whipple	437 42	" "		
" 21	2 "	F. W. Helwig	973 87	" "	88 46	176 92
" 14	4 "	J. & W. S. Tooker	235 70	" "		
" 1	4 "	D. Haggart	292 15	" "		
" 14	4 "	C. M. Coe	391 04	" "		
" 23	1 "	W. R. & R. D. Burr	642 61	" "	41 50	83 00
" 30	6 "	Foster & Barnum	263 92	Aug. 5		
Aug. 2	6 "	C. McDougall	406 43	" "		
" 3	3 "	H. Moore	125 55	" "		
" 3	2 "	S. Haggart	65 25	" "		
Aug. 4	4 "	N. J. Brockway & Co	187 94	Aug. 5th		
" 2	3 "	D. Haggart	98 99	" "		
" 2	1 "	W. H. Van Vranken	50 38	" "		
May 1	4 "	G. W. Jeffers & Co	126 95	" "		
June 15	4 "	Tarr Bros	75 46	" "		
Aug. 2	4 "	Ireland Bros	212 40	" "		
July 29	6 "	S. Hulett	91 49	" "		
Aug. 4	6 "	Parsons & Smith	654 58	" "	113 85	227 70
" 6	4 "	J. H. Farthing	870 00	" 6th		
		W. H. Brower	148 34	" "	37 29	74 58
Aug. 7	4 "	Geo. E. Wright & Co	497 89	" 11th		
" 3	4 "	J. H. Brower	499 65	" "	49 80	99 60
" 4	2 "	J. & W. S. Tooker	500 00			
July 30	6 "	E. Hulburt	893 03	" 2d	54 47	108 94
Aug. 1	1 "	W. R. & R. D. Burr	1,570 30	" "		
Aug. 12	1 "	W. R. & R. D. Burr	1,570 30	" "	16 51	33 02
Aug. 16	5 "	J. Wooster & Sons	421 14	" 17th		
" 4	4 "	J. & W. S. Tooker	223 21	" "		
June 15	4 "	E. A. Eddy	74 42	" "		
Aug. 14	4 "	Wm. Rice	81 24	" "		
May 6	4 "	Wade & Shults	407 00	" "		
Aug. 16	4 "	Geo. E. Wright & Co	288 38	" "		
July 24	4 "	L. Fay	113 30	" "		
Aug. 14	4 "	Wm. Easterly	77 88	" "		
27						
May 25	4 mo.	L. Jennisson & Son	$174 30	Aug. 17		
July 26	4 "	W. H. Rowles	122 44	" "		
" 6	4 "	Boonville Glove Co	145 00	" "	$73 41	146 82
Sept. 1	4 "	A. Kline	180 68	" "		
Aug. 23	4 "	S. Hulett	164 40	" "		
Sept. 1	6 "	C. McDougall	624 58	" "		
" 1	6 "	Parsons & Smith	251 40	" "		
Aug. 16	4 "	J. & W. S. Tooker	511 35	" "		
Sept. 1	4 "	A. C. Churchill & Co	517 06	" "		
Aug. 10	4 "	Mason & Campbell	108 67	" "	110 82	221 64
		L. M. Johnson	2,000 00	" "	47 83	95 66
Sept. 1	2 "	James Parker	74 14	Sept. 11th		
" 1	4 "	John Moore	67 50	" "		
" 1	4 "	E. W. Squires	525 26	" "		
" 1	4 "	Moore & Peckham	204 07	" "		
" 1	2 "	Sol. Jeffers	105 00	" "		
" 1	4 "	G. Honeywell	29 15	" "		
" 8	1 "	W. D. Foote	62 20	" "	36 81	73 62
" 1	6 "	J. C. Leonard & Sons	436 89	" 14th		
" 13	6 "	Plummer & Wells	241 31	" "		
Aug. 1	4 "	A. Liswell & Co	116 74	" "		
Sept. 10	4 "	Geo. E. Wright & Co	114 46	" "		
" 13	4 "	J. H. Farthing	286 75	" "		
" 13	4 "	H. T. Cole	104 76	" "		
" 13	4 "	J. H. Brown	341 47	" "		
" 14	4 "	J. H. Farthing	1,146 00	" "	125 68	251 36
" 21	3 "	T. Wayne	120 27	" 22d		
" 18	4 "	H. Moore	138 00	" "		
" 20	1 "	John Peek	200 00	" "		
" 1	4 "	Geo. Geary	283 39	" "		

Date.	Time.	Maker.	Am't note.	When dis'ted.	Am't of disc't.	Forf't.
1874.				1874.		
Sept. 20	2 mo.	A. Liswell	500 00	Sept. 22d	31 66	63 32
" 20	4 "	J. H. Hale	131 03	" 21st		
" 20	4 "	W. H. Hulett	300 00	" "	17 53	35 06
" 28	4 "	L. Fay	130 43	" 28th		
" 12	80 d's	H. R. Leonard	161 58	" "		
" 9	4 mo.	Lyke & Robertson	197 22	" "		
" 15	4 "	J. & W. S. Tooker	398 59	" "		
" 13	4 "	E. W. Squires	682 21	" "	55 68	111 36
Aug. 20	3 "	W. R & R. D. Burr	1,257 21	Oct. 6		
Sept. 20	3 "	W. R. & R. D. Burr	1,257 21	" "	30 09	60 18
" 1	4 "	Chas. McCoy	86 38	" "		
" 16	4 "	J. H. Farthing	285 35	" "		
28						
Oct. 1	4 mo.	J. & W. S. Tooker	$373 04	Oct. 6th		
" 1	1 "	Geo. E. Wright	411 18	" "		
" 2	6 "	Geo. E. Wright	565 45	" "		
" 4	4 "	W. H. Rowles	633 18	" "	$91 18	$182 36
" 11	4 "	Moore & Peckham	202 09	Oct. 9		
		Emmet Blair	350 32	" "		
" 11	3 "	Moore & Peckham	875 00	" "	49 18	98 36
Sept. 10	4 "	F. Pauley	112 32	Oct. 12		
" 30	4 "	E. W. Squires	271 69	" "		
" 23	6 "	C. McDougall	315 92	" "	27 96	55 92
" 24	6 "	F. W. Helwig	150 00	Oct. 23		
" 1	6 "	J. S. Heacock & Co	289 54	" "	23 47	46 94
Oct. 1	4 "	H. C. Day	2,000 00	Oct. 26	47 82	95 64
Nov. 5	2 "	J. & W. S. Tooker	650 00	Nov. 8	13 65	27 30
Oct. 1	4 "	Valk & Mills	139 87	Nov. 13		
" 20	4 "	Emmet Blair	159 63	" "		
Nov. 1	4 "	W. H. Rowles	84 32	" "		
" 8	4 "	Geo. Geary	200 00	" "		
" 8	2 "	J. &. W. S. Tooker	270 13	" "	25 94	51 88
Sept. 25	4 "	Mason & Campbell	107 80	Nov. 10		
Oct. 20	4 "	E. W. Squires	161 08	" "		
" 1	4 "	Lyke & Robertson	124 91	" "	12 34	24 68
Nov. 29	4 "	J. H. Brown	282 32	Nov. 30	11 56	23 12
Jan. 1	6 "	Parsons & Smith	707 18	Dec. 8		
Dec. 6	4 "	Geo Geary	200 00	" "		
Nov. 15	4 "	E. W. Squires	157 49	" "		
Dec. 6	4 "	W. H. Rowles	317 24	" "		
1876.						
Jan. 1	6 "	A. Kline	332 46	" "		
1875.						
Dec. 7	6 "	J. H. Farthing	987 50	" "	138 59	317 18
Oct. 1	4 "	C. M. Coe	82 80	Nov. 22		
Nov. 1	4 "	L. Fay	91 80	" "		
" 22	6 "	J. H. Brown	567 86	" "	39 95	79 90
Dec. 15	4 "	J. H. Farthing	241 64	Dec. 17	9 64	19 28
1876.				1876.		
Jan. 1	6 "	D. Haggart	268 93	Jan. 4		
" 3	6 "	Lyke & Robertson	573 55	" "		
" 3	6 "	W. H. Rowles	842 88	" "	102 84	205 68
" 1	5 "	L. Fay	224 00	Jan. 5	11 20	22 40
1875.						
Dec. 28	6 "	Geo. Geary	478 13	Jan. 8		
29						
1876.				1876.		
Jan. 15	6 mo.	J. H. Brownell	$635 67	Jan. 8th	$68 88	$137 76
" 12	4 "	S. M. Johnson	2,000 00	Jan. 15	49 95	99 90
" 11	6 "	N. J. Brockway & Co	600 66	" 17		
Feb. 1	6 "	J. H. Brownell	395 55	" "	61 33	122 66
1875.						
Dec. 23	4 "	Emmet Blair	229 55	Jan. 19		
		Will Smith	176 30	" "		
1876.						
Feb. 1	6 "	A. Kline	821 32	" "		
1875.						
Dec. 1	4 "	Geo. Hewett	244 59	" "		
1876.						
Jan. 12	4 "	Geo. Geary	482 05	" "	87 92	175 84

Yours, &c., C. M. PARKE,
Pl'ff's Attorney.

Supreme court, county of Fulton.

JAMES H. JOHNSON, PL'FF, *against* THE NATIONAL BANK OF GLOVERSVILLE, def't.	Case with exceptions.

This action was commenced by the service of the summons therein on the 1st day of November, 1876. The complaint was served on the 19th day of January, 1877.

The answer of the defendant was served on the 28th day of February, 1877.

The summons and complaint and answer are included in the judgment roll to which this case is annexed, and which are to be read as if here inserted.

Issue having been so joined, this cause was referred by an order of this court, made and entered on the 20th day of April, 1877, to John
30 R. Putnam, a counsellor of this court, of Saratoga Springs, to hear and determine the same.

In pursuance of said order the cause came on for trial before said referee, on the 4th day of May, 1877, and was tried on that day and subsequent days.

The plaintiff, to maintain the issue on his part, gave the following evidence:

The incorporation and organization of the defendant, as alleged in the complaint, was admitted, and that the date of its organization was on the 17th day of February, 1872.

It was further admitted that a uniform rate of twelve per cent. was charged upon the paper mentioned in the bill of particulars at the time of its purchase or discount, and was then reserved and taken by the defendant, and the plaintiff's account had credit for the amount of the paper, less the discount so taken, and the net proceeds of the paper was entered upon the bank-book of the pl'ff.

JAMES H. JOHNSON was then called and sworn as a witness on behalf of the plaintiff, and testified: I am plaintiff; I obtained the discount of the paper mentioned at the defendant's bank; I wanted to raise money, and I took the paper there and they discounted it at the rate specified; I endorsed the paper before they took it; when it was not paid by the makers, it was charged up to my account, or I took it up by check; I paid some of the extra interest by check; that does not appear on the bill of particulars; the aggregate amount, however, is to be added to the amount appearing on the bill of $206.80; the transactions were generally had with Mr. Wood, the cashier; had no transactions with any other director; the paper was all business paper, excepting the notes mentioned on paper B.

31 The paper appearing on Ex. B was paper made and taken to the bank for the purpose of obtaining a loan thereon, and they had their first inception in the bank.

Cross-examination:

I can't state that I told Mr. Wood, the cashier, at the time the paper was discounted that it was accommodation paper, and there was nothing on the face of the paper to indicate it.

The plaintiff then rested, and JAMES M. WOOD was called as a witness on the part of the defendant, and testified as follows:

With the exception of the two-day notes, I understood that all the paper on Exhibit B was business paper; the two-day notes were discounted at 7 per cent.; I made an arrangement with Mr. Johnson to send the accommodation paper away to other banks, and get it discounted for him, charging him a commision for the same, and which I presume that he paid me.

Cross-examined:

We had a talk about it; can't state when it took place.

Redirect:

All the business paper discounted was purchased by the defendant at a uniform rate of 12 per cent. per annum, and the defendant had credit upon his bank account for the amount of the paper, less the discount.

The defendant here rested its case, and JAMES H. JOHNSON was recalled for plaintiff, and testified: I have heard the testimony of Mr. Wood; I never had any such conversation as he has detailed; I always checked against these notes; one accommodation note, S. M. Johnson, was carried about two years; on the notes marked on Exhibit B, A, B, C, D, E, F, the extra interest was paid by checks.

32 It was then admitted that the total amount of notes discounted or purchased by defendant was $158,003.91, and that the amount taken from the face of the paper at the time of the purchase or discount thereof and thus paid by plaintiff and received by defendant, was the sum of $6,392.49, with amount of checks to be added of $206.80. The excess over the legal rate is 5-12 of the whole of that amount.

The bill of particulars was put in evidence, marked A, and also paper B, which latter paper showed an aggregate of $27,028.00 of notes, upon which an aggregate sum of $813.45 was reserved by defendant and paid by plaintiff. Further admitted that all the notes were discounted or purchased at the times mentioned in the bill of particulars, and have been paid.

Paper B is included in paper A.

The evidence here closed, and the foregoing is all the evidence given on said trial.

The said referee thereupon made and filed his report, which is part of the judgment roll herein, containing his findings of fact and law, as follows, to wit:

Supreme court.

JAMES H. JOHNSON, PL'FF,
against
THE NATIONAL BANK OF GLOVERSVILLE,
def't.

To the supreme court:

Having heard the proofs and allegations of the parties, the following are my conclusions of law and fact.

CONCLUSION OF FACT.

The defendant is, and during all the times below mentioned was, a corporation duly and legally incorporated as a national bank under the

national banking laws of the United States of America, and doing business as such in Gloversville, N. Y. That from November 10th, 1874, to February 7th, 1876, the defendant, as such bank, discounted for the plaintiff a large amount of commercial paper and promissory
33 notes, viz., notes in the aggregate amounting to the sum of $158,-003.00.

That such discounts were all made by the defendant for the plaintiff at the rate of 12 per cent. annual interest, being 5 per cent. over and above the lawful interest allowed by the laws of this State. That the aggregate amount of interest paid by plaintiff to defendant on the aggregate amount of said discounts so made, was $6,564.88. That of said above sum of $6,564.88 interest, the sum of $2,735.36 was in excess of the legal rate of interest allowed by the laws of this State, was knowingly received by the defendant, and that all of said interest has been paid by plaintiff to defendant before this action.

The said sum of $6,564.88, so received by defendant from plaintiff, was interest on said discounts at the rate of 12 per cent. per annum, charged by defendant, knowingly received by it, and paid by plaintiff.

As conclusion of law, I find the plaintiff is entitled to judgment against the defendant for twice the amount of said interest received in excess of the legal rate of interest, viz., for the sum of $5,470.72.

I direct judgment to be entered accordingly in favor of plaintiff and against the defendant for said sum of $5,470.72, and that plaintiff recover the costs of this action.

June 22d, 1877.

JOHN R. PUTNAM, *Referee.*

Fee, $50.

The referee afterwards made the following additional findings of fact, and directed the same to be filed and made a part of his report:

34 Supreme court.

JAMES H. JOHNSON, PL'FF,
against
THE NATIONAL BANK OF GLOVERSVILLE,
def't.

The following additional findings of fact are hereby made and directed to be added to my original report made and filed herein:

First. That of the aggregate amount of notes and commercial paper discounted by the defendant for the plaintiff, to wit, the sum of $158,003, the sum of $146,274.37 was commercial or business paper.

That the aggregate amount of interest or discount knowingly taken thereon by the defendant and paid by the plaintiff, was the sum of $6,074.48, of which the sum of $2,640.26 was in excess of the legal rate of interest allowed by the laws of this State.

Second. That of said amount of $158,003.00 the sum of $11,728.63 was accommodation paper, consisting of notes which had their first inception upon the discount of the same by the defendant. There was nothing upon the face of the paper to indicate that it was accommodation paper.

That the amount of interest knowingly received by the defendant, and paid by the plaintiff on the discount of such accommodation paper, was the sum of $492.20. That of the said sum, the sum of $95.10 was in excess of the legal rate allowed by the laws of this State.

Third. That all the paper and notes included in the $158,003.00 has been paid to the defendant.

Fourth. The defendant did not know and had no reason to believe that the accommodation paper was such at the time the same was discounted.

JOHN R. PUTMAN, *Referee.*

35 Supreme court.

JAMES H. JOHNSON, PL'FF,
against
THE NATIONAL BANK OF GLOVERSVILLE,
def't.

EXCEPTIONS BY DEFENDANT.

To the first finding of fact in the finding of the referee in this case, commencing with the words, "That such discounts were all made by the defendant for the plaintiff at a rate of 12 per cent. annual interest, being 5 per cent. over and above the lawful interest allowed by the law of this State," and to each and every part thereof the defendant excepts.

To the first additional finding of fact by the referee in this case, commencing with the words, "That the aggregate amount of interest or discount knowingly taken thereon by the defendant, and paid by the plaintiff, was the sum of $6,074.48, of which the sum of $2,640.26 was in excess of the legal rate of interest allowed by the laws of this State," and to each and every part of the same, the defendant excepts.

To the second additional finding of fact by the referee in this case, commencing with the words, "That the amount of interest knowingly received by the defendant and paid by the plaintiff upon the discount of such accommodation paper, was the sum of $492.20," and to each and every part thereof the defendant excepts.

To the first and only conclusion of law and to each and every part thereof the defendant excepts.

36 Second. The defendant excepts to his order and decision that judgment be entered in favor of the plaintiff and against the defendant, according to his conclusion of law.

Yours, &c.,

H. S. PARKHURST,
Def't's Attorney.

Supreme court.

JAMES H. JOHNSON, PL'FF,
against
THE NATIONAL BANK OF GLOVERSVILLE,
def't.

Judgm't July 3d, 1877, at h. m. m.

This action having been duly referred, by an order, dated February 20th, 1877, to John R. Putman, esq., of Saratoga Springs, to hear and decide all the issues therein, and the report of the said referee being filed, it is now, on motion of C. M. Parke, esq., counsel for the plaintiff, adjudged that James H. Johnson, the plaintiff, recover of the National Bank of Gloversville, the defendant, the sum of five thousand four hundred and seventy dollars and seventy-two cents, with four hundred and five dollars and ninety nine cents, costs of the action, making together the sum of five thousand eight hundred and seventy-six dollars and seventy one cents, and that plaintiff have execution therefor.

W. S. McKIE, *Clerk.*

Supreme court.

JAMES H. JOHNSON, PL'FF,
against
THE NATIONAL BANK OF GLOVERSVILLE,
def't.

SIR: Take notice that the defendant, The National Bank of
37 Gloversville, appeals to the general term of the supreme court for the third judicial department, from the judgment entered in this action, in the county clerk's office of Fulton County, on the 3d day of July, 1877, for five thousand eight hundred and seventy-six dollars and seventy-one cents in favor of the plaintiff, and from each and every part thereof.

Dated July 3d, 1877.

Yours, &c.,

H. S. PARKHURST,
Defendant's Attorney.

To C. M. Parke, esq., pl'ff's attorney, and W. S. McKie, co. clerk.

38 Court of appeals.

JAMES H. JOHNSON, RESP'T,
ag'st
THE NATIONAL BANK OF GLOVERSVILLE, APPL'T.

RAPALLO, *J.:*

The same point which is raised in this case was made in Nash v. White's Bank of Buffalo, 68 N. Y., 396, viz, that the paper discounted being business paper & the transaction not usurious under the general statutes of the State, the bank was not liable under the banking act for taking a greater rate of discount than seven per cent. per annum thereon. We there held that the character of the paper was not material, & that the act applied to all discounts as well as to loans. That case arose under the State banking act of 1870, ch. 163. The provisions affecting this case contained in the U. S. banking act are identical with those of the State act, except that the latter speci-
39 fies seven per cent. per annum as the rate of interest which may be taken on every loan or discount made, or upon any note, &c., while the act of Congress says that on any loan or discount interest may be taken at the rate allowed by the laws of the State where the bank is located, and that when no rate is fixed by the laws of the State, the bank may charge a rate not exceeding seven per centum.

We think that it was the intent of the act of Congress to limit the rate to be taken on the discount of commercial paper to seven per cent. in those States where no rate was fixed by law for the interest of money, & where a rate was fixed to limit the national banks to such rate. In this State the rate of interest on money is limited to seven per cent. per annum, & the act of Congress consequently limits the rate of discount to that rate. It is claimed by the appellant that as the State law fixes no limit to the rate which natural persons may take for the dis-
40 count or purchase of existing business paper, & the taking of discount at a greater rate than seven per cent. on such paper is not usurious under the State law, there is no restriction upon the rate which national banks may take on similar discounts. We cannot so

construe the act of Congress. It limits the rate of interest to be taken on loans & discounts. If the rate were limited only on loans there might be some plausibility in the argument that the purchase of business paper at a discount did not fall within the limitation. But it distinctly specifies discounts as well as loans, and it is well known that the principal office of banks of discount is to discount the business paper of their customers. The object of the statute was to limit the rate to be charged on these discounts as well as upon loans, and this rate is limited to the rate of interest fixed by the State law, for it says that the national bank may take on any discount interest at the rate allowed by the laws of the State. This, we think, refers to the rate fixed by the State law for interest for the use of money, & not
41 the rate fixed by such law for the discount of commercial paper.

If, however, it should be deemed to refer to the rate fixed for discounts, as well as for the use of money, there as there is no rate fixed in this State for such discounts, the provision of the act of Congress, that when no rate is fixed by the laws of the State the banks may take a rate not exceeding seven per cent., would apply. That the framers of the act understood that it applied to the discount of business as well as accommodation paper is apparent from the concluding provision of § 5197, viz, that the purchase, discount, or sale of a bona-fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest. If the rate to be charged on the discount, purchase, or sale of a bona-fide bill of exchange was
42 not restricted at all by the previous provisions as to discounts, this provision was clearly superfluous. It evidently was understood that such paper was embraced in the restrictions, & the language "purchase, discount, or sale of a bona-fide bill" was employed so as to confine the privilege of including exchange in the sum charged for discount, to bona fide bills, drawn in the regular course of business, & to prevent its being made available to enable the banks under the pretext of exchange to charge additional discount on accommodation bills drawn merely for the purpose of raising money.

The effect of the act was we consider to restrict the rate of discount on all paper whether accommodation or business paper to the rate established by the State law for interest for the use of money, & where no such rate was established to seven per cent. per annum. The use of the word usurious at the end of section 5198 is not sufficient to govern the construction & make it appear that the transaction must be
43 usurious under the State law to authorize the recovery back of excessive interest paid. It is used for brevity with reference to the preceding prohibitions & a violation of them may be usury under the act of Congress though not under the State law.

The judgment should be affirmed.

Church, ch. j.; Folger & Andrews, j. j., concur. Miller & Earl, j. j., absent.

A copy.

H. E. SICKLES,
Reporter for C.

(Indorsed:) Johnson ag'st Nat. Bank of Gloversville. Opinion. Rapallo, j.

44 United States Supreme Court.

NATIONAL BANK OF GLOVERSVILLE, PL'FF IN error,
vs.
JAMES H. JOHNSON, DEF'T IN ERROR.

It is hereby stipulated and consented by and between the respective parties above named, by their respective attorneys, that the annexed opinion of the court of appeals of the State of New York be made a part of the record in this case and the clerk of this court is requested to file the same with the return herein.

Dated Dec. 29th, 1879.

C. M. PARKE,
Att'y for Def't in Error.
H. S. PARKHURST,
Att'y for Pl'ff in Error.

(Indorsed:) U. S. Supreme Court. The National Bank of Gloversville, pl'ff in error, vs. James H. Johnson, def't in error. Opinion of c't of appeals & stipulation to file with return.

(Indorsed:) Supreme Court U. S., 1879. October term. No. 683. The National Bank of Gloversville vs. James H. Johnson. Opinion & stipulation of counsel. Filed 2 January, 1880.

(Indorsement on cover:) No. 385. The National Bank of Gloversville, plaintiff in error, vs. James H. Johnson. New York sup. c't. Filed 6th December, 1878.

FILED
NOV 16 1881
JAMES H. McKENNEY, Clerk.

United States Supreme Court.

THE NATIONAL BANK OF GLOVERSVILLE,
PLAINTIFF IN ERROR,

vs.

JAMES H. JOHNSON, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

The case is brought before this Court, by writ of error, to review a judgment by the Court of Appeals of New York, affirming a judgment of the Supreme Court of that State in favor of the above named Johnson, against the National Bank of Gloversville.

The suit was commenced in January, 1877, in the Supreme Court of New York, to recover penalties alleged to have been incurred by the Bank under and by virtue of sections 5197 and 5198 of the United States Revised Statutes. The complaint is at folios 17 to 20. The answer is at folio 20. The bill of particulars of plaintiff's claim is at pages 8 to 12.

The action was referred to and tried by a Referee, in May, 1877. The case containing all the evidence before the Referee is on pages 13 and 14. The report of the Referee containing his findings of fact and conclusion of law is at folios 32½ to 34. He afterwards made an additional finding of facts, which is at folio 34.

The counsel for the Bank, the defendant below, duly excepted to some of the findings of fact and to the conclusions of law by the Referee. (Fol. 35.)

Judgment was entered in favor of the plaintiff below against the Bank for $5,470.72 and costs. (Fol. 36.)

The Bank appealed to the Supreme Court, at General Term, (folio 37,) where the judgment ordered by the Referee was affirmed. (Fols. 9 and 10.) An appeal was then taken to the Court of Appeals, by which Court the judgment below was affirmed. (Fols. 11 to 14.)

The opinion of the Court of Appeals is found in the record at folios 38 to 44. The decision is reported in 74 *New York Reports*, 329.

The complaint alleges that Johnson made and obtained divers loans and discounts of the Bank, on notes and other evidences of debt; and that the Bank, by a corrupt and usurious agreement between it and Johnson, reserved and received of him on the loans and discounts, a rate of interest exceeding seven per cent. per annum. (Complaint, fol. 18.) The answer denies this. (Fol. 20.) By the statute of New York, at the time in question, the legal rate of interest for the loan or forbearance of money, was at the rate of seven per centum per annum.

3 *Revised Statutes of New York, 5th edition, p.* 72, *&c.*

Between the 10th of November, 1874, and February 7th, 1876, Johnson transferred to the Bank negotiable paper amounting in the aggregate to $158,003.00; and the Bank paid him therefor, by crediting him in his account, the amount of this paper, less at the rate of twelve per cent. per annum on

the amount of the paper for the time it was to run to maturity. (Admissions and evidence, fols. 30 to 32; finding, 33.)

The aggregate amount of this twelve per cent. received by the Bank was $6,564.88; and of this amount the sum of $2,735.36 was the excess over seven per cent. per annum on the paper till it matured. Judgment was ordered by the Referee and entered for $5,470.72, being twice the amount of the said excess of $2,735.36. (Finding, fol. 33; judgment, fol. 36.)

All the said paper purchased or discounted as aforesaid by the Bank, was valid business paper in the hands of Johnson, except paper to the amount of $11,728,63, which was paper in fact made by other parties for the accommodation of Johnson. The excess of twelve per cent. over seven per cent. received by the Bank on this accommodation paper was $95 $\frac{10}{100}$. (Fol. 34.)

The Bank received this accommodation paper, believing and having reason to believe, that it was valid business paper in the hands of Johnson. (Testimony of Johnson, fol. 31; findings, "second" and "fourth," fol. 34.)

ASSIGNMENTS OF ERRORS.

First. For the first assignment of error, the plaintiff in error states and insists that the Referee erred in his ruling and decision as matter of law; that the plaintiff below was entitled to judgment against said Bank for the sum of $5,470.72, and in directing judgment therefor. (Findings and conclusion of the Referee, fol. 33; exceptions, fols. 35, 36.)

I. The aggregate amount of the paper transferred to and received by the Bank was $158,003.00. Of this aggregate, paper to the amount of $146,274.37 was commercial or business

paper, and paper to the amount of $11,728.63 was accommodation paper. (Findings, fols. 33 and 34.)

The excess retained by the Bank over the rate of seven per cent. per annum on the business or commercial paper was $2,640.26, and on the accommodation paper it was $95.10. The judgment was for double these two amounts. (Fols. 33 and 34.)

II. The plaintiff below was not entitled to recover double the sum of $2,640.26, the excess retained on the amount of the business paper.

By the law of New York, as long settled, persons or copartnerships may lawfully do in that State precisely what this National Bank did as to this business paper. It is neither usurious or unlawful for them to do so.

3 Revised Statutes of N. Y., 5th edition, p. 72, *&c.*
Munn v. The Com. Co., 15 *J. R., pp.* 44, 55, *&c.*
Cram v. Hendricks, 7 *Wendell, p.* 569.
Cobb v. Titus, 10 *N. Y. Court of Appeals R., p.* 198.
Rapelye v. Anderson, 4 *Hill, N. Y. R., p.* 472.

The transaction, by the law of New York, was a purchase of this commercial paper and not a loan of money. The rule of law is the same whether the owner who transfers the business paper endorses it or guarantees its payment or not.

See cases cited above.

III. The true intent and meaning of the National Banking Act is, that the corporations organized under it are to be upon the same footing as to the rate of interest on loans, and as to the amount of discount at which they may become the owners of commercial business paper as natural persons in the State where they are located.

U. S. Revised Statutes, secs. 5197, 5198.
Tiffany v. National Bank, 18 *Wall.*, 409.
National Bank v. National Bank, 92 *U. S. R.*, 122, 127.
Hinterminster v. National Bank, 64 *N. Y. R.*, 212, 216.

1st. A large portion of the business of banking in the State of New York consists of acquiring business paper at such rate of discount as the parties may agree upon. It is perfectly legal for natural persons to do so in that State. The National Banks have been accustomed to do so to a large amount. It would be contrary to the policy and spirit of the National Banking law, and seriously detrimental to the success and usefulness of the institions authorized by it, if they are to be liable to a heavy penalty for acquiring business commercial paper at the same rate of discount at which it may be and is acquired by natural persons in that State.

See 18 *Wallace, supra.*

2. The provisions of the statute in question were intended to prevent the National Banks from violating the *usury* laws of the State. (Sections 5197, 5198.)

By the law of New York, it is usurious to loan or advance money to a party upon his own paper, or upon paper made for his accommodation, at a greater rate of interest or discount than seven per cent. per annum. But it is not usurious or illegal in that State for parties to acquire business paper—paper valid in the hands of the holder—at a rate of discount agreed upon by the parties and amounting to more than seven per cent.

Penal statutes are to be constructed strictly. They are not to be extended to cases not clearly within their intent and meaning. Full effect is given to the penal provisions of the statute in question by applying them to transactions which are *usurious* by the law of the State of New York, and not applying them to transactions which are neither usurious or unlawful by the laws of New York.

The penalty is aimed at what are usurious transactions by the laws of New York; and the action for the penalty must be "commenced within two years from the time the usurious transaction occurred." If the transaction is not *usurious* by

the laws of New York, then the Bank has not incurred any penalty.

U. S. Revised Statutes, secs. 5198.

3. The Bank had authority to become the owner of commercial paper by purchase. This is a part of the ordinary business of banking.

But, conceding that the Bank had not such authority, the plaintiff below was not entitled to recover.—

(1.) By doing so, the Bank did not become liable for penalties to be recovered by the plaintiff below.

(2.) The plaintiff below could not successfully raise the question as to the want of power in the Bank.

National Bank v. Whitney, 103 *U. S. R., p.* 99.

Second. For a second assignment of errors, the plaintiff in error insists that the Referee erred in ordering and directing a recovery of penalties on account of what is called accommodation paper amounting to $11,728.63. The recovery on account of this was $190.20, being twice the sum of $95.10. (Referee's findings, fol. 34.)

I. This paper was in the form of business paper, apparently valid and enforceable, in the hands of the plaintiff below. There was nothing on the face of the paper indicating it was accommodation paper. The defendant below did not know, and had no reason to believe, that it was not business paper, valid in the hands of the plaintiff below. (Finding, fol. 34, pages 15 and 16.)

II. The plaintiff below offered it to the defendant below as business paper. The defendant, in good faith, became the purchaser of the same as business paper at a price agreed upon. The Court will not permit the plaintiff below to treat the paper now as accommodation paper to enable him to recover a penalty. He is estopped from claiming now that it was not what it purported and he represented it to be, viz: business paper, valid in his hands.

Holmes v. Williams, 10 *Paige's N. Y. R.*, 326.
Trescott v. Davis, 4 *Barbour's N. Y. R.*, 495, 498.

III. The plaintiff can no more recover on account of this paper than on account of the business paper referred to above, under the first assignment of error.

It is submitted, that the judgment below should be reversed, and a new trial ordered.

FRANCIS KERNAN,
Counsel for Plaintiff in Error.

IN THE

SUPREME COURT

-OF THE-

United States.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

THE NATIONAL BANK OF GLOVERSVILLE,

Plaintiff in Error,

vs.

JAMES H. JOHNSON,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

C. M. PARKE, Attorney,

and of Counsel for Defendant in Error.

GLOVERSVILLE
INTELLIGENCER STEAM PRINT.
1881.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE NATIONAL BANK OF GLOVERSVILLE, Plaintiff in Error, *against* JAMES H. JOHNSON, Defendant in Error.	No. 139.

In error to the Supreme Court of the State of New York.

STATEMENT OF CASE.

This action was commenced in the Supreme Court of the State of New York, on the first day of November, 1876, by James H. Johnson, defendant in error, against the National Bank of Gloversville, plaintiff in error, for the recovery of the penalty or forfeiture incurred by reason of the violation of sections 5197 and 5198 of the U. S Revised Statutes, regulating the amount of interest which may be taken by National Banks.

See Record, fols. 29, 17 *et. seq.*

The action was tried before a Referee, pursuant to an order of the Supreme Court, who reported in favor of the defendant in error, and directed judgment to be entered against the said Bank, plaintiff in error, for the sum of five thousand four hundred and seventy dollars and seventy-two cents, besides costs.

See Ref. Rep., Record, fols. 32 and 33.

From the judgment entered in pursuance of such direction, the plaintiff in error appealed to the Supreme Court of the State of New York, at General Term, where the said judgment was in all things affirmed with costs.

Record, fols. 9, 10.

From that judgment of affirmance the plaintiff in error appealed to the Court of Appeals of the State of New York, where the judgment appealed from was in all things affirmed with costs.

Record, fol. 13.

The record having been remitted from the Court of Appeals to the Supreme Court of the State of New York and judgment entered in pursuance thereof, a writ of error was allowed and taken to this Court.

Record, fol. 1.

THE PLEADINGS.

The complaint of the plaintiff below alleged the incorporation as a National Bank of the defendant below at the times mentioned in the complaint. That during the

two years immediately preceding the commencement of the action, the said bank made loans to, and discounted for the said James H. Johnson divers notes, bills, &c., amounting in the aggregate to the sum of one hundred and sixty thousand eight hundred and sixty-three dollars, and sixty cents, and that upon all such loans and discounts the said bank reserved, charged, took and received of said Johnson, and the said Johnson allowed and paid to the said bank a rate of interest exceeding seven per centum per annum, to wit: at rates varying from twelve to fifteen per cent. per annum, reckoning the time the said loans, discounts, notes, &c., had to run. That such illegal interest was paid and knowingly received, &c., contrary to the provisions of sections 5197 and 5198 of the U. S. Revised Statutes.

That the amount of interest so paid on such loans and discounts was the sum of seven thousand, seven hundred and ninety-five dollars, and fourteen cents.

That under the provisions of said sections of the U. S. Revised Statutes, the said bank became liable to pay to said Johnson twice the said amount, to wit: fifteen thousand five hundred and ninety dollars and twenty-eight cents.

Prayer for judgment for said amount.

See complaint in full, Record, fols. 17, 18. 19.

The answer of the bank denied a part of the complaint.

Admitted its incorporation, as alleged in the complaint.

Alleged that if it had received more than seven per cent., it was upon commercial paper, or paper which the plaintiff below represented as commercial at the time of the discount, which the defendant (bank) discounted by purchase.

See answer, Record, fol. 20.

PROOFS AND FINDINGS.

The proofs showed and the Referee found that the plaintiff in error was, at the times alleged in the complaint, duly incorporated as a National Bank under the National Banking laws of the United States of America, and doing business at Gloversville, New York.

Record, fols. 30, 32.

Between November 10th, 1874, and February 7th, 1876, a period embraced within two years next prior to the commencement of the action, the plaintiff in error as such bank, discounted for the defendant in error, notes in the aggregate amounting to the sum of $158,003.00

Record, fols. 30, 32, 33.

Upon these notes a uniform rate of twelve per cent. annual interest was charged and received by the bank at the time of the discount, and was paid by the defendant in error.

Record, fols. 30, 32, 33.

The amount so taken by the bank was the sum of $6,564.88.

Record, fols. 32, 33.

The excess over the legal rate in the State of New York, to-wit: seven per cent., was admitted to be 5-12 of that amount, or the sum of $2,735.36.

Record, fols. 32, 33.

This amount was knowingly charged and taken by the plaintiff in error.

Record, fols. 33, 32, 30.

All the interest was paid by Johnson to the bank before the action was brought.

Record, fols. 32, 33.

All of the notes so discounted were paid to the bank before action.

Record, fols. 32, 34.

The Referee found that the defendant in error was entitled to recover of the plaintiff in error, twice the amount of interest received in excess of seven per cent., amounting to the sum of $5,470.72.

Record, Folio 33.

The Referee, in his additional findings, has separated the business, or commercial paper, from the accommodation paper which had its first inception at the bank of the plaintiff in error.

Record, folio 34.

He finds:

The total amount of commercial or business notes discounted was....	$146,274.37
Total accommodation notes, or notes which had their first inception at the bank was	11,728.63
Total amount discounted,....	$158,003.00

Total discount taken on commercial or business paper, ...	$ 6,074.48
Total discount taken on accommodat'n paper	492 20
Total excess over seven per cent. taken on business or commercial paper,.....	$ 2,640.26
Total excess over seven per cent. taken on accommodation paper,.....	95.10
	$ 2,735.36

Record, folio 34.

All the paper discounted consisted of notes.

Record, fols. 32, 33.

The only questions presented in any of the Courts below were :

FIRST.—Was the defendant in error entitled to recover twice the excess over seven per cent. paid by him and taken by the bank upon the discount of *business* or *commercial* paper ?—and

SECOND.—Is the bank excused because it did not know that the accommodation paper was such at the time it was discounted ?

POINTS.

I.

The plaintiff was entitled to recover twice the excess

over seven per cent. taken upon the discount of business or commercial notes, as well as upon the discount of accommodation paper.

a. By "business or commercial paper" is meant notes taken in the ordinary course of business, and which had their inception before they came to the hands of the bank.

b. By "accommodation paper" is meant, notes made for the purpose of procuring a loan thereon, and which had their first inception at the bank.

1. The sections of the U. S. Revised Statutes under which this action is brought, are as follows:

"§ 5197. Any association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State, Territory or District where the bank is located, and no more, except that where, by the laws of any State, a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State, under this Title. When no rate is fixed by the laws of the State, Territory or District, the bank may take, receive, reserve or charge a rate not exceeding seven *per centum*, and such interest may be taken in advance, reckoning the days from which the note, bill or other evidence of debt has to run. And the purchase, discount or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

§ 5198. The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid or his legal representative, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred."

2. National Banks are organized under act of Congress, and Congress has power not only to authorize them to transact certain business, but to restrict the manner in which such business shall be done, and they must act strictly in the manner prescribed.

2 Kent, 290, 299.
In re. Wild, 11 Blatchford, 243.
Fowler vs. Scully, 72 Penn. St., 456.
Venango Nat. Bank vs. Taylor, 56 Penn. St., 14.
Head vs. Prov. Ins. Co., 4 Cranch, 127.
Bank of U. S. vs. Dandridge, 12 Wheat, 64.
Bank of Augusta vs. Earle, 13 Pet., 587.

They are authorized to take on any loan or discount made, or on any note, bill of exchange or other evidence of debt, interest at the rate allowed by the laws of the State, Territory or District where the bank is located, and no more, except that where State banks are permitted to take a higher rate, National banks in the same State are allowed such rate.

U. S. Rev. Stat., § 5197.

Seven per cent. per annum is the rate established by the laws of the State of New York.

1 New York, Rev. Stat. (Edm. ed.), 725.

Banks organized under New York State laws are only allowed to take, charge, &c., seven per cent.

N. Y. Laws 1870, Ch. 193.

3. The specific power has been given National banks "to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt."

U. S. Rev. Stat., § 5136, sub. 7.

Discounting promissory notes by a bank consists in advancing funds upon them, deducting the interest in advance for the time they have to run.

Webster's Dic. Discount.
Fleckner vs. Bank of U. S., 8 Wheat., 338.
Farmers' & Mechanics' Bank vs. Baldwin, 23 Minn. 198, S. C. 23, Am. Rep. 683, Thomp. Nat. Bank, Cas. 639.
Niagara Co. Bank vs. Baker, 15 Ohio, 68.

Whatsoever loose or general meaning may have been applied to the term *discount*, when not applied to banking business, no proposition is more firmly established by judicial decision than this: that discounting paper, as understood in the busi-

ness of banking, is only a mode of loaning money on the same, and taking the interest in advance.

Cases above cited and
Smith vs. Exchange Bank, 26 Ohio St., 141, Thomp. N. B. Cas., 836.
Fireman's Ins. Co. vs. Ely, 2 Cow., 699.
Talmage vs. Pell, 7 N. Y., 343.
The People vs. Utica Ins. Co., 15 Johns. N. Y., 392.
Pape vs. Capital Bank of Topeka, 20 Kans., 440, 27 Am. Rep. 183.

4. The transaction in evidence in this case, as to both business and accommodation paper, was that of DISCOUNT, and is directly within the statute which forbids the taking of more than seven per cent. "upon any loan or discount made, or upon any note, bill of exchange, or other evidence of debt."

There is nothing, either in law or reason, why a borrower may not obtain the discount by a bank of the existing notes and bills of others of which he is the holder, as well as of his own paper made directly to the bank. And when such paper is discounted in violation of the prohibition contained in section 5197, U. S. Revised Statutes, the bank so discounting is liable to the penalty imposed therefor.

Nash vs. White's Bank of Buffalo, 68 N. Y., 396.
Johnson vs. the National Bank of Gloversville, 74 N. Y., 329. See opinion Court of Appeals, Record, folio 38.
Smith vs. Exchange Bank, 26 Ohio St., 141, Thomp. Nat. Bank, Cas. 836.
First Nat. Bank of Rochester vs. Pierson, 24 Minn., 140, S. C. 31, Am. Rep. 341.

The term DISCOUNT, when applied to the business of banking, is equally applicable to business or commercial paper, and means *ex vi termini*, a deduction or drawback made upon its advances or loans of money upon negotiable paper or other evidences of debt payable at a future day, which are transferred to the bank.

Niagara Co. Bank vs. Baker, 15 Ohio St., 85.
Fleckner vs. Bank, 8 Wheat., 338.
Atlantic State Bank. vs. Savery, 82 N. Y., 291, 305.

5. It is entirely immaterial whether the transaction is called a *purchase* or a *discount.*

In McLeod on banking, speaking of "price, discount and interest," the author says: "Now as money naturally produces a profit, it is clear that the price given for a debt payable a year hence must be less than the amount of the debt. The difference between the price of the debt and the amount of the debt is called discount. Therefore, clearly the price, together with the discount, equals the amount of the debt; and as the price decreases the discount increases. In the language of the money market, it is usual to estimate the value of money by the discount or the profit it yields; and to buy or purchase a debt is always in commerce termed to discount it."

McLeod on Banking, p. 43.
See also further on same subject at page 291.

The term "discount" includes purchase as well as loan.

Pape vs. Capital Bank of Topeka, 20 Kans., 440, S. C. 27 Am. Ref., 183.
1 Bouv. Law Dict., title, Discount.

It is undeniably clear that the term *discount*, when used in a general sense, is equally applicable to either business or accommodation paper, and is appropriately applied either to loans or sales by way of discount, when a sum is *counted off*, or taken from the face or amount of the paper at the time the money is advanced upon it, whether that sum is taken for interest upon a loan or as the price agreed upon a sale.

Niagara Co. Bank vs. Baker, 15 Ohio St., 68.

The New York State Banking act gives the same powers in this regard to banks organized under it, as the Federal banking act gives to National Banks, to wit: "to carry on the business of banking by discounting bills, notes, and other evidences of debt, &c. * * * "

N. Y. Laws of 1838, Ch. 260, § 18.

The Court of Appeals of that State has held, in a case where a business note was transferred to the bank, at a place other than the banking house, and the one who transferred it did not become liable to the bank upon the note, yet that the transaction was a *discount* within the meaning of the banking act above cited.

Atlantic State Bank vs. Savery, 82 N. Y., 291.
So held in same case at General Term of Supreme Court, 18 Hun., 41.

A so called purchase of business paper, at more than seven per cent. discount, is held to subject the bank to the payment of twice the excess over the legal rates, under the provisions of that act, which

are precisely like those of the national act, in this regard.

Nash vs. White's Bank of Buffalo, 68 N. Y., 396.

It is to be noticed in this connection that the act above referred to (the New York State Banking Act,) as amended by Chap. 193, Laws of 1870, authorized a banking association organized thereunder, "to take, receive, reserve and charge, on every loan or discount made, or upon any note, bill of exchange, or other evidence of debt," interest at the rate of seven per cent. It prescribes a penalty for taking more, and then declares that the purchase, discount or sale of a *bona fide* bill of exchange, note or other evidence of debt payable at another place * * * * at not more than the current rate of exchange, or a reasonable charge for collecting in addition to interest," shall not make a case within the penalty.

This is broader than the act of Congress relating to the same matter, (§ 5197 U. S Rev. Stat.), for the latter applies its last clause to the purchase, &c., of bills of exchange only, while the former includes notes and other evidences of debt.

6. In some cases a distinction has been made between a purchase and the discount of a note as characterized by the transaction itself—thus it has been said that the term purchase is used to denote the transaction "when the seller does not endorse the note and is not accountable for it.

Farmers' and Mechanics' Bank vs. Baldwin, 23 Minn., 198.

1 Bouv. Law Dict., 481, title Discount, citing Pothier de l'usure, n 128.

See Morse on Banks and Banking, 20.

Pape vs. Capital Bank of Topeka, 20 Kans., 440, S. C., 27 Am. Rep., 183.

In the case of First National Bank of Rochester vs. Pierson, 24 Minn., 140, S. C. 31, Am. Rep., 341, it was said that the endorsement of the note by the holder at the time of the transfer is undoubtedly a distinguishing test of the character of the transaction, and raises a strong presumption denoting the existence of the relation of lender and borrower, and indicates that the parties intended a loan upon the credit of the paper so endorsed.

The case at bar is within this rule, and the evidence shows beyond any doubt that in this case there was a loan of money upon the credit of the paper transferred.

See Record, fol. 30.

The uncontradicted testimony of plaintiff on this point is as follows: "I wanted to raise money, and I took the paper there and they discounted it at the rate specified; I endorsed the paper before they took it. When it was not paid by the makers, it was charged up to my account, or I took it up by check."

7. But whether it is called a purchase or a discount, it seems to be the unanimous opinion of the courts so far as opinions have been expressed, that National Banks cannot declare such a transaction as that in evidence in this case a purchase, and thereby escape the penalty prescribed by the Federal Banking act.

In Niagara Co. Bank vs. Baker, 15 Ohio St., 68, the Court says, after discussing the term discount, "and this brings us to the precise question upon which the decision of this case depends. Was this bank empowered to discount by way of purchase, promissory notes, or must all such discounts be

deemed loans, and thus be brought within the purview of the usury laws," and they decide in favor of the latter alternative.

In Smith vs. Exchange Bank, 26 Ohio State, 141, the Court says in speaking of business notes: "It is true that, as between natural persons, the purchase of such paper, when made in good faith, and not as a disguise for a loan, is not subject to the usury laws, but it is otherwise as to a bank."

In Pape vs. Capital Bank of Topeka, 20 Kans.,440, the Court, after reviewing various cases, says: "These authorities go no further than this, that where an ordinary commercial bank is created, and power given it not generally to discount, but to carry on the business of banking by discounting, * * it may not purchase as an individual may, paper already existing at any price it may agree upon with the holder, but can only deduct from its face the legal interest in advance."

In Farmers' and Mechanics' Bank vs. Baldwin, 23 Minn., 198, the Court says "if associations" organized under authority to carry on banking by discounting, &c., "possess the unlimited power of dealing in promissory notes * * * as property, the same as individuals, then obviously this restriction as to the rate of interest is a practical nullity, as the bank has the power of evading it at any time, by simply buying the paper, instead of loaning money upon it. No judicial construction leading to such a result is allowable."

In Lazear vs. National Union Bank of Baltimore, Browne's National Bank, Cas. 261, the Court,

after discussing the question of purchase, says: "If any other construction were given to such a transaction as this, the intention of Congress to prohibit National Banks from buying and selling notes would be entirely defeated, and those institutions would be at perfect liberty to decline making discounts for their customers, and afterward buy up the very paper which had been offered for discount and refused, at such price as the banks might choose to give."

In National Pemberton Bank vs. Porter, 125 Mass., 333, S. C., 28 Am. Rep., 235, the Court says: "It is said that if this be the correct view of the law, the statute in relation to usurious contracts would be nullified; that a bank could say to its customers, 'we cannot discount this note, but we will buy it,' and thereupon does buy it, at a rate at which they were not authorized to discount it, and thus avoid the penalty. *Such r sult by no means follows.*"

In Nash vs. White's Bank of Buffalo, 74 N. Y., 399, Rapallo J., delivering the opinion in which the entire court concurred, says, "The point made by the defendant that the paper discounted, being business paper purchased by the defendants, there was no usury, does not aid its case. The question * * * under the act * * * which prohibits banks from charging on any discount a rate greater than seven per cent."

See opinion in this case, Record, folio 38.

8. It was the intent of this federal banking act to secure to the public loans and accommodations at reasonable rates, and to protect the banks and their shareholders

against the risk of loss from inadequate securities, such as would be likely to be taken under the temptation of high rates, limited only by the borrower's necessity and the cupidity of bank directors. Such object we insist would be entirely defeated if the rule is established that such transactions as in the case at bar are not within the prohibition of the statute. If the history of the transactions of this bank and its fate could be spread before the Court, no better commentary could be given of the wisdom of the construction for which we contend.

See Farmers' and Mechanics' Bank vs. Baldwin, 23 Minn., 198.

9. The plaintiff in error should be estopped, and not permitted to deny that he took those notes by discount.

National Pemberton Bank vs. Porter, 125 Mass., 333, S. C., 28 Am. Rep., 235, Browne's Nat'l Bank. Cas. 266.

In the answer of the defendant below, it is alleged and admitted that the bank disconnted this paper—that it was "discounted by purchase," but we submit that the statute is a nullity in this regard, if a bank may, by thus characterizing its discounts, escape the penalty imposed.

10. It is not necessary to make a case of usury under the general State law, and the term "usurious," as used in the end of section 5198 U. S. Revised Statutes, refers to the preceding prohibitions. A violation of them may be usurious under the act of Congress, though not under the State law.

Opinion Ct. of Appeals in this case, Record, fol. 43.
The First Nat'l Bank of Columbus vs. Garlinghouse, 22 Ohio St., 492, S. C. Thompson's Nat'l Bank Cas., 811.
Nash v. White's Bank of Buffalo, 68 N. Y., 396.

This latter decision was under the N. Y. State banking law, which contains precisely the same prohibitions and the same penalties as the National banking law.

N. Y. Laws of 1870, Ch. 163.

11. If it be said that the laws of the State of New York fix no rate for the discount of commercial paper, then the provision of the act of Congress, that when no rate is fixed by the laws of the State the banks may take a rate not exceeding seven per cent., would apply.

U. S. Rev. Stat., §5197
Opinion of Ct. of Appeals, Record, folio 41.
In re Wild 11, Blatchford, 243.
S. C. Thompson's Nat'l Bank Cas., 246.

12. Upon the discount of paper by a bank, *interest* is counted off from the face of the paper. Interest is the profit realized for the use or advance of funds, and when deducted in advance from the amount of a *c'vse in action* or evidence of debt, it is called discount.

"In commercial transactions it is customary, when a bill is be discounted, to pay to the holder or presenter the amount, minus the simple interest, calculated for the time the bill has to run."

Am. Encyclopædia. Discount. See Webster's Dic. Discount.

In Poor's Laws of Money, the author, in discussing the subject of banking and its methods, declares that business notes are the proper and usual subjects of discount.

Laws of Money. pp. 16, 18, 30, 39.

And that upon the discount of such paper interest is paid.

Id., pp. 19, 21.

At page 47, the same author says: "It has been seen that borrowers at banks always pay interest on their loans. This is paid in the first place by producers in the discount of bills received by them in the sale of their merchandise."

It would be superfluous to enter into any extended discussion of the term *interest*. It was the evident intention of Congress to prohibit banks from counting off for their own benefit more than seven per per cent. upon any advance of funds by them—to cover the whole ground, the act says, "upon any loan or discount made, or upon any note, bill of exchange or other evidence of debt," and their intention is as well expressed by the use of the term *interest*, as if it also used the terms *use*, *profit* and *discount*. In this connection all these terms are synonymous.

13. Calling the transaction a purchase was a mere device on the part of the bank to cover a forbidden rate of interest. That was a question for the jury or referee.

Southworth vs. Bennett, 58 N. Y., 659.

The finding is against the plaintiff in error upon that point, and with such finding this Court will not interfere.

U. S. Rev. Stat., § 1011.

14 The term "negotiate," as used in section 5136, subd. 7, adds nothing to the powers of national banks in respect to the acquisition of commercial or business paper. "Negotiate" means "to sell," "to pass."

Webster's Dic. Negotiate.

First National Bank of Rochester vs. Pierson, 24 Minn., 140, S. C. 31, Am. Rep. 341, Thomp. Nat'l Bank Cas. 637.

Morse on banking, 4, 5.

15. It is a fact admitted by the answer, shown in proof, and found by the Referee, that these notes in question were *discounted.* That they were discounted at a uniform rate of twelve per cent. annual interest. That the interest was paid.

See Referee's Rep., Record, folio 33.

The facts also show that upon these notes so discounted, money was loaned by the bank to Johnson, for he endorsed the paper, and when it became due, if it was not paid by the makers the bank charged it up on his account, or he took it up by check.

See Record, folio 30.

Here are all the elements of a loan, with the paper discounted and held by the bank as collateral security. Money was advanced on the strength of the security, and when due, if the bank did not realize on the collateral, the borrower at once made it good. There could not be a clearer case of a *loan.* The transaction is within all the definitions given in the

cases and authorities need not be multiplied; it is sufficient to cite

Fleckner vs. Bank, 8 Wheat., 338.
Smith vs. Exchange Bank, 26 Ohio St. 141, S. C. Thompson N. B. Cas., 836.
Talmage vs. Pell, 7 N. Y., 328.
Niagara Co. Bank vs. Baker, 15 Ohio St., 68.
Farmers' & Mechanics' Bank vs. Baldwin, 23 Minn., 198, S. C. Thomp. N. B. Cas. 639.
Pape vs. Capital Bank of Topeka, 20 Kans., 440, Browne's N. B. Cas. 238.

By whatever name it is called, it is within the prohibition of the statute.

II.

The sum of $429.20 of interest was paid by Johnson and knowingly received by the bank on accommodation paper. The sum of $95.10 was in excess of seven per cent.

Record, folio 34.

The judgment of the State Court is right for at least twice this amount, however the other question may be disposed of; for lack of knowledge on the part of the bank that the accommodation paper was such, at the time of its discount, does not avoid the liability.

Even under the State laws the discount of accommodation paper for more than seven per cent. by an

innocent party, makes the note usurious, and this has been held from the case of Wilkie vs. Rosevelt, 3 Johns. Cas. 66, down to the present time.

Whether the discounter had knowledge has never been held to affect the question.

There is much more reason to hold the principle true under the Statute in question, where the bank is prohibited from taking more than seven per cent. on any *loan* or *discount*, or on *any note*, &c.

The defendant knowingly exacted and took twelve per cent. on all this paper, and in the case of the accommodation paper it was an actual loan; it was taken to the bank for that purpose, and had its first inception there.

Record, folio 31.

In such a case, if more than legal interest is taken for the use of money, it is conclusive evidence of a corrupt agreement, although the party acted in ignorance.

Bank of Salina vs. Alvord, 31 N. Y., 473.
Hall vs. Earnest, 36 Barb., 585.

Finally, it is respectfully submitted that there is no error in the judgment below, and the same should be in all things affirmed, and direction given that it be enforced as entered.

CLAYTON M. PARKE,

Attorney and of Counsel for Defendant in Error.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~314.~~ 69

JOHN C. BELK, PLAINTIFF IN ERROR,

vs.

HENRY MEAGHER, ANTOINE GAGNON, AND LOUISA A. THORNTON.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED OCTOBER 23, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 314.

JOHN C. BELK, PLAINTIFF IN ERROR,

vs.

HENRY MEAGHER, ANTOINE GAGNON, AND LOUISA A. THORNTON.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA

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1 In the district court of the second judicial district of the Territory of Montana in and for the county of Deer Lodge.

JOHN C. BELK, PLAINTIFF AND APPELLANT, *against* ANTOINE GAGNON AND HENRY MEAGHER ET al. deft's & respondents.	Bill of exceptions on motion for new trial.

Be it remembered that heretofore, to wit, on the 25th day of October, A. D. 1877, plaintiff filed his amended complaint herein, which said amended complaint is in words and figures as follows, to wit:

Amended complaint.

In the district court of the second judicial district of the Territory of Montana in and for the county of Deer Lodge.

JOHN C. BELK, PLAINTIFF,
vs.
HENRY MEAGHER AND ANTOINE GAGNON AND Louisa A. Thornton, defendants.

2 Now comes the above named plaintiff, by his amended complaint, and complains of the above named defendants, and for cause of complaint states:

That on or about the 19th day of December, A. D. 1876, plaintiff became and was the owner and in possession and entitled to the possession of that certain quartz lode claim situated in Summit Valley mining district, Deer Lodge County, M. T., and known and designated as the Anna Maria lode claim, said claim being 1,500 feet in length and 600 feet in width, and is situated about 100 feet north of the town site of the town of Butte, and is a relocation of a part of what is known as the old original lode claim. That this plaintiff is now the owner and entitled to the possession of all of the above described quartz lode property.

That on or about the 12th day of February, A. D. 1877, while this plaintiff was such owner and in possession of the above described property as aforesaid, said defendants, Henry Meagher and Antoine Gagnon, wrongfully entered into and took possession of and ejected this plaintiff from that certain portion of the above described premises, described as follows, to wit:

That certain tract of ground (being a portion of what is known as the Anna Maria lode claim), being three hundred and forty feet in
3 length in, along, and upon the vein of said Anna Maria lode claim, running easterly and westerly and (50) fifty feet in width on each side of the centre of said vein northerly and southerly and said tract is bounded as follows: Commencing at a point about 140 feet westerly from Buffalo Gulch and on or about the northern boundary of the town site of the town of Butte, said point being the southeast corner of the tract herein in dispute and being also the southwest corner of the claim of William A. Clark and others on the original lode claim; thence running northerly one hundred (100) feet to the northeast corner of the tract of ground in dispute; thence running (340) three hundred and forty feet westerly to the northwest corner of said tract; thence running southerly one hundred (100) feet to the southwest corner of said tract, and thence running easterly three hundred and forty (340)

feet to the place of beginning. Said tract adjoins the claim of W. A. Clark and others on the east and of the National Mining and Exploring Co. on the west, both of said claims being on what is known as the old original quartz lode claim.

That said last named defendants have, ever since the 12th day of February, A. D. 1877, withheld and still do withhold the possession
4 of the above described tract of ground from this plaintiff.

That the said Louisa A. Thornton claims to have acquired the title to an undivided one-third (⅓) interest of the above described tract under and by virtue of a deed executed by the said defendants Meagher and Gagnon to the said Louisa A. Thornton for a valuable consideration. But this plaintiff avers that the said defendant Thornton well knew of the rights of this plaintiff at the time she so made her purchase and paid her money thereon, and that no title to such property passes to the said Thornton by such conveyance.

Plaintiff further avers that the value of the rents, issues, and profits of the ground herein sued for from the said 12th day of February, 1877, and while this plaintiff has been excluded therefrom, is the sum of ($1,000) one thousand dollars.

Wherefore plaintiff prays judgment against the said defendants for the restitution of said premises and against the said defendants Meagher and Gagnon for the sum of one thousand dollars the value of the rents, issues, and profits of such premises and for his costs of suit herein expended.

(Signed) JOHN F. FORBIS,
Att'y for Plaintiff.

5 TERRITORY OF MONTANA,
County of Deer Lodge, ss:

John C. Belk, being first duly sworn, says on oath that he is the plaintiff named in the foregoing action; that he has heard read the foregoing complaint, and knows the contents thereof, and that the matters and things therein stated are true of his own knowledge, except as to those matters which are therein stated on information and belief, and that as to those matters he believes it to be true.

(Signed) JOHN C. BELK.

Subscribed and sworn to before me this 10th day of October, 1877.
(Signed) JOHN F. FORBIS,
Notary Public.

Accept service of the within complaint and waive all further service, this 24th day of October, 1877.
(Signed) J. C. ROBINSON,
Att'y for Def'ts, Meagher, Gagnon, and Thornton.

(Endorsed:) 1137. John C. Belk vs. Henry Meagher et al. Amended complaint. Filed Oct. 25th, 1877, (Signed) O. B. O'Bannon, clerk, by Geo. W. Irvine, II, deputy. John F. Forbis, att'y for plaintiff.

6 And afterwards, to wit, on the 31st day of October, A. D. 1877, the defendants filed herein their answer to plaintiff's amended complaint herein, which said answer was in words and figures as follows, to wit:

Answer.

In district court, 2d judicial district, Deer Lodge County, Montana Territory.

JOHN C. BELK, PLAINTIFF,
vs.
HENRY MEAGHER, ANTOINE GAGNON AND Louisa A. Thornton, defendants.

Now come said defendants, and for their answer to the amended complaint of said plaintiff, and deny that about the 19th day of December, 1876, or at any other time said plaintiff became, or was, or now is, the owner of the property described in his said complaint, or any portion thereof, or that he was ever in possession of the same or of any portion thereof.

Defendants admit that about the time named in said complaint they entered upon and took possession of that portion of said property last described in said complaint, but aver that at said time they so entered thereon, the same was vacant and unoccupied and part of the
7 public domain of the United States, & so being, said defendants entered thereon under and by virtue of the acts of the Congress of the United States relating to the location and possession and occupancy of quartz lodes, and of the laws of said Territory, and the local rules and regulations of the district in which said lode is situated, relating thereto; and have ever since so held, occupied, and worked the same.

Defendants deny that the rents and profits of said property have been the sum of one thousand dollars, or any other sum.

Wherefore defendants pray judgment for their costs in this behalf expended.

(Signed) J. C. ROBINSON,
Attorney for Defendants.

TERRITORY OF MONTANA,
Deer Lodge County, ss:

Antoine Gagnon, being duly sworn, says on oath that he is one of the defendants above named, and has heard read the foregoing answer and knows the contents thereof, and that the facts therein stated are true of his own knowledge.

(Signed) ANTOINE GAGNON.

Subscribed and sworn to before me this 27th of October, 1877.
8 (Signed) JOHN C. C. THORNTON,
Notary Public.

Accept service of above answer and waive further service this 27th day of April, 1877.

(Signed) JOHN F. FORBIS,
Att'y for Plaintiff.

(Endorsed:) 1137. In dist. court. John C. Belk vs. Henry Meagher et al. Answer. Filed Oct. 31, 1877. (Signed) O. B. O'Bannon, clerk, by Geo. W. Irvine II, deputy. J. C. Robinson, att'y for def'ts.

And afterwards, to wit, on the 11th day of December, A. D. 1877, plaintiff filed herein his replication to defendant's answer herein, which said replication was in words and figures as follows, to wit:

Replication.

In the district court of the second judicial district of Montana Territory in & for Deer Lodge County.

JOHN C. BELK, PLAINTIFF,
vs.
HENRY MEAGHER, ANTOINE GAGNON, AND Louisa A. Thornton, defendants.

9 Now comes the above-named plaintiff, and, for replication to defendants' answers on file herein, denies that at the time of defendants' alleged entry on the ground last described in plaintiff's complaint that the same was vacant or unoccupied. Denies that defendants or either of them entered on such ground under or by virtue of the laws of the Congress of the United States relating to the location, possession, or occupancy of quartz lodes, or of the laws of Montana Territory, or the local rules and regulations of the district in which said lode is situated relating thereto, or that they have ever or at any time since, or now do so hold, work, or occupy the same.

Wherefore plaintiff prays judgment as in his amended complaint on file herein.

(Signed) SHARP & NAPTON,
JOHN H. FORBIS,
Att'ys for Plaintiff.

TERRITORY OF MONTANA,
County of Deer Lodge, ss:

John C. Belk, being first duly sworn, says on oath that he is the plaintiff in the foregoing action. That he has read the foregoing complaint, and knows the contents thereof, and that the matters and
10 things therein stated are true of his own knowledge.

(Signed) JOHN C. BELK.

Subscribed & sworn to before me this 10th day December, 1877.

(Signed) J. H. B. FOSTER,
Justice of the Peace.

Accept service of within replication and waive copy this 11th day of December, A. D. 1877.

(Signed) J. C. ROBINSON &
W. W. DIXON,
Atty's for Def'ts.

(Endorsed:) 1137. John C. Belk vs. Henry Meagher et al. Replication. Filed Dec. 11, '77. (Signed) O. B. O'Bannon, clerk. by Geo. W. Irvine II, deputy. Sharp and Napton & John F. Forbis, att'ys for plaintiff.

And on the 14th day of December, A. D. 1877, said cause coming on regularly for trial, and a jury having been duly empannelled, the following evidence was introduced, to wit:

Statement of testimony taken on trial.

In the district court of the second judicial district of Montana Territory in and for Deer Lodge County.

11 JOHN C. BELK
vs.
HENRY MEAGHER ET AL.

JOHN C. BELK, the plaintiff, was sworn and examined in his own behalf, and testified as follows, to wit,

I am the plaintiff in this action. I am a minor. I am acquainted with the ground in dispute. I located the ground on the 19th day of December, A. D. 1876, by posting notice of location on such ground, and marking the boundaries; at each corner of my claim I built of dirt and rock mixed, and dug a ditch around each mound. At the northeast corner, I built a monument of dirt and stone; dug a ditch around the mound, and stuck a stake up, which was about 2½ or 3 feet high. This stake was about 3 or 4 inches through. There was a notice in writing on this stake. I have a copy of such notice. It is, "The northeast corner of the Anna Maria lode mining claim, located by John C. Belk, December 19, 1876." The distance from NE. corner to southeast corner was about 600 feet. I built same kind of mound at the southeast corner as at northeast corner, and put up some kind of stake. I dug
12 ditch around monument and put notice on stake, which was, "Southeast corner of Anna Maria lode claim, located by John C. Belk, December 19, 1876." The southwest corner was about 1,500 feet from southeast corner. I paced the distance. At southwest corner, I put up monument and post same as others; the post at corner was larger than others. It stood about three feet above ground. I put notice on this corner similar to others. I have not copy of notice. I went to get copy, but stake was gone. I could not find it. I searched for it, but it was removed. I made no inquiry for it, but made search for it. The stake was gone, but the mound was there. The notice was almost same as others except it said "southwest corner." The northwest corner was about 600 feet from the southwest corner. I put up monument at southwest corner of dirt and rock, and a stake; stake was about 3 feet high, and about same as others. There was a notice on stake, and a ditch around mound. The notice on stake read, "Northwest corner of Anna Maria lode claim, located by John C. Belk, December 19, 1876." I placed no other stake on the ground except corner stakes. I put discovery notice on a large post that was on the ground. I placed
13 notice on ground, claiming same, on a large stake standing on ground. I do not know where original notice is; have not it in my possession. I have a copy of such notice in my possession. (Here witness introduced copy of notice.) A copy of this notice was posted at or near the centre of the claim. I heard that the name of the lode I relocated was the Gold Hill. I have since learned that it was called the original. I posted my discovery notice near a deep shaft sunk several years ago.; I posted my notice on the 19th day of December, 1876. The same day or the day before I set my corner stakes, I found a lead on the ground I located. This lead crops out. The material taken from the vein would indicate a vein. At two other places on the lode there was a hole, each indicating a lode. One hole was about 70 or 100 feet from my discovery notice. I have been on ground since I located. I have been there two or three times a week. I crossed the ground for a

long time two or three times a day. I found some holes and a ditch on the ground. The hole was from 5 to 7 feet deep. The ditch was probably 2½ or 3 feet deep. I cannot say how long holes had been sunk; some times from appearances. The ditch seemed to have been dug
14 several years since. It was hard to tell how long since hole was dug; probably 6 months, probably two years. Both holes would probably cost $20.00; 4 days' work. Defendants have taken possession of this ground since. I do not know how much rock defendants have taken from ground; I think they have taken 80 or 90 tons; I saw some of the rock; cannot say how much. Don't know what it was worth; never assayed it. I sent a copy of my notice of location to Deer Lodge for record (record of notice is here introduced and admitted in evidence by the court on part of plaintiff), a copy of which is herein transcribed on pages 72 & 73. I saw croppings of quartz on the lode; also saw veins of ore in the holes. I found well defined veins in two holes; there were granite wall-rocks on each side of ore; the lode has the appearance of being a copper lode; at one place from croppings lode appears to be very large; in the holes it appears to be small. I did work on lode at several different times. In coming from and going to work, I stopped often and worked; I dug out and examined ore. The work I did was principally done in prospecting and examining lode and rock.

I was at that time working on Acquisition lode. The last work I
15 did on Anna Maria lode claim was about Feb'y 15, 1877. The part I worked on was the ground in dispute. The ground in dispute commences about 70 feet east from centre of my claim. The ground in dispute is 340 feet in length and 100 feet in width. The north side of Butte town site is nearly parallel with south boundary of my claim. I do not know exactly the boundaries of the Butte town site. I think town site has been surveyed.

Cross-examined:

The vein lies north of Butte town site. I do not know length of north side of town site, nor do I know exactly where line is. I claim all the ground within my stakes. I know nothing of Mr. Clark having patented ground within my limits. I think he has not any patented ground within my limits. I heard that he claimed ground on my claim. I think Mr. Clark claims ground on which my discovery notice is posted. I think Mr. Clark claims about 70 feet west of my discovery stake. I don't remember of ever seeing any surveyor's monuments on Mr. Clark's claim. I have seen monuments there; don't know that they are
16 surveyor's mounds. I don't remember any marks on monuments. I don't know who the shaft belongs to; I claim it. I do not know of any stakes or mounds on line except at corners. I do not know surveyor's monuments when I see them. I do not know that monuments I saw there are surveyor's monuments; I believe they are. I believe they mark the ground Clark claims. Mr. Clark told me he claimed ground. I have not understood that Mr. Clark claims ground and has patent to it. I never did any work on ground prior to putting up my notice. I have heard that the National Mining and Exploring Company claim some ground on west line of my claim. I never set any stakes on the ground in dispute. I have done work on ground in dispute. I did not do work in the discovery shaft; I worked on ground with pick and shovel and hammer. I have worked as much as one hour at a time on such ground, aside from putting up monuments. I probably put two days' work on said ground. I never did any hard work on claim. I will swear I have done as much as 10 hours' work on claim.

I have taken out more than 500 lbs. of ore. I did this work on the ground in dispute at different places, mostly near west and east ends.
17 There were two holes on ground; one about 3 feet deep, other 6 or 7 feet deep. The holes were shapeless, neither square nor round. The three feet hole is near west end; the other hole is near east end. One hole was a kind of a ditch about 12 feet long, 3 feet wide, and 3 feet deep. It is narrower at each end than in the middle. I could dig this hole in less than a day in such rock. It was worth probably $4.00; probably could be done for less if you pay a man wages. The other hole at widest place was about 5 or 6, and about 10 feet at longest place. The hole was not regular; there are no two places the same. I believe I could dig the hole in two days. The hole has been worked on since I located. I think Meagher and Gagnon are not working there now. Don't think hole was tunnelled in 5 or 6 feet. The hole was gouged out to a point. I don't think a man could stand up in gouge. I think I could do all the work in two days. The hole at deepest from upper part of hill might be 8 or nine feet deep. I put in my time mostly breaking rock. I broke more than a ton of rock. I did not do much work with pick and shovel. I did not sink any. I cleaned out shaft and broke down some ore. I did more than one hour's
18 work with pick and shovel, besides putting up monuments. I can't tell how many holes are on my ground; there are a good many. Only two on ground in dispute. There is a hole near west end of my ground 30 or 40 feet deep. This hole is about 150 feet from west end of the ground in dispute. Theae is tunnell on south of ground. This is south of ground in dispute. There is another hole on southwest corner of my ground, and S. W. of the ground in dispute. I don't know how big it is; it is a small hole. I do not know how much work was done on the tunnel; could not tell; tunnel is all caved in. There is a hole about 500 or 600 feet east from my discovery. The hole is probably 25 or 30 feet deep, judging from dump. I think there are several other holes on the ground; they are small ones. One, I think, is marked with a location called the "Woonsocket." Do not think notice was there when I located ground. The lead cannot be traced all the way through my claim. Discovery shaft is probably 40 or 50 feet deep. It would probably take a day to the foot to sink this shaft, if not troubled with water. This shaft is timbered. Do not know who sunk shaft. There was no notice on this shaft. Different parts
19 of ground had appearance of having been formerly located. The ground in dispute might have been previously located. It had no stakes on it. The lode crops out all along west end of my claim so that it can be traced. I heard this ground was the Original lode claim after I had located it. I had an idea, before and at the time of my location, that this was the Gold Hill lode claim. I had been on ground several times before I located it. I asked a man where the Gold Hill claim was, and he told me it was at big shaft, where I located lode. There are no other big shafts close enough to make me think he meant any other shaft. The nearest one is probably 600 or 700 feet. There is no big shaft south of this shaft. We were standing from shaft about ¼ mile northwesterly. This was a day or two before I located. Joseph Clark was the man that told me. I asked him for information. I wanted to know where the Gold Hill claim was. I wanted to locate it. I supposed it to be vacant. I had information to that effect. I thought the Gold Hill was the name of the ground I located. I know where there is a shaft that I have been told was the Gold Hill. I do not
20 think it is within my limits. Some part of the Gold Hill ground

is within the limits of claim. I aimed to locate ground I located, but thought it was the Gold Hill. I had heard of Original lode. I had heard talk of it was all I knew. The last work I did on my claim I think was about middle of Feb'y. I dug out and threw up some dirt and rock. I cannot state positively what I did do. I must have had tools with me; I always have; don't know what tools. I worked on ground from time I located it until it was jumped. I didn't intend to jump anybody's ground. I thought Biclenberg and Clark had previously owned ground when I located it. I had monuments at each corner. I am positive of this; each corner had a post; I swear this positively. The stakes, as near as I could ascertain, were set as stated in the notice. East end is on level ground, very near; no bush, not much rock. A man can see a monument 100 yards off. Monuments on west end can be readily found; any man can step off distance and find the monuments. The mounds of dirt and stone were probably 1½ to 2 feet high, and about 3 feet through at bottom. I know where there is a hole I was told was the Gold Hill lode. Don't know depth of hole. Clark told me Gold
21 Hill shaft was back of Humphrey's. Buffalo Gulch runs just east of ground in dispute, about 100 feet east from discovery shaft. I claim all ground in my location. My discovery stake is on ground known as claim of W. A. Clark et al. I conveyed a portion of my location prior to bringing suit to Biclenberg and H. S. Clark. They conveyed property back to me.

Plaintiff then introduced JOHN F. FORBIS as a witness, who was sworn, and testified as follows, to wit:

I know plaintiff's location. I saw southeast corner of plaintiff's claim. It was a mound of dirt & stone, about one and one-half feet high. The stake at this corner was from 2½ to 4 feet high, above the ground. I did not take copy of notice on stake. I saw on stake that it was the southeast corner of Anna Maria lode claim. The stake was from 3 to 5 inches in diameter and hewn on one side.

Cross-examined:

This was best monument I ever saw for a location. There are from 10 to 100 monuments over hill side. I saw shaft referred to by Mr. Belk, where he had posted location notice.

22 ANDREW J. GRUBB was then sworn and examined as a witness for plaintiff, and testified as follows, to wit:

I am a miner. I am acquainted with Anna Maria quartz lode claim. I saw the monuments at the northwest and southwest corners of said claim. The stakes were 4 or 5 inches through, flattened a little on two sides. I noticed writing on corner stakes, stating that they were northwest and southwest corners of claim. Stakes also contained date of location and names of locator. The stakes stood about 3 feet high.

Cross-examined:

I saw stakes nearly every day for 2 or 3 months. I worked right by one of them; saw it every day. I did not see Belk put up stakes. I have seen Belk's discovery notice. I saw the northwest and southwest corner stakes in latter part of December, 1876.

CHARLES S. WARREN is now sworn and examined on part of plaintiff, and testified as follows, to wit:

I know the Anna Maria lode claim. I know the northeast corner of

claim. It looked as if stake had been driven in ground and dirt &
23 rock thrown up around it. The stake was 3 or 4 inches in diameter, an dabout foot & half or two feet above ground. The southwest corner was similar to the northeast corner; rock was thrown around it; it was hewn on one side. I saw enough to see that stakes were the northeast and southwest corners of Anna Maria lode claim. Stakes were signed by or had plaintiff's name on them.

Cross-examined:

I have jumped lode since defendants located it; have an agreement ment with plaintiff for a compromise in which I expect an interest.

Plaintiff now rests.

Defendants then open their case and introduce GARLAND O. HUMPHREY, who, being first duly sworn, testified as follows, to wit:

I am acquainted with the ground in dispute, and with the old Original lode. I know the ground Mr. Clark now owns, and also with the ground of the National Mining & Exploring Co.; am acquainted with the ground lying between these claims. The ground here in dispute is what is known as the west one-half of discovery claim, claim No. one (1) and a part of claim No. (2) two west from discovery on Original lode. These
24 claims were located by William Allison and myself. We located discovery claim and claims Nos. 1 and 2 west. We staked and recorded these claims. The hole I sunk there is on west half of discovery claim. I think we located claims in July or August, 1864. When I sunk discovery hole, I found pretty good copper vein, carrying silver. I found what I call wall rock and staked ground. I think we put up a stake at each end of discovery claim, and stake at end of every 200 feet of claim after. We put up notice claiming discovery claim and claims Nos. one (1) and (2) two west. We recorded claims in district records on sheets of paper attached together in book form, and it was understood at the time that district records were made on slips of paper; that they were to be copied into a book as soon as we got one. This was first book we got, and it was copied into this book, which was the first book of county records; and these records were afterwards copied into county recorder's records. I was county recorder, and turned records over to Judge Lewis, my successor. I would know district records if I could see them. (Here book was produced.) I think that is the book. I think the handwriting in the book is that of Mr. Fisk. He was
25 doing work for me. I believe this is the book in which records of district were copied. I think this is the book I had when county recorder. Mr. Fisk was deputy recorder and did most of the work. I won't be positive that the Original lode was recorded in this book. It may be that it was recorded in a small book used for district record and then copied in this book. Mr. Allison, I think, was district recorder when Original lode was recorded. These district records were kept until a county recorder was appointed. I was appointed county recorder by Gov. Edgerton. I think I received my appointment about December, 1864. Part of this book is copied from district records. District records were delivered to me when I was appointed county recorder, and that was an old district record up to time of my appointment—was copied into this book. We issued certificates of location from such records copied into this book. The signature in back of book purporting to be mine is not mine. I think same party that wrote rest signed my name. (Referring to page 30 of book, witness said): I wrote name of G. O. Humphreys on this page, but no other names that appear

on the page. I cannot say why it is that I have written some and
26 other parties have written rest. I think district records were copied just as they appeared on old records. I turned this book over to Judge Lewis, county recorder, who was my successor, in the winter of '64–'65, or spring of '65. These books were recognized as the records of that district by the miners generally. I gave the book to Judge E. E. Lewis, county recorder, at Butte, or Silver Bow. He moved his office from Butte to Silver Bow. I had my office at Butte. The county seat was wherever the records were. I was appointed county recorder by Governor Edgerton during session of legislature, I think about December, 1864. I think I entered upon the discharge of my duties about one month after my appointment. I did some recording in district records after I was county recorder, and made entries on record after my appointment. There was a dispute about Mr. Clark's west boundary. He was 60 feet further west than he had any right to go. He already owned east half of discovery claim. The shaft is close to middle of discovery claim, but is on the east half a few feet—how much I don't know. I can't fix date exactly when I delivered district records to Judge Lewis, county recorder. This book is partly copied
from old district records. I don't know what became of old dis-
27 trict records after they were copied. I do not know where they are. I think they are lost; I haven't them in my possession. The old records were partly on slips of paper fastened together and made into book form and then copied into this book. I think these slips are lost. They came into my possession in 1864. I got them as soon as I went into office. I think papers are not in existence. I think Mr. Fisk copied records of Original lode. He was deputy recorder. I cannot say that I was present when he copied record, or that I compared it. I think it is a true copy, but cannot say positively. I cannot say that I know it is a true copy; I do not knew that is. I think it is a true copy, because Mr. Fisk copied it. I authorized him to make copy. I think he made a correct copy. If I had not thought Mr. Fisk would make correct copy I would not have employed him. Mr. Fisk is somewhere in the Eastern States.

HENRY S. CLARK was then sworn and examined as a witness for defendants, and testified as follows, to wit:

I am county clerk and recorder of Deer Lodge County, M. T. This
is one of the books of record in my office. I found this book in
28 office when I took charge of office. I have no slips of paper attached together in book form or otherwise purporting to be the records of Summit Valley Mining District, now in my office, as those described by G. O. Humphreys, as being the original records of that district.

(Defendants here offered in evidence such book and record of Original lode as therein contained, a copy of which is as follows:)

SUMMIT VALLEY DISTRICT, M. T.

E. *Original lode.* W.

Brannan & Fuller .....200 ft., Sept. 4, '64, No. 6.
Discovery Humphreys and Allison .....200 ft., Aug. 10, '64.
G. O. Humphreys .....200 ft., Aug. 10, '64, No. 1.
Wm. Allison .....200 ft., " " " " 2.
J. B. Robertson .....200 ft., " " " " 3.

	T. Sequin	200 ft.,	Aug. 10, '64,	No. 4.
	Geo. S. Scranage	200 ft.,	" " " "	5.
No. 5,	R. Repperton	200 ft.,	" " " "	
	S. B. Miner	200 ft.,	" " " "	7.
No. 1,	Maltby	200 ft.,	" 12, '64.	
" 2,	John Ryan	200 ft.,	July 11, '64.	
" 3,	McClurg & Robertson	200 "	Aug. 13, '64.	
	H. H. Porter	200 "	Sept. 7, '64, "	9.
	T. C. Porter	200 "	" 7, '64, "	10.
29	H. Madison	200 "	Sept. 7, '64,	No. 11.
	Anson Ford	200 "	" " " "	12.
	Geo. Holman	200 "	" 4, '64, "	17.
	Patrick Smith	200 "	" " " "	16.
	C. M. Ryan	200 "	" " " "	13.
	Wm. Barker	200 "	" " " "	14.
	Geo. Weldon	200 "	" " " "	15.
	Charles Blivins	200 "	" 12, '64, "	18.
Solon,	Johnson & Gleason	100 "	Oct. 1, '64, "	8.
No. 6,	Alex. Scott	200 "	" 14, '64.	
" 8,	G. W. Newkirk	200 "	" 14, '64.	
" 9,	P. M. Fiske claims	200 "	" 14, '64.	
" 7,	D. Leary	200 ft.,	" 15, '64.	
	John Gleason	200 "	" " "	No. 19.
	S. W. Long	200 "	" " " "	20.
No. 4,	S. M. Wessels & J. Townshend	200 "	" 18, '64.	
	T. W. Talifero	100 "	Nov. 4, '64, "	8.
	John Cowan	200 "	" 7, '64, "	21.
	John Miller	200 "	" 8, '64, "	22.
	N. Contancier	200 "	" " " "	23.
	J. Plunkett	200 ft.,	Nov. 8, 1864, "	24.
	J. McCamon	200 "	" 16, '64, "	25.

30 To the introduction of which plaintiff objected. The court admitted such book, and plaintiff excepted to ruling.

Defendants then introduced JOHN C. C. THORNTON, who was sworn and examined as a witness for defendants, and testified as follows, to wit:

I am acquainted with discovery claim and claims Nos. one (1) and two (2) west on Original lode. Have known the ground since '68, or '69. There was a deed from William Allison and wife of such premises to Joseph D. Binns. The deed came into my possession. I had it recorded, and could never find it since. I have not seen it since. I have not seen deed for years. I have looked for it recently among my papers and could not find it. I have never given deed to any one. I do not know that I ever took deed from recorder's office. I am satisfied it is lost. I never took copy of the deed. I can't say whether original was ever delivered to me by county recorder. Haven't any memory about it.

Defendants then recalled H. S. CLARK, who testified as follows, to wit:

(Referring to copy of deed.) That is my handwriting; it is a copy of the original instrument. I copied it myself. I have made search
31 in proper places in my office for deed from Allison & wife to Binns, but cannot find it.

Defendant then offered in evidence copy of such deed, to the in-

troduction of which plaintiff objected, and his objection was overruled, and plaintiff excepted to ruling of court.

William Allison & wife to Joseph D. Binns.

Know all men by these presents that we, William Allison and Mary A. Allison, wife of said William Allison, both of the town of , county of Dade, and State of Missouri, parties of the first part, for and in consideration of the sum of five hundred dollars ($500.00) to us paid, which we do hereby acknowledge to have received of Joseph D. Binns, of the county of Deer Lodge, and Territory of Montana, party of the second part, do grant, bargain, sell, and forever transfer unto the said Joseph D. Binns, his heirs and assigns forever, all our right, title, and interest, said interest being an undivided one-half of property below described, except claim No. two west, on the Original lode, in and to all that certain part or parcel of quartz mining property situate, lying,
32 and being in Summit Valley district, county of Deer Lodge, and Territory of Montana, known and described as follows, to wit: Claims No. one and two west, and discovery claim, being six hundred feet, all on the Buffalo lode; also, claim No. two west, the same being two hundred feet; and an undivided one-half interest in one hundred feet of discovery claim west, all on the Original lode. Also, claim No. 4 east and five west, being four hundred feet on the Missoula lode; also, discovery claim and claims No. one and two west, and one and two east, being one thousand feet on the Pacific Slope lode; also, east half of discovery claim and claims No. one and two east, being five hundred feet on the Lead lode; also, west half of discovery claim and claim No. one west and two west, being five hundred feet on the Mountain lode; also, discovery claim and claims No. one east and claims No. two, three, & four west, being one thousand feet on the Lookout lode; also, discovery claim and claims No. one west and one east, being six hundred feet on the Moscow lode; also, discovery claim and claims No. one and two west, being six hundred feet on the Twin Sisters lode; also, discovery claim and claims No. one and two east, being six hundred feet on the Last Chance lode; also, discovery claim and claims No. one west
33 and No. one east, being six hundred feet on the North lode; also, discovery claim and claims No. one east and No. one west, being six hundred feet on the South lode; also, claims No. seven and eight west, being four hundred feet on the Grey Eagle lode; also, No. two west, being two hundred feet on the Nova Scotia lode; also, claims No. five and six west, being four hundred feet on the Butte lode; also, discovery claim and claims No. one and two east, being six hundred feet on the Black Chief lode; also, claim No. two west, being two hundred feet on the Jennie Lind lode; also, claim No. five east, being two hundred feet on the Bob Tail lode; also, claim No. two east, being two hundred feet on the Wild Pat lode; also claim No. five east, being two hundred feet on the Copperhead lode; also, claim No. two west, being two hundred feet on the Rabbit lode; also, claim No. five east, being two hundred feet on the Virginia lode; also, claim No. four west, being two hundred feet on the Melbourne lode; also, claim No. fifteen east, being two hundred feet on the Comstock lode; also, claim No. two east, being two hundred feet on the Lulu lode; also claim No. two west, being two hundred feet on the Sunny Side lode; also, claim No. five
34 west, being two hundred feet on the Mountain Chief lode; also, claims No. five and six west, being four hundred feet on the Springfield lode; also claim No. two west, being two hundred feet on the

Sheffield lode; also, claim No. five west, being two hundred feet on the Douglas lode; also, claim No. three west, being two hundred feet on the Wilderness lode; also, claims No. one and two west, being four hundred feet on the Mount Shasta lode; also, claim No. one west, being two hundred feet on the Caledonia lode; also, claims No. five and six east, being four hundred feet on the Blind lode; also, discovery claim and claims No. one east and No. one west, being six hundred feet on the North Branch lode; also, claim No. one west, being two hundred feet on the Lunt to Lust lode; also, claim No. two southwest, being two hundred feet on the Brazil lode; also, claim No. two west, being two hundred feet on the Transcient lode; also, claim No. five southeast, being two hundred feet on the Mountain Air lode; also, claims No. one and two west, being four hundred feet on the Johnnie Bull lode; also, claim No. one west, being two hundred feet on the St. Mary's lode; also, claim No. three west, being two hundred feet on the Robin Hood
35 lode, together with all and singular the dips, spurs, and angles, tenements, hereditaments, and appurtenances thereto belonging, and all the estate, property, possession, and claim whatsoever, as well in law as in equity, of said parties of the first part of and to the above described premises and every part and parcel thereof.

To have and to hold to the said Joseph D. Binns, his heirs and assigns, forever.

In witness whereof we have hereunto set our hands & seals this the 22d day of June, A. D. 1872.

(Signed) WILLIAM ALLISON. [SEAL.]
(Signed) MARY A. ALLISON. [SEAL.]

[50 cents int. rev. stamp, canc'd.]

STATE OF MISSOURI,
County of Dade, ss:

Be it remembered that on this 22nd day of June, A. D. 1872, before the undersigned, clerk of the circuit court within and for the county of Dade and State of Missouri, personally came William Allison and Mary A. Allison, who are personally known to me to be the same persons whose names are subscribed to the foregoing and annexed instrument of writing as parties thereto, and acknowledged the same to be
36 their act and deed for the purposes therein mentioned; and the said Mary A. Allison, being by me first made acquainted with the contents of said instrument, upon an examination separate and apart from her husband, acknowledged that she executed the same, and relinquishes her dower in the real estate therein mentioned, freely and without fear, compulsion, or undue influence of her said husband.

In testimony whereof I have hereunto set my hand and affixed my official seal at my office in Greenfield, the day and year first above written.

{ CIR. COURT SEAL } ARCH M. LANG,
{ DADE CO., MO. } *Clerk.*

Filed for record September 11th, A. D. 1873, at 9 o'clock a. m.
H. S. CLARK,
County Recorder.

Defendants then recalled JOHN C. C. THORNTON, who testified as follows, to wit:

I have not in my possession a certain deed from Joseph D. Binns to myself of ground on the Original lode. I lost deeds. I had such deed

6 or 7 years ago. I have made search among my papers, but cannot find deed. I never gave deed to any one.

37 H. S. CLARK was then recalled and examined for defendants, and testified as follows, to wit:

(Referring to copy of deed.) That is my handwriting. This is exact copy of original instrument. I copied it from original deed. I have made examination, and have not the original deed in my possession. I took acknowledgment to deed. I am satisfied I saw Binns sign deed.

(Here defendants introduced in evidence copy of deed from Joseph D. Binns to J. C. C. Thornton, which was objected to by plaintiff, and objection overruled, and plaintiff excepted to ruling of the court.)

Joseph D. Binns to John C. C. Thornton.

Know all men by these presents that, Joseph D. Binns, of the county of Deer Lodge, and Territory of Montana, party of the first part, for and in consideration of the sum of one thousand dollars to me in hand paid, which I do hereby acknowledge to have received of John C. C. Thornton, of the county of Deer Lodge and Territory of Montana, party of the second part, do grant, bargain, sell, and convey unto
38 the said John C. C. Thornton, his heirs and assigns forever, all my right, title, and interest (said interest being an undivided one-half of property below described, except claim No. 2 west, on the Original lode) in and to all that certain part or parcel of quartz mining property situated, lying and being in Summit Valley district, County of Deer Lodge and Territory of Montana, known and described as follows (all claims being two hundred feet each), to wit, claims No. one (1) and two west, and the discovery claim on the Buffalo lode, and No. two (2) west, and an undivided one-half interest in one hundred feet of discovery claim west, all on the Original lode; also claims No. four (4) east and five west on the Missoula lode; also discovery claim and claims Nos. one and two west, and one and two east, on the Pacific Slope lode; also the east half of discovery claim and claims Nos. one and two east on Lead lode; also the west half of discovery claim and No. one west, and two west, on the Mountain lode; also the discovery claim and claims No. one east, and claims No. two, three, and four west, on the Lookout lode; also discovery claim and claim No. one west, and No. one east, on the Moscow lode; also discovery claim and claims Nos. one and two west, on the Twin Sisters lode; also discovery claim and
39 claims Nos one and two east, on the Last Chance lode; also, discovery claim and claims No. one west, and No. one east, on the North lode; also, discovery claim and claim No. one east, and No. one west, on the South lode; also, claims No. seven and eight west, on the Grey Eagle; also, claim No. two west, on the Nova Scotia lode; also, claims Nos. five and six west, on the Butte lode; also, discovery claim and claims Nos. one and two east, on the Black Chief lode; also, claim No. two west, on the Jenny Lind lode; also, claim No. five east, on the Bobtail lode; also, claim No. two east, on the Wild Cat lode; also, claim No. five east, on the Copperhead lode; also, claim No. two west, on the Rabbit lode; also, claim No. five east, on the Virginia lode; also, claim No. four west, on the Melbourne lode; also, claim No. fifteen east, on the Comstock lode; also, claim No. two east, on the Lulu lode; also claim No. two west, on the Sunny-Side lode; also claim No. five west, on the Mountain Chief lode; also claims No. five and six west, on the Springfield lode; also, claim No. two west, on the

Sheffield lode; also, claim No. five west, on the Douglas lode; also, claim No. three west, on the Wilderness lode; also, claims Nos. one and two west, on the Mount Shasta lode; also, claim No. one
40 west, on the Caledonia; also, claims No'. five and six east, on the Blind lode; also, discovery claim and claims No. one east and one west, on the North Branch lode; also, claim No. one west, on the Trust to Luck lode; also, claim No. two southwest, on the Brazil lode; also claim No. two west, on the Transcient lode; also, claim No. five southeast, being on the Mountain Air lode; also, claims Nos. one and two west, on the Johnny Bull lode; also, claim No. one west, on the St. Mary's lode; also, claim No. three west, on the Robin Hood lode; together with all and singular the dips, spurs, and angles, tenements, hereditaments, and appurtenances thereto belonging; and all the estate, property, possession and claim whatsoever, as well in law as in equity, of said party of the first part, of and to the above described premises, and every part and parcel thereof.

To have and to hold to the said John C. C. Thornton, his heirs and assigns forever.

In witness whereof I have hereunto set my hand and seal this 5th day of September, A. D. 1872.

(Signed) JOSEPH D. BINNS. [SEAL.]

TERRITORY OF MONTANA,
County of Deer Lodge, ss:

41 Be it remembered, that on this the 5th day of September, A. D. 1872, before the undersigned, county clerk, within and for the county of Deer Lodge and Territory of Montana, personally came Joseph D. Binns, who is personally known to me to be the same person whose name is subscribed to the foregoing and annexed instrument of writing as a party thereto, and acknowledged the same to be his act and deed for the purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my official seal, at my office, in Deer Lodge City, the day and year first above written.

H. S. CLARK,
County Clerk, Deer Lodge County, M. T.

Filed for record September 11th, A. D. 1873, at 10 o'clock a. m.
(Signed) H. S. CLARK,
County Recorder.

Defendant then recalled JOHN C. C. THORNTON, who testified as follows, to wit:

I have not in my possession a certain deed from C. E. Humphreys et al. to myself, nor is it under my control. I have looked for it among my papers; can't find it. I had it; don't know what became of
42 it. (Referring to record of deed.) I think C. stands for Chastine. Chastine is Mr. Humphrey's christian name. "C" represents the name he goes by. I don't know what "G" stands for. I always call him George. (Referring to deed from J. C. C. Thornton and wife to John T. Murphy.) "Jas" here used stands for and represents John. J. C. C. are initial letters of my name. My sire christened me John Caldwell Calhoun Thornton. That is my name. I have not the deed from myself & wife to John T. Murphy in my possession or under my control. I gave deed to Murphy. Murphy resides in Helena. So far as I know, my wife executed the deed from myself and her to Murphy at the time in the deed mentioned.

HENRY MEAGHER was then recalled and examined on part of defendants, and testified as follows:

I am one of the defendants in this action. I have not in my possession or under my control a deed from Allison and wife to Binns, or a deed from Binns to Thornton, or of Thornton & wife to Murphy, conveying any interest on Original lode claim. I have none of such deeds in my possession or under my control.

G. O. HUMPHREYS was then recalled on part of defendants, and testified as follows, to wit:

43 My name is G. O. Humphreys. (Referring to deed from Humphreys et al. to Thornton.) G. O. Humphreys is my name. G. O. stands for Garland Oliver. "C. E." represents Chastine Erasmus. That is my brother's christian name.

Defendants then introduced ANTOINE GAGNON, who testified as follows, to wit:

I am one of defendants in this action. I have not, nor have ever had, in my possession or under my control a deed from Allison and wife to Binns, or a deed from Binns to Thornton, or from Humphreys et al. to Thornton, or from Thornton & wife to Murphy, conveying any interest in Original lode. I do not know where such deeds are.

(Defendants here offered in evidence the record of deeds from C. E. Humphreys et al. to Thornton, and of J. C. C. Thornton and wife to Murphy. Objected to by pl'ff. Objection overruled, and plaintiff excepts.)

Humphrey, C. E., and wife, Humphrey, G. O., to Thornton, John C. C.

Know all men by these presents that we, G. O. Humphrey, C. E. Humphrey, and Vianet Humphrey, wife of C. E. Humphrey, all of the town of Butte and county of Deer Lodge, in the Territory of Montana,
44 parties of the first part, in consideration of the sum of one thousand dollars to us paid, which we do hereby acknowledge to have received of John C. C. Thornton, of the town of Deer Lodge, county of Deer Lodge, and Territory of Montana, party of the second part, do grant, bargain, sell, and forever transfer unto the said John C. C. Thornton, his heirs and assigns, forever, all our right, title, and interest in and to an undivided one-half interest, said interest being one undivided fourth of all the property below described (except claim No. 1 west on the Original), in all that certain part or parcel of quartz mining property, together with all the dips, spurs, and angles thereof, situate, lying, and being in Summit Valley mining district, in the county of Deer Lodge and Territory of Montana, known and described as follows, to wit: One undivided one-half interest in claim No. one (1) west, the same comprising two hundred feet (200 ft.); also, one-fourth interest in the west half of discovery claim, all on the Original lode; also, discovery claim and claims Nos. one (1) and two (2) west, being six hundred (600) feet, all on the Buffalo lode; also, claim No. (4) four and No. (5) five west, being four hundred feet on the Missoula lode; also, discovery claims
45 and claims No. (1) one and (2) two west, and claims No. (1) and two (2) east, being one thousand feet, all on the Pacific Slope lode; also, east half of discovery claim and claims No. one and two east,

being five hundred feet on the Lead lode; also, west half of discovery claim and claims No. one and two west, being five hundred feet on the Mountain lode; also, discovery claim and claims No. one (1) east, and two (2), three (3), and four (west), being one thousand feet on the Lookout lode; also, discovery claim and claims No. one (1) west and No. one (1) east, being six hundred feet on the Moscow lode; also, discovery claim and claims No. one (1) & two (2) west, being six hundred feet on the Twin Sisters lode; also, discovery claim and claims Nos. one (1) and two (2) east, being six hundred feet on the Last Chance lode; also, discovery claim and claims No. 1 west and No. one east, being six hundred feet on the North lode; also, discovery claim and claims No. one east, and No. one west, being six hundred feet on the South lode; also, claims No'. seven (7) and eight (8) west, being four hundred feet on the Grey Eagle lode; also, claim No. two west, being two hundred feet on the Nova Scotia lode; also, claims No'. five (5) and six (6) west, being four hundred feet on the Butte lode; also, discovery claim and
46 claims Nos. one (1) and two (2) east, being six hundred feet on the Black Chief lode; also, claim No. two (2) west, being two hundred feet on the Jenny Lind lode; also, claim No. (5) five east, being two hundred feet on the Bob Tail lode; also, claim No. two (2) east, being two hundred feet on the Wild Pat lode; also, claim No. (5) five east, being two hundred feet on the Copperhead lode; also, claim No. two (2) west, being two hundred feet on the Rabbit lode; also, claim No. five (5) east, being two hundred feet on the Virginia lode; also, claim No. four west, being two hundred feet on the Melbourne lode; also, claim No. fifteen east, being two hundred feet on the Comstock lode; also, claim No. two east, being two hundred feet on the Lulu lode; also, claim No. two east, being two hundred feet on the Sunny Side lode; also, claim No. five west, being two hundred feet on the Mountain Chief lode; also, claims No'. five and six west, being four hundred feet on the Springfield lode; also, claim No. five west, being two hundred feet on the Sheffield lode; also, claim No. five west, being two hundred feet on the Douglas lode; also, claim No. three west, being two hundred feet on the Wilderness lode; also, claims Nos. one & two west, being four hundred feet on the Mount Shasta lode; also, claim No. one west, being two hundred feet on the Caledonia lode; also, claims Nos. five
47 and six east, being four hundred feet on the Blind lode; also, discovery claim and claims No. one east and No. one west, being six hundred feet on the North Branch lode; also, claim No. one west, being two hundred feet on the Trust to Luck lode; also, claim No. two southwest, being two hundred feet on the Brazil lode; also, claim No. two west, being two hundred feet on the Transcient lode; also, claim No. five southeast, being two hundred feet on the Mountain Air lode; also, claims No. one and two west, being four hundred feet on the Johnny Bull lode; also, claim No. one west, being two hundred feet on the St. Mary's lode; also, claim No. three west, being two hundred feet on the Robin Hood lode; together with all and singular the spurs, dips, and angles, tenements, hereditaments, and appurtenances thereunto belonging; and all the estate, property, possession, and claim whatsoever, as well in law as in equity, of said party of the first part of, in, and to the above described property, and every part and parcel thereof.

To have and to hold unto the said John C. C. Thornton, his heirs and assigns, forever.

In witness whereof we have hereunto set our hands and seals this 31st day of May, A. D. 1872.

C. E. HUMPHREYS. [SEAL.]
48 VIANET HUMPHREYS. [SEAL.]
G. O. HUMPHREYS. [SEAL.]

[$1 int. rev. stamp, canc'd.]

TERRITORY OF MONTANA,
County of Deer Lodge, ss:

On this the day of May, A. D. 1872, before me, William P. Wheeler, a justice of the peace in and for said county, personally appeared G. O. Humphreys, C. E. Humphreys, and Vianet Humphreys, his wife, to me personally known to be the persons described in, and who executed the foregoing deed, and who each acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein mentioned; and that the said Vianet Humphreys, wife of the said C. E. Humphreys, upon an examination begun, had separate and apart from and without the hearing of her said husband, after being by me made acquainted with the contents of said deed, acknowledged to me that she executed the same freely and voluntarily and without undue influence or compulsion of her said husband, and that she does not wish to retract the same.

Witness my hand this the 31st day of May, A. D. 1872.

(Signed) WM. P. WHEELER,
Justice of the Peace.

Filed for record June 3d, A. D. 1872, at 7 o'clock p. m.

(Signed) H. S. CLARK,
County Recorder.

49 Know all men by these presents that we, John C. C. Thornton and Louisa A. Thornton, wife of said Thornton, both of the town of Deer Lodge, county of Deer Lodge, and Territory of Montana, in consideration of the sum of one thousand dollars to us paid by John T. Murphy, of the city of Helena, county of Lewis & Clarke, in the Territory of Montana, the receipt of which sum we do hereby acknowledge, do bargain, sell, and convey unto the said John T. Murphy, his heirs and assigns forever, the following property, situate and described as follows, to wit: Claim number one (1), west from discovery, the same comprising two hundred feet (200 ft.); also the west half of discovery claim, the same being one hundred feet (100 ft.), and seventy-five feet of the east end of claim number two west, in all three hundred and seventy-five feet (375 feet), all on the Original lode; also claims number one and two (1 & 2), west from discovery, fractional, the same comprising three hundred & fifty feet (350), all on the Mountain lode; also claims No. one (1) and two (2), east from discovery; discovery claim and one-half of claim number one west, comprising in all seven hundred feet (700 ft.), all on the Moscow lode; all of said quartz property
50 lying and being in Summit Valley mining district, in the county of Deer Lodge, and Territory of Montana; also an undivided one-third interest in Placer mining lot number thirty-eight (38), situate in Pioneer mining district, in township nine (9) north, of range eleven (11) west, containing an area of one hundred and fifty and $\frac{10}{100}$ acres (150 10-100 acres), in the county of Deer Lodge, and Territory of Montana; together with all and singular the spurs, dips, and angles and appurtenances thereunto belonging.

To have and to hold the property aforesaid unto him, the said John T. Murphy, his heirs and assigns, forever.

In witness whereof we have hereunto set our hands and seals this the twenty-eighth day of January, A. D. 1876.

(Signed) J. C. C. THORNTON. [SEAL.]
LOUISA A. THORNTON. [SEAL.]

TERRITORY OF MONTANA,
County of Deer Lodge, ss:

On this the 28th day of January, A. D. 1876, before me, H. S. Clark, county clerk & recorder in and for said county, personally appeared J. C. C. Thornton and Louisa A. Thornton, his wife, personally well known to me to be the persons described in and who executed the forego-
51 ing conveyance, and the said J. C. C. Thornton acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned; and the said Louisa A. Thornton, wife of said J. C. C. Thornton, upon an examination by me had, separate and apart from and without the hearing of her said husband, after being made acquainted with the contents of said instrument, acknowledged to me that she executed the same freely and voluntarily, without fear, compulsion, or undue influence of her said husband, and that she does not wish to retract the execution of the same.

In testimony whereof I have hereunto set my hand and affixed the seal of said county the year and day in this certificate above written.

{ SEAL OF DEER LODGE CO., M. T. } (Signed) H. S. CLARK,
County Clerk & Recorder in & for Deer Lodge County, M. T.

Filed for record January 28, A. D. 1876, at 9 o'clock a. m.
(Signed) H. S. CLARK,
County Recorder.

J. C. C. THORNTON was then recalled and examined on part of def'ts, and testified as follows, to wit:

The deeds before referred to contain description of same prop-
52 erty as that described in the complaint. I claimed the property under those deeds. In year 1875 I employed Mr. Humphreys to make representation of property according to law. I don't know that Mr. Humphreys did any work on the ground. I was not there. I employed him for myself.

Cross-examined:

I employed Mr. Humphreys directly; he was in town here, I think. Humphreys came to me and offered to represent ground according to law, if I would allow him to take out what ore he wanted. The agreement was that he was to take out ore and have it; there was no limit on the amount; I wanted the lead represented; I made contract some time in 1875; can't say when; I can't say work was done before June, 1875; never thought whether Humphreys complied with contract; I don't know when Humphreys made affidavit of representation; this affidavit was put on record of district; don't know when.

G. O. HUMPHREYS was then recalled and examined on part of the defendants, & testified as follows, to wit:

When I first located Original lode, I put up big rough stakes, 5 or 6 inches through and 2 or 3 feet high. The stakes were set 200 feet

apart and at end of each claim. There was something written
53 on stakes; they are lost. There was written on stakes whose
claim it was, and how much they claimed; there were dates on stakes, part of which I remember, and others I don't; dates corresponded with times stakes were put there; records of claims were made in reasonable times after stakes were put up; I think just as soon as we staked ground we recorded it; probably same day staking was done. I had a contract with Thornton to do work on Original lode in 1875 on the ground in controversy. I agreed with Col. Thornton to represent ground for a consideration; I was to take out ores and make what I could. The agreement was that I was to represent ground for Thornton for 1875, and take my pay out of ore that I took out; I burned about three loads of wood on the ground to thaw it out so that I could take out ore; I thawed out the ground and took out ore; I assorted ore into two piles; that was the ore I intended to use; other ore I threw out as rubbish with dirt. The wood I burned was cut for shaft timbers; was worth as much as fire-wood; fire-wood was worth as much as $7.00 per load. After ground was thawed out I sunk pit. I took out ore part of time and assorted ore part of time. The pit I sunk was
12 or 14 feet long and about 8 feet wide—maybe more. The hole
54 on south side was 3 or 4 feet deep at shallowest place; the ore
dipped north, and at north side hole was 7 feet deep; the character of the ground was quartz, loam, and clay, resembling pipe-clay. The digging was tough, hard work; I used a pick in all of it; had a pick and shovel. This hole is about 375 feet west from centre of discovery claim, and is on the ground in dispute. I hired some help in doing this work; I had two men working on the ground, one at a time; I don't recollect one of men's name; I called him John; the other was Alex. Scott. The hired men dug and threw out ore. The work, as near as I can tell, was worth $200. I don't recollect how many days I worked. I figured up and found I was out about $200 on work. First man worked about 6 days; Scott worked from 8 days to 2 weeks; I don't recollect how long—something over a week—I think about 10 days; work at that time was worth about $4.00 per day. I furnished tools. If a man furnished his own tools, work was worth $5.00 per day. I worked more or less in different places; hired men worked only in one place. I worked some east of hole about 125 or 150 feet; this work didn't amount to anything; don't know how much it was. I worked a
little on another hole about 375 feet east of where hired men
55 were working. This was on the old discovery hole; I didn't make
any estimate of that work. I was picking and shovelling out loose rock in hole and assorting ore on top; probably pilled up 1,500 or 2,000 pounds of rock; all the work outside of first hole didn't amount to as much as one day's work; the discovery hole in 1875 was 10 or 11 feet deep, 7 feet wide on top, and about 10 or 12 feet long at surface; hole runs gradually up, so that a man can climb up it. We stripped off some dirt at west end of hole and thew it back into hole. The north bank of hole was caved in some. The entire amount of work that I done and have done in 1875 amounted to over $200.00. I did not do more than two days' work in taking out ore at that hole. I worked some on hole when hired men were not working; I probably worked two (2) days in throwing out ground before I hired men; I worked on ground some after hired men quit, assorting ore; I did not take out much ore. I can't tell how how much I worked. I worked on ground most of time hired men were working—probably 18 or 20 days in all at different kinds of work, assorting ore, building fires, etc.

Cross-examined:

56 About ⅔ of discovery hole is on ground in controversy. There has been some work on hole since 1864. Mr. Clark's survey takes in part of discovery hole. The work I did was on west end of the ground in dispute. I commenced to dig where there was a sort of oblong place already dug out. It was about 12 or 14 inches deep, and looked like it had been sunk with sticks. The hole I sunk was 7 feet at deepest place and about 4 feet at shallowest place. I do not know how long it would take a man to dig this hole if ground were not frozen; it is owing to circumstances. A man with ordinary showing ought to dig hole in 10 or 12 days. That is as little time as I would expect a man to do the work in. (I commenced work early in the spring of '75 and continued until as late as June.) There was snow on ground when I commenced. I think I made affidavit to work. I don't know how long after I did work. I heard from one of the men that helped me last in San Francisco. I don't know where other man is. I agreed to pay these men $4.00 per day. I think I had three loads of wood on ground. I did not dispose of any of wood for firewood. I believe I made arrangements with Thornton in Deer Lodge. I never made any arrangement with
57 Murphy. Thornton was living in Deer Lodge. Don't know when he moved to Butte. Don't know where Murphy lives. The character of the ground in which I sunk hole was quartz and rock, with granite wall rocks. The ground was frozen about 3 feet deep. The ground was thawed out in places, and in other places was not, when I commenced work. I did no blasting. I think I took out 18 or 20 tons of ore. Width of vein varied; sometimes was 18 or 20 inches wide; at other times 2½ feet wide. I can't say how much of vein was ore. I found copper ore and red rock, which has proved very rich.

DENIS LEARY was then called for defendants, and was sworn and examined, & testified as follows, to wit:

I live in Butte, and am a miner. I came to Butte in August, 1864. I have not lived there ever since. I know the Original lode and the ground in controversy. I was in Butte in 1875. I was on ground in dispute sometime in spring of '75. I went on the ground to look at ore. I found pile of assorted ore on ground. I saw pit ore was taken from. I think pit was on No. 2 west from discovery; hole was between 8 & 10 feet wide. I wondered why they made it so wide. I think
58 hole was over 12 feet long. On south side was not over two (2) feet deep, and vein dipped to north. North side was 5 or 6 feet deep. The stripping was thrown back. There was good deal of loose dirt in hole. I am not certain that there was any work done west of this place. I cannot tell how long it would take to sink hole. The rock outside was hard rock. I think I saw this hole in 1864; only about 8 inches de p in centre. In 1875, I believe, some parties paid as much as $6.00 per day for representation. I only paid $3.50 for regular work. If rock in hole is such as I thought, it would be worth $50 or $60. It makes a big difference if ground was frozen. A man can't do ½ work in frozen ground that he can do otherwise.

JOEL W. RANSOM was then called for defendants, was sworn and examined, and testified as follows, to wit:

I live at Butte. Have been there since '66. I am a miner. I know ground in controversy. I know Mr. Humphreys and Alex. Scott. I was in Butte in 1875; was on ground in controversy in spring of '75. I

can't say what time. At this time Mr. Humphreys and Alex. Scott were at work. At another time I saw Mr. Humphreys and some other man at work—one might have been 8 or 10 days after other. At
59 first time Scott was in hole and Humphreys was assorting ore. At second time the other man was in the hole and Humphreys was assorting ore. I don't know who man was. Sat at hole for some time. I don't know that I have been on ground since until this season. At times I was on ground I thought they were doing good work. Miners' wages in 1875 were 4 and 5 dollars per day. Some parties paid as high high as $6.00. I don't know how much it would cost to do work. It was a big hole, from 10 to 12 feet wide, from 12 to 15 feet long, and from 3 to 7 feet deep. I don't think work could have been done for less than $60 or $70.

Defendants then introduced C. E. IRVINE, a witness for defendants, who was first sworn & examined, testified as follows, to wit:

I went to Butte in December, 1875. I had lived there before. I know ground in controversy. I saw it next day after I got to Butte. I saw the hole dug on the ground. The hole was 8 or 9 feet wide by about 12 feet in length. In the south side the hole was about 3 or 4 feet deep; on north side, 7 or 8 feet deep. Miners' wages were $4 or $5 per day. I think it would take a man 10 or 12 or 15 days to sink the hole.

60 DAVID R. MCDONALD was then sworn and examined on part of defendants, & testified as follows, to wit:

I have resided at Butte since May last. I know Original lode and ground in controversy. I worked on west end of ground last June for Mr. Meagher. I don't know of any hole on this ground except on east end. There was old pit at west of claim. Old pit was 13 or 15 feet long, 8 or 10 feet wide; on north side 7 feet deep & on south side 3 or 4 feet deep. We started shaft on the north side of shaft. I worked on this shaft 8 or 10 days. Mr. Meagher worked with me. It appeared that most of the dirt had been cast back. We dug shaft 4 or 5 feet from old pit. I think it would take a man 15 or 16 days to dig old pit. The deeper we got in our pit the softer the dirt got.

HENRY MEAGHER was then recalled and examined for defendants, and testified as follows, to wit:

I am one of defendants in this action; I have no interest in action now. I sold out. I know the ground in dispute. I located it in Feb'y, 1877. Mr. Gagnon was with me. We put notice on ground and put corners up. I put up stake; notice was on first. We put up notice and corner stakes. My notice was posted on the east end of claim. I put 2 × 4 scantling up; put box on stake and notice in box; I
61 stuck stake in ground and piled rocks around it. Rocks were piled 1½ or 2 feet high. The box was nailed on stake; was a wooden box, about 2 feet long & 1 foot wide. I do not know what became of notice. Do not know where it is. Notice was not in box when I was on ground last. It is not now in my possession. (Referring to copy of notice.) That is a copy of the notice I put up on ground. Notice was printed; I put one stake at each corner. The stake at southeast corner was a pretty large stake; probably 6 inches in diameter. Northeast corner was split pole with dirt thrown around. The pole was 3 or 4 inches through, and 2 or 2½ feet high. The northwest corner was about the same, with dirt around post. The southwest was rock mound;

stake was about same size as others. There was some snow on ground. From east to west, stakes were 500 feet; other way was 200 feet. I wrote on stakes the corner and name of lode. I found vein in hole when I put my notice. There was a well defined vein and wall. I sent copy of notice to Deer Lodge for record. I didn't work on ground for two weeks after I located it. I commenced work two weeks after location; sunk hole on center of ground. I worked there one day; hired man
62 worked there 1½ days. My partner went to work on hole there. We sunk hole 17 feet deep. Hole is 7 × 4 feet in clear. I sunk a shaft on north side of old hole 25 feet deep and 4 × 7 feet in the clear. I run two drifts in shaft; one 25 the other 30 feet. A hole had been previously sunk near shaft. I did not sink old shaft; it was about 12 feet long, 8 feet wide, and 3 or 4 feet deep on north side. It seemed to be about same character of ground that I was working in. I think it would take a man 15 or 16 days to sink old shaft. The ground was what I would call picking rock.

Cross examined:

This is a copy of notice that was posted in box. I don't know where original notice is. Don't know who took it off. Did not see Gagnon take it. I did not do any work on ground before I located it. I saw no notice on the ground I located. I saw notice on the shaft, but did not read it. I supposed that Col. Thornton had originally claimed this ground. I heard that Belk had a notice on the shaft, but I paid no attention to that. If a stake was southwest corner of claim I marked it "southwest corner for Gagnon lode." I put no names on stake. I heard Belk had notice at Clark's shaft. I heard that he had claimed
63 Gold Hill lode. His notice was on my ground. I never talked to any one about Belk claiming ground. I saw Belk's notice; thought he had located ground too soon, and went on and located it myself. I saw Mr. Belk's corners afterwards; did not see them before. I did not see Belk's notice until the day before I located ground, or on the same day. I was in Butte in Feb'y, 1877. I was working on Lexington about one mile from the ground in dispute. I went by the ground as I went to work. I was watching the ground; I worked on the Lexington after I took this ground up. I was not in Butte in January; I was on ground in 1876. The day I set stakes on the ground the ground was frozen. I didn't sink the stakes more than 1 foot in ground, but piled up rocks around the stakes; somebody packed off one of the stakes and the N. W. corner fell down. The stakes were standing after the ground thawed out; the stakes were likely to stand for a year if not knocked down. I sold my interest to Mr. Mahon & Co. and Rosenthol & Kelly.

ANTOINE GAGNON was then recalled and examined on part of deft's, and testified as follows, to wit:

64 I am one of the defendants in this action; I was present with Mr. Meagher when we put notice upon ground. We put notice in a box at the side of a hole; I looked for notice and could not find it. It is not there now. It was not in box when I looked for it. We tacked notice in box when we located ground.

(Def't's here offered in evidence copy of notice of location, which was objected to by plaintiff and objection overruled and plaintiff excepted.)

J. C. C. THORNTON was then recalled and examined on part of defendants, and testified as follows, to wit:

There was never any work done on the ground in 1876. I never au-

thorized any one to do any work. Mr. Murphy never authorized any one to do any work. I was attending to ground for Mr. Murphy. I agreed to attend to work, but did not do so; it was an oversight.

Cross examined:

I was in Rocker in '76; I don't think Mr. Murphy was at Butte in '76; I don't know when original stakes fell down; I don't think Mr. Murphy was ever in Butte.

(Record of Gagnon lode claim offered in evidence; objected to by plaintiff & objection overruled; plaintiff excepts.)

65 GAGNON LODE CLAIM.

SUMMIT VALLEY MINING DISTRICT, DEER LODGE COUNTY, MONTANA TERRITORY.

Notice is hereby given that the undersigned have this twenty-first day of February, A. D. 1877, located 500 feet in length and 200 feet in width on the above named quartz lode mining claim, bearing gold, silver, copper & other metals, situated in the mining district, county and Territory aforesaid, together with all mineral veins contained within the following described inches and bounds, to wit: Beginning at a stake planted at the discovery shaft on the Original lode, thence running north (100) one hundred feet to a stake; thence running west (500) five hundred feet to a stake; thence running south (200) two hundred feet to a stake; thence running east (500) five hundred feet to a stake, and thence running north (100) one hundred feet to the place of beginning. This claim, formerly known as the west half of discovery claim and claims number (1) one and (2) west from discovery on the original quartz lode, comprising 500 feet in a west direction and from the center of discovery shaft, including one hundred in width on each side of the centre of said lode, the corners of said claim being marked by posts firmly set in the ground so that its
66 boundaries can be readily traced. A similar copy of this notice was posted at the discovery shaft on said claim on the 21st day of February, A. D. 1877.

(Signed) PATRICK H. MEAGHER.
" ANTOINE GAGNON.

MONTANA TERRITORY,
Deer Lodge County, ss:

The undersigned, being first duly sworn, on oath says, each for himself and not one for the other, that he is of lawful age: a citizen of the United States; and that the foregoing notice by them subscribed is similar copy of the original notice of location of the claim above described as posted thereon on the day therein stated.

(Signed) PATRICK H. MEAGHER.
" ANTOINE GAGNON.

Subscribed and sworn to before this 21st day of February, 1877.

(Signed) ANSON FORD,
Justice of the Peace in & for said County.

(Endorsed:) Gagnon lode claim. Filed for record February 22d, A. D. 1877, at 8 o'clock p. m., and recorded in book II of lodes, at page 458, records of Deer Lodge County, Montana Territory. (Signed)
67 H. S. Clark, county recorder. Filed December 18th, '77, O. B. O'Bannon, clerk. By Geo. W. Irvin, II, deputy. Fee, $3.00; paid. Defendants rest.

ROBERT HANSWIRTH is now sworn and examined on part of plaintiff in rebuttal, and testified as follows, to wit:

I live in Butte; am a miner; know ground in dispute perfectly. I heard testimony of witnesses as to hole on ground in dispute. I saw hole in Dec., '76, or January, '77. I saw it some two months ago; also hole was about 12 feet in length, 4 to 5 feet in width, 4 feet in one place and 2½ in another in depth. The value of digging hole would not be over $15 or $20. I could dig hole in two or three days. If ground was frozen 3 feet deep, I could dig the hole in 4 or 5 days. I have mined for three years. The National Mining and Exploring Co.'s ground cuts this hole in two; about one-half of hole is on this ground. Part of work on ground in dispute is not worth over $8.00 or $10.00

Cross examined:

I never measured hole, but I know what I think it is worth to
68 dig it; but I think $20.00 would be big price to dig hole. I have mined in quartz for other parties and for myself. Dug such a hole as this on south side of Silver Bow Creek, 9 x 15 and 25 feet deep. There were two of us, and were from 10 to 13 days in digging hole. There was no water. It was mostly granite—2 feet of hard quartz and sometimes less. We timbered it all. I swear positively we were not over 16 or 17 days digging this hole. There is some difference in digging in summer and winter. Never dug any on original ground. I only judge from looking at ground, and it was soft rock. I guessed at size of hole on the original lode. I went there to look around; was looking at lead. I stepped down in hole; it might have been filled up some. The only loose dirt in hole in what had caved in. None had been thrown back; if any, very little. I cannot swear positively hole was not over 4 feet deep anywhere, but I will swear positively it was not over five feet deep anywhere. In deepest part it was caved in some; I was in deepest part. Perhaps a day and a half difference in working in frozen ground & ground not frozen. I have worked in frozen ground. Never saw it frozen 2 feet deep. A hole 4 feet deep & 4 or 5 feet wide,
69 & 12 feet long, if frozen a foot, I could dig in a day. I have heard that line of National Mining and Exploring Company's ground runs through hole. Heard it from Lin McFarland & Belk. Belk said he knew where line was, and that it runs through hole. I never had any talk with Belk about my testimony. Belk told me N. M. & Ex. Co. owned ground on west.

DEMAS L. MCFARLAND is then sworn and examined on part of plaintiff, & testified as follows, to wit:

I live in Deer Lodge. I am a surveyor. I know ground in dispute. Was on ground to-day. I saw hole about 12 feet long. Don't know where boundaries of ground were in 1875. I saw 4 stakes on Gagnon claim—one at each corner. I surveyed north boundary as marked for Gagnon lode; the length was 312 feet. I know nothing of line in 1875. I saw hole about west boundary of ground in dispute. The hole was 12 feet long. I measured it. I did not measure depth or width. Hole is nearly filled up now. I should judge it was about 4 feet wide.

Cross-examined:

There was snow in hole; not much on surface. There is a good deal of dirt, which has been thrown out of hole. Know nothing of size or depth of hole in 1875.

ANDREW J. GRUBB was then recalled and examined on part of plaintiff, and testified as follows, to wit:

70 I am a miner. I live in Butte. Have been over the ground in controversy. I heard some testimony about hole sunk there. I have examined the hole; I should judge hole was 12 feet long, 5 or 6 feet wide, and 3 or 4 feet deep. I have mined a good deal. How long it would take to dig hole would depend on the time of the year. I think I could dig hole in 4 or 5 days, any time. I saw hole in Sept., '75, and from that time on. It was about same size in 1875 as now. It was caved in a little. I have walked over ground 4 times a day for 3 months at a time. I worked on acquisition and for Prof. Smith; wages were $3.00 or $3.50 per day. I never saw time when a man could not dig hole in 4 or 5 days. If ground was frozen solid it might take longer.

Cross examination:

I have no interest in this suit. I have not helped hunt up testimony. I have been in hole 50 times, looking at rock; I can't say about what time. I am not a very good worker. I saw hole first in August, 1875, and examined it at that time. I wanted to see rock. I saw no dirt thrown back in hole. There was no loose dirt to amount to any-
71 thing in hole. Hole was well cleaned out and was not caved in.

JOHN H. LEFFLER was then sworn and examined for plaintiff, & testified as follows, to wit:

72 ANNIE MARIA LODE CLAIM.

SUMMIT VALLEY MINING DISTRICT, DEER LODGE COUNTY, MONTANA TERRITORY.

Notice is hereby given that the undersigned has this nineteenth day of December, 1876, located fifteen hundred feet in length and six hundred feet in width, on the above named quartz lode mining claim, bearing copper and other metals, situated in the mining district, county, and Territory aforesaid, together with all mineral veins contained within the following described metes and bounds, to wit: Beginning at a stake at the southwest corner of the claim and running eastwardly fifteen hundred feet; thence westwardly fifteen hundred feet; thence southwardly six hundred feet to the place of beginning, and is a relocation of the Gold Hill lode claim, and is located on the north side of the Butte town site, comprising 750 feet in an eastwardly direction, and 750 feet in a westwardly direction from the centre of discovery shaft, including 300 feet in width on each side of the centre of said lode, the corners of said claim being marked by posts firmly set in the ground, so that its boundaries can be readily traced. A similar copy of this notice was posted at the discovery shaft on said claim on the nineteenth day of December, 1876.

73 (Signed) JOHN C. BELK.

TERRITORY OF MONTANA,
Deer Lodge County, ss:

The undersigned, being first duly sworn, on oath says, each for himself and not one for another, that he is of lawful age, a citizen of the United States, and that the foregoing notice by him subscribed is a similar copy of the original notice of location of the claim above described as posted thereon on the day therein stated.

(Signed) JOHN C. BELK.

Subscribed and sworn to before me this 19th day of December, 1876.
[SEAL.] (Signed) CHARLES S. WARREN,
Notary Public.

(Endorsed :) Annie Maria lode claim. Filed for record December 21st, A. D. 1876, at 7 o'clock p. m., and recorded in Book II of Lodes at page 374, records of Deer Lodge Co., M. T. (Signed) H. S. Clark, county recorder. Filed Dec. 18th, 1877. (Signed) O. B. O'Bannon, clerk. By Geo. W. Irvin, II, deputy. $3.00; paid.

The foregoing evidence was agreed to before me by attorneys for the respective parties and is all the evidence introduced in said cause—
74 is correct and made a part of the bill of exceptions herein, this 29th day of December, A. D. 1877.
(Signed) HIRAM KNOWLES,
Judge 2nd Dist., M. T.

75 And during the progress of said trial and the introduction of said evidence the following objections were duly made and exceptions taken and signed at the request of plaintiff, to wit:

Bill of Ex., No. 1.

In the dis. court, second judicial district, Deer Lodge County, Montana Territory.

JOHN C. BELK, PLAINTIFF,
vs.
HENRY MEAGHER ET AL., DEFENDANTS.

Be it remembered that on the trial of this cause, G. O. HUMPHREYS was introduced as a witness for defendant, who testifies as follows:

I am acquainted with the ground in dispute in this action, and with the old Original lode claim. I know the ground now owned by Mr. Clark, and also the ground of the National Mining and Exploring Company, and am also *also* acquainted with the ground lying between the two claims. The ground here in dispute is what is known as the west one half of discovery claim, No. one west and a portion of No. 2 west from discovery on the old original lode; these claims were located by William Allison and myself. We located discovery claim and claims Nos. one and two west. I know where the hole is that I sunk there.
It is on the west half of discovery claim. This was in August or
76 July, 1864. I sunk discovery hole; found pretty good copper ore carrying silver. I found what I call wall rock, and staked the ground. I put up stake at each end of discovery claim and a stake at each 200 feet. We put up notice claiming discovery claim and claims No'. 1 & 2 west from discovery. We recorded claims in district records, and these records were afterwards copied into records in county recorder's office. I was district recorder and turned records over to Judge Lewis, county recorder. I would know records if I saw them. (Here record was produced). I think that is the book. I think the handwriting in the book is that of Mr. Fisk. He was doing work for me. I believe this is the book in which the district records were copied. I think this is the book I had when county recorder. Mr. Fisk was deputy recorder, and did most all the work. I won't be positive that the Original lode was recorded in this book. It may be that it was copied in a small book used

for dist. record and copied in this book. Mr. Allison, I think, was district recorder when Original lode was recorded. These district records were kept until a county recorder was appointed. I was appointed county recorder by Gov. Edgerton. I think I received my appointment about December, 1864. Part of this book copied from district
77 records. District records were delivered to me when I was appointed county recorder. All that was in old district records up to time of my appointment was copied into this book. We issued certificates of location from such records copied into this book. The signatures in back of the book purporting to be mine is not mine. I think same party that wrote rest signed my name. (Referring to page 30 of book, witness said:) I wrote name of G. O. Humphries on this page, but no other names that appear on the page. I could not tell why it is I have written some and other parties have written rest. I think district records were copied just as they appeared on the old record. I turned this book over to my successor, the county recorder, in the winter of '64–'65. These books were recognized as the records of the district by the miners generally. I gave the book to Judge C. E. Lewis, county recorder, at Butte or Silver Bow. He moved his office from Butte to Silver Bow. I had my office at Butte. The county seat was wherever the county records were. I was appointed county recorder by Gov. Edgerton during the session of the legislature in December, '64. I think I entered upon the discharge of my duties about one month after my appointment. I did some recording in district records
78 after I was county recorder, and made entries on record after my appointment. There was a controversy about Mr. Clark's west boundary. He was 60 feet further west than he had a right to go. He already owned east half of discovery claim. The shaft is close to the middle of discovery claim, but is on the east half a few feet; how much I don't know. I can't fix the date positively when I delivered district records to Judge Lewis, county recorder. This book is partly copied from old district record. I don't know what became of old district records after they were copied. I do not know where they are. I think they are lost. I havn't them in my possession. The old records were partly on slips of paper fastened together, and made into book form, and then copied into this book. I think these slips are lost. They came into my possession in 1864. I got them as soon as I went into office. I think papers are not in existence. I think Mr. Fisk copied record of original lode. He was deputy recorder. I cannot say that I was present when he copied it, or that I compared it. I think it is a true copy, but cannot say positively. I cannot say that I know it is a correct copy. I do not know that it is. I think it is a true copy, because Mr.
79 Fisk copied it. I authorized him to make copy. I think he copied correctly. If I had not thought Mr. Fisk would make a correct copy, I would not have employed him. Mr. Fisk is somewhere in the Eastern States.

Defendants then introduced H. S. CLARK, a witness for defendants, who testified as follows, to wit:

I am county clerk and recorder of Deer Lodge County, M. T. This is one of the books of record in my office. I found the book in my office when I took charge of office. I have no such records now in my office as those described by G. O. Humphrey's as being the original records of the district.

Defendants then offered to introduce in evidence such book, to the introduction of which plaintiff, by his counsel, then and there objected,

on the ground that such book was no record at all, and was not the original record of Summit Valley Mining District; that there was no proof of the loss or destruction of the original records of such district, and no proof showing that this book was a copy of such records; which objection of plaintiff the court overruled, and admitted in evidence such book, and the record of such original lode claim as therein contained, as appears at page 4 of said book, & is in words & figures following, to wit:

80 SUMMIT VALLEY MINING DISTRICT, M. T.

E.	*Original lode.*			W.
Brawmunn & Tullar	200 feet	Sept. 4, '64.		No. 6
Discovery, Humphreys & Allison	200 "	Aug. 10, '64.		
G. O. Humphreys	200 "	" " "		No. 1
Wm. Allison	200 "	" " "		" 2
J. B. Robertson	200 "	" " "		" 3
T. Sequin	200 "	" " "		" 4
Geo. S. Scrannage	200 "	" " "		" 5
No. 5, R. Ripperton	200 "	" 18, '64.		
S. R. Minro	200 "	" " "		" 7
No. 1, Maltby	200 "	" 12, '64.		
" 2, John Ryan	200 "	July 11, '64.		
" 3, McClurg & Robertson	200 "	Aug. 13, '64.		
H. H. Porter	200 "	Sept. 7, '64.		" 9
T. C. Porter	200 "	" " "		" 10
H. Madison	200 "	" " "		" 11
Anson Ford	200 "	" " "		" 12
Geo. Holman	200 "	" 4, '64		" 17
Patrick Smith	200 "	" " "		" 16
C. M. Ryan	200 "	" " "		" 13
Wm. Berkin	200 "	" " "		" 14
Geo. Welden	200 "	" " "		" 15
Charles Blivins	200 "	" 12, '64		" 18
81 Solon, Johnson & Gleason	100 "	Oct. 1, '64		No. 8
No. 6, Alex. Scott	200 "	" 14, '64.		
No. 8, Geo. Newkirk	200 "	" " "		
" 9, P. M. Fisk claims	200 "	" " "		
" 7, D. Leary	200 "	" 15, '64.		
John Gleason	200 "	" " "		No. 19
S. W. Long	200 "	" " "		" 20
4, S. M. Wessels & J. Townsend	200 "	" 18, '64.		
T. W. Talliafero	100 "	Nov. 4, '64		" 8
John Cowan	200 "	" 7, '64		" 21
John Miller	200 "	" 8, '64		" 22
W. Constancin	200 "	" " "		" 23

(Page 92 of said book as follows:)

SUMMIT VALLEY DISTRICT, M. T.

E.	*Original lode.*			W.
J. Plunkett	200 ft.	Nov. 8, 1864.		No. 24
J. McClarren	200 "	" 16, "		" 25

And to the ruling of the court in admitting said book and record of

said original lode as therein contained plaintiff then and there excepted, and asked the court to sign this his bill of exceptions; which is done this 17th day of December, A. D. 1877.

(Signed) HIRAM KNOWLES, *Judge.*

82 *Bill of Ex., No. 2.*

In the district court, second judicial district, Deer Lodge County, Montana Territory.

JOHN C. BELK, PLAINTIFF,
vs.
HENRY MEAGHER ET ALS., DEFEND'TS.

Be it remembered that on the trial of this cause defendants offered in evidence the records of a certain deed, dated , A. D. 1872, from William Allison & wife to Joseph D. Binns, to the introduction of which plaintiff objected.

And thereupon said defendants introduced J. C. C. THORNTON as a witness, who testified as follows, to wit:

I had said deed in my possession; have examined for it; could not find it; am satisfied it is lost. I never took any copy of it. Don't remember if it was returned to me by the recorder; there is a copy of it in the records.

Whereupon said defendants introduced HENRY S. CLARK, who testified:

I am clerk and recorder of Deer Lodge County. The records offered here are a copy of the original deed from Allison & wife to Binns, above referred to. I have carefully examined for the original in my office where it would be found if there, and was unable to find it, and thereupon defendants again offered in evidence said record as a copy
83 of said deed, of which the following is a copy, to wit:

William Allisón & wife to Joseph D. Binns.

Know all men by these presents, that we, William Allison and Mary A. Allison, wife of said William Allison, both of the town of , County of Dade, and State of Missouri, parties of the first part, for and in consideration of the sum of five hundred dollars ($500) to us paid, which we do hereby acknowledge to have received of Joseph D. Binns, of the County of Deer Lodge, and Territory of Montana, party of the second part, do grant, bargain, sell, and forever transfer unto the said Joseph D. Binns, his heirs and assigns forever, all our right, title, and interest—said interest being an undivided one-half of property below described (except claim No. 2, west on the original lode) in and to all that certain part or parcel of quartz mining property situated, lying, and being in Summit Valley District, County of Deer Lodge, and Territory of Montana, known and described as follows, to wit: Claims No. one and two west, and discovery claim, being six hundred feet, all on the "Buffalo" lode; also claim No. two west, the same being two
84 hundred feet, and an undivided one-half interest in one hundred feet of discovery claim west, all on the Original lode; also claim No. four east, and five west, being four hundred feet on the Missoula Lode; also discovery claim and claims Nos. one and two west, and one and two east, being one thousand feet on the Pacific Slope lode. Also east half of discovery claim, and claims Nos. one & two east, being five hundred feet on the "Lead" lode; also west half of discovery claim &

No. one west, and two west, being five hundred feet on the Mountain lode; also discovery claim, and claims No. one east, and claims No. two, three, and four, west, being one thousand feet on the Look Out lode; also discovery claim, and claim No. one west, and No. one east, being six hundred feet on the "Moscow" lode; also discovery claim, and claims No. one and two west, being six hundred feet on the Twin Sisters lode; also discovery claim, and claims Nos. one and two east, being six hundred feet on the Last Chance lode; also discovery claim, and claim No. one west, and No. one east, being six hundred feet on the North lode; also discovery claim, and claims No. one east, and No. one west, being six hundred feet on the "South" Lode; also claims Nos. seven and eight west, being four hundred feet on the Grey Eagle lode; also
85 No. two west, being two hundred feet on the Nova Scotia lode; also claims No. five and six west, being four hundred feet on the "Butte" Lode; also discovery claim, and claims Nos. one and two east, being six hundred feet on the Black Chief lode; also claims No. two west, being two hundred feet on the Jenny Lind lode; also claim No. five east, being two hundred feet on the Bob Tail Lode; also claim No. two east, being two hundred feet on the Wild Pat lode; also claim No. five east, being two hundred feet on the Copperhead lode; also claim No. two west, being two hundred feet on the Rabbit lode; also claim No. five east, being two hundred feet on the Virginia lode; also claim No. four west, being two hundred feet on the Melbourne lode; also claim No. fifteen east, being two hundred feet on the Comstock lode; also claim No. two east, being two hundred feet on the Lulu lode; also claim No. two west, being two hundred feet on the Sunny Side lode; also claim No. five west, being two hundred feet on the Mountain Chief lode; also claims Nos. five & six west, being four hundred feet on the Springfield lode; also claims No. two west, being two hundred feet on the Sheffield lode; also claim No. five west, being two hundred feet on the Douglas lode; also claim No. three west, being two hundred feet on the
86 Wilderness lode; also claims No. one and two west, being four hundred feet on the Mount Shasta lode; also claim No. one west, being two hundred feet on the "Caledonia" lode; also claims No. five and six east, being four hundred feet on the Blind lode; also discovery claim and claims Nos. one east, and one west, being six hundred feet on the North Branch lode; also claim No. one west, being two hundred feet on the Trust To Luck lode; also claim No. two south-west, being two hundred feet on the Brazil lode; also claim No. two west, being two hundred feet on the Transient lode. I also claim No. five south-east, being two hundred feet on the Mountain Air lode; also claims Nos. one and two west, being four hundred feet on the Johnny Bull lode; also claim No. one west, being two hundred feet on the St. Mary's lode; also claim No. three west, being two hundred feet on the Robin Hood lode; together with all and singular the dips, spurs, and angles, tenements, hereditaments, and appurtenances, thereto belonging; and all the estate, property, possession, and claim, whatsoever, as well in law as in equity, of said parties of the first part of and to the above described premises, and every part and parcel thereof.

To have and to hold to the said Joseph D Binns, his heirs, and assigns, forever.

87 In witness whereof, we have hereunto set our hands and seals this the 22nd day of June, A. D. 1872.

(Signed) WILLIAM ALLISON. [SEAL.]
(Signed) MARY A. ALLISON. [SEAL.]

[50 cents int. rev. stamp, canc'd.]

STATE OF MISSOURI,
County of Dade, ss:

Be it remembered that on this 22nd day of June, A. D. 1872, before the undersigned, clerk of the circuit court within and for the County of Dade and State of Missouri, personally came William Allison and Mary A. Allison, who are personally known to me to be the same persons whose names are subscribed to the foregoing and annexed instrument of writing, as parties thereto, and acknowledged the same to be their act and deed for the purposes therein mentioned. And the said Mary A. Allison, being by me first made acquainted with the contents of said instrument, upon an examination separate and apart from her husband, acknowledged that she executed the same, and relinquishes her dower in the real estate therein mentioned, freely and without fear, compulsion, or undue influence of her said husband.

In testimony whereof, I have hereunto set my hand and affixed my official seal at my office in Greenfield, the day and year first above written.

88 { CIR. COURT SEAL, DADE CO., MO. } (Signed) ARCH. M. LONG, *Clerk.*

Filed for record September 11th, A. D. 1873, at 9 o'clock a. m.
(Signed) H. S. CLARK, *County Recorder.*

To the introduction of which plaintiff objected, for the following reasons:

1st. It is incompetent, intending to show an outstanding title in a stranger, with whom defendants do not propose to connect themselves, which is inadmissable in this case.

2nd. The said deed has not been properly acknowledged and certified to, so as to convey any interest in real property under the laws of this Territory.

3rd. The certificate of acknowledgment to said deed does not show that said Allison acknowledged the same to the officer, or that it was freely & voluntarily done or that his said wife acknowledged the same to said officer, or without the hearing of her said husband, or that she did not wish to retract the same.

4. For the further reason that the same has not been properly acknowledged so as to entitle it to be recorded or to impart notice. Upon the argument of said objections it was duly entered as an admis-
89 sion that defendants did not claim as successors in interest to said Binns, nor did they intend to connect themselves with any title coming from him; which objections being considered by the court were overruled, and said record as a copy of said deed admitted; to which ruling plaintiffs excepted, and this his bill of exceptions is signed, sealed and made a part of the record herein.

Dec. 18th, 1877.
(Signed) HIRAM KNOWLES, *Judge.*

(Endorsed:) 1137. John C. Belk vs. Antoine Gagnon et al. Plaintiff's exceptions Nos. 1 and 2. Filed Dec'r 18, 1877. O. B. O'Bannon, clerk.

Bill of Ex. No. 3.

In the district court, second judicial district of M. T., in and for Deer Lodge County.

JOHN C. BELK
vs.
HENRY MEAGHER ET AL.

Be it remembered that, on the trial of this cause, the defendants introduced JOHN C. C. THORNTON, who testified as follows, to wit:

I have not in my possession a deed from Joseph D. Binns to myself of certain ground on the Original lode claim; I lost deed; there was such a deed 6 or 7 years ago; I have made search among my papers, but cannot find the deed. I never gave deed to any one.

90 Defendants then introduced H. S. CLARK, who testified as follows, to wit:

(Referring to copy of deed.) That is my handwriting; this is an exact copy of original instrument from Binns to Thornton. I copied it from original deed. I have not the original deed in my possession. I have examined for it. I took the acknowledgement to the deed. I am satisfied I saw Binns sign the deed.

(Here defendants offered in evidence the copy of the deed from Binns to Thornton, which said copy is in words & figures following, to wit:

Joseph D. Binns to John C. C. Thornton.

Know all men by these presents, that I, Joseph D. Binns, of the county of Deer Lodge, and Territory of Montana, party of the first part, for and in consideration of the sum of one thousand dollars to me in hand paid, which I do hereby acknowledge to have received of John C. C. Thornton of the county of Deer Lodge and Territory of Montana, party of the second part, do grant, bargain, sell and convey unto the said John C. C. Thornton, his heirs and assigns forever, all my right, title and interest (said interest being an undivided one-half of
91 property below described, except claim No. 2 west on the Original lode) in and to all that certain part or parcel of quartz mining property, situated, lying and being in Summit Valley district, county of Deer Lodge, and Territory of Montana, known and described as follows (all claims being two hundred feet each), to wit: claims No. one (1) and two west, and discovery claim on the Buffalo lode; also claim No. two (2) west, and the undivided one half interest in one hundred feet of discovery claim west, all on the Original lode; also claims No. four (4) east and five west on the Missoula lode; also discovery claim and claims Nos. one and two west and one and two east, on the Pacific slope lode; also the east half of discovery claim and claims Nos. one and two east on the Lead lode; also the west half of discovery claim and No. one west and two west on the Mountain lode; also the discovery claim and claims No. one east and claims Nos. two, three and four west on the Lookout lode; also discovery claim and claim No. one west and No. one east on the Moscow lode; also discovery claim and claims Nos. one and two west on the Twin Sisters lode; also discovery claim and claims Nos. one and two east on the Last Chance lode; also discovery claim and claim No. one west and No. one east on the North

92 lode; also discovery claim and claim No. one east and No. one west on the South lode; also claims No. seven and eight west on the Grey Eagle; also claims No. two west on the Nova Scotia lode; also claims Nos. five and six west on the Butte lode; also discovery claim and claims No. one and two east on the Black Chief lode; also claim No. two west on the Jenny Lind lode; also claim No. five east on the Bob Tail lode; also claim No. two east on the Wild Pat lode; also claim No. five east on the Copperhead lode; also claim No. two west on the Rabbit lode; alse claim No. five east on the Virginia lode; also claim No. four west on the Melbourne lode; also claim No. fifteen east on the Comstock lode; also claim No. two east on the Lulu lode; also claim No. two west on the Sunny Side lode; also claim No. five west on the Mountain Chief lode; also claims Nos. five and six west on the Springfield; also claim No two west on the Sheffield lode; also claim No. five west on the Douglas lode; also claim No. three west on the Wilderness lode; also claims No. one and two west on the Mount Shasta lode; also claim No. one west on the Caledonia; also claims No. five and six east on the Blind lode; also discovery claim and claims No. one east and one west on the North Branch lode; also claim No.
93 one west on the Trust to Luck lode; also claim No. two southwest on the Brazil lode; also claim No. two west on the Transcient lode; also claim No. five southeast, being on the Mountain Air lode; also claims Nos. one and two west on the Johnny Bull lode; also claim No. one west on the St. Mary's lode; also claim No. three west on the Robin Hood lode. Together with all and singular the dips, spurs and angles, tenements, hereditaments and appurtenances thereto belonging; and all the estate, property, possession and claim whatsoever, as well in law as in equity, of said party of the first part of and to the above described premises, and every part and parcel thereof, to have and to hold to the said John C. C. Thornton, his heirs and assigns forever.

In witness whereof I have hereunto set my hand and seal this the 5th day of September, A. D. 1872.

(Signed) JOSEPH D. BINNS. [SEAL.]

TERRITORY OF MONTANA,
County of Deer Lodge, ss:

Be it remembered that on this, the 5th day of September, A. D. 1872, before the undersigned, county clerk within and for the county of Deer Lodge, and Territory of Montana, personally came Joseph D. Binns, who is personally known to me to be the same person whose
94 name is subscribed to the foregoing and annexed instrument of writing as a party thereto, and acknowledged the same to be his act and deed for the purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my official seal, at my office, in Deer Lodge City, the day and year first above written.

H. S. CLARK,
County Clerk, Deer Lodge Co., Montana Territory.

Filed for record September 11th, A. D. 1873, at 10 o'clock a. m.

(Signed) H. S. CLARK,
County Recorder.

And to the introduction of such copy in evidence, plaintiff, by his counsel, then there objected, on the grounds:

1st. That there was no sufficient evidence showing that the original deed was lost or destroyed.

2nd. That there was no witnesses to such deed.

3rd. That there was no acknowledgement entitling such deed to record.

4. That such deed was wholly invalid, and conveyed no title.

Which objection of plaintiff the court overruled, and admitted such copy in evidence; and to the ruling of the court overruling plaintiff's objections, plaintiff then and there excepted, and asked the court
95 to sign this his bill of exceptions, which is done this 18th day of December, A. D. 1877.

(Signed) HIRAM KNOWLES, *Judge.*

(Endorsed:) 1137. John C. Belk vs. Henry Meagher et als. Plaintiff's exceptions No. 3. Filed Dec. 18, 1877. O. B. O'Bannon, clerk.

Bill of Ex. No. 4.

In the district court, second judicial district of Montana Territory, in & for the county of Deer Lodge.

JOHN C. BELK
vs.
HENRY MEAGHER ET AL.

Be it remembered that on the trial of this cause defendants introduced JOHN. C. C. THORNTON, who testified as follows, to wit:

I have not in my possession a certain deed from C. E. Humphreys et al. to myself, nor is it under my control. (In referring to record of deed witness said:) C.; I think "C." stands for Chastine; that is the Christian name of Mr. Humphreys. C. represents the name he goes by. I don't know what G. stands for; I always call him George. (In referring to deed from J. C. C. Thornton and wife to John T. Murphy, witness said:) J, as here used, stands for and represents John. J. C. C. are initial letters of my name. My sire christened me John Caldwell
96 Calhoun Thornton; that is my name. I have not the deed from myself & wife to John T. Murphy in my possession, or under my control. I gave deed to Murphy. Murphy resides in Helena. So far as I know, my wife executed the deed from myself and her to Murphy, at the time in deed mentioned.

Defendants then introduced HENRY MEAGHER, who testified as follows, to wit:

I am one of the defendants in this action. I have not in my possession, or under my control, a deed from Allison and wife to Binns, or a deed from Binns to Thornton, or a deed from Humphreys et al. to Thornton, or from Thornton and wife to Murphy, conveying any interest on original lode claim. I have none of such deeds in my possession or under my control.

Defendants then introduced G. O. HUMPHREYS as a witness, who testified as follows, to wit:

My name is G. O. Humphreys. (In referring to deed from Humphreys et al. to Thornton, witness said:) G. O. represents my Christian name.

"G." stands for Garland; C. E. represents Chastine Erasmus; that is his Christian name.

Defendants then introduced ANTOINE GAGNON, who testified as follows, to wit:

I am one of the defendants in this action. I have not, nor never
97 had, in my possession, or under my control, a deed from Allison and wife to Binns, or a deed from Binns to Thornton, or from Humphreys et al. to Thornton, or from Thornton and wife to Murphy, conveying any interest in original lode. I do not know where such deeds are.

Defendants here offered in evidence the record of the deeds from C. E. Humphreys et al. to J. C. C. Thornton, and the record of a deed from Thornton and wife to Murphy, which said records of such deeds are in the words & figures following, to wit:

Humphrey, C. E., and wife, Humphrey, G. O., to Thornton, John C. C.

Know all men by these presents that we, G. O. Humphreys, C. E. Humphrey, and Vianet Humphrey, wife of C. E. Humphrey, all of the town of Butte, and county of Deer Lodge, in the Territory of Montana, parties of the first part, in consideration of the sum of one thousand dollars to us paid, which we do hereby acknowledge to have received of John C. C. Thornton, of the town of Deer Lodge, county of Deer Lodge, and Territory of Montana, party of the second part, do grant, bargain,
sell, and forever transfer unto the said John C. C. Thornton, his
98 heirs and assigns forever, all our right, title, and interest in and to an undivided one half interest, said interest being one undivided fourth of all the property below described (except claim No. one west on the Original) in all that certain part or parcel of quartz mining property, together with all the dips, spurs, and angles thereof, situate, lying, and being in Summit Valley mining district, in the county of Deer Lodge, and Territory of Montana, known and described as follows, to wit: An undivided one-half interest in claim No. one (1) west, the same comprising two hundred feet (200 ft.); also one-fourth interest in the west half of discovery claim, all on the original lode; also discovery claim and claims Nos. one (1) and two (2) west, being six hundred (600) feet, all on the Buffalo lode; also claim No. (4) four and No. (5) five west, being four hundred feet on the Missoula lode; also discovery claim and claims No. (1) one and two (2) west, and claims No. (1) one and two (2) east, being one thousand feet, all on the Pacific slope lode; also east half of discovery claim, and claims No. one and two east, being five hundred feet on the Lead lode; also west half of discovery claim and claims
No. one and two west, being five hundred feet on the Mountain
99 lode; also discovery claim, and claims No. one (1) east and two (2), three (3), and four (4) west, being one thousand feet on the Look Out lode; also discovery claim and claims Nos. one (1) west and No. one (1) east, being six hundred feet on the Moscow lode; also discovery claim and claims No. one (1) and two (2) west, being six hundred feet on the Twin Sisters lode; also discovery claim and claims Nos. one (1) and two (2) east, being six hundred feet on the Last Chance lode; also discovery claim and claims No. one west and No. one east, being six hundred feet on the North lode; also discovery claim and claims Nos. one east and No. one west, being six hundred feet on the South lode; also claims No. seven (7) and eight (8) west, being four hundred feet on the Grey Eagle lode; also claim No. two west, being two hundred feet on the Nova Scotia lode; also claim No. five (5) and six (6) west, being

four hundred feet on the Butte lode; also discovery claim and claims Nos. one (1) and two (2) east, being six hundred feet on the Black Chief lode; also claim No. two (2) west, being two hundred feet on the Jenny Lind lode; also claim No. five (5) east, being two hundred feet on the Bob Tail lode; also claim No. two (2) east, being two hundred feet on the Wild Pat lode; also claim No. five (5) east, being two hundred feet on the Copperhead lode; also claim No. two (2) west, being two
100 hundred feet on the Rabbit lode; also claim No. five (5) east, being two hundred feet on the Virginia lode; also claim No. four west, being two hundred feet on the Melbourne lode; also claim No. fifteen east, being two hundred feet on the Comstock lode; also claim No. two east, being two hundred feet on the Lulu lode; also claim No. two west, being two hundred feet on the Sunny Side lode; also claim No. five west, being two hundred feet on the Mountain Chief lode; also claims No. five and six west, being four hundred feet on the Springfield lode; also claim No. five west, being two hundred feet on the Sheffield lode; also claim No. five west, being two hundred feet on the Douglas lode; also claim No. three west, being two hundred feet on the Wilderness lode; also claims Nos. one and two west, being four hundred feet on the Mount Shasta lode; also claim No. one west, being two hundred feet on the Caledonia lode; also claims Nos. five and six east, being four hundred feet on the Blind lode; also discovery claim and claims No. one east and No. one west, being six hundred feet on the North Branch lode; also claim No. one west, being two hundred feet on the Trust to Luck lode; also claim No. two southwest, being two hundred feet
101 on the Brazil lode; also claim No. two west, being two hundred feet on the Transcient lode; also claim No. five southeast, being two hundred feet on the Mountain Air lode; also claims Nos. one and two west, being four hundred feet on the Johnny Bull lode; also claim No. one west, being two hundred feet on the St. Mary's lode; also claim No. three west, being two hundred feet on the Robin Hood lode.

Together with all and singular the spurs, dips, and angles, tenements, hereditaments, and appurtenances thereto belonging; and all the estate, property, possession and claim whatsoever, as well in law as in equity of said parties of the first part of, in, and to the above-described property, and every part and parcel thereof. To have and to hold unto the said John C. C. Thornton, his heirs and assigns, forever.

In witness whereof we have hereunto set our hands and seals this 31st day of May, A. D. 1872.

C. E. HUMPHREYS. [SEAL.]
VIANET HUMPHREYS. [SEAL.]
G. O. HUMPHREYS. [SEAL.]

[$1 int. rev. stamp, canc'd.]

TERRITORY OF MONTANA,
County of Deer Lodge, ss:

102 On this, the day of May, A. D. 1872, before me, William P. Wheeler, a justice of the peace in and for the said county, personally appeared G. O. Humphreys, C. E. Humphreys, and Vianet Humphreys, his wife, to me personally known to be the persons described in and who executed the foregoing deed, and who each acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein mentioned; and that the said Vianet Humphreys, wife of the said C. E. Humphreys, upon an examination by me had separate and apart from and without the hearing of her said husband, after being by me made acquainted with the contents

of said deed, acknowledged to me that she executed the same freely and voluntarily and without undue influence or compulsion of her said husband, and that she does not wish to retract the same.

Witness my hand this the 31st day of May, A. D. 1872.

(Signed) WM. P. WHEELER,
Justice of the Peace.

Filed for record June 3d, A. D. 1872, at 7 o'clock p. m.

(Signed) H. S. CLARK,
County Recorder.

103 Know all men by these presents that we, John C. C. Thornton and Louisa A. Thornton, wife of said Thornton, both of the town of Deer Lodge, county of Deer Lodge, and Territory of Montana, in consideration of the sum of seven thousand dollars to us paid by John T. Murphy, of the city of Helena, county of Lewis and Clarke, and Territory of Montana, the receipt of which sum we do hereby acknowledge, do bargain, sell, and convey unto the said John T. Murphy, his heirs and assigns, forever the following property situate and described as follows, to wit: claim number one (1) west from discovery, the same comprising two hundred feet (200 f't); also the west half of discovery claim, the same being one hundred feet (100 f't), and seventy-five feet of the east end of claim number two west, in all three hundred and seventy-five feet (375 f't) all on the Original lode; also claims number one and two (1 & 2) west from discovery, fractional, the same comprising three hundred and fifty feet (350), all on the Mountain lode; also claims number one (1) and two (2) east from discovery *discovery* claim and one-half of claim number one west, comprising in all seven hundred feet (700 f't), all on the Moscow lode. All of said quartz prop-
104 erty lying and being in Summit Valley Mining District, in the county of Deer Lodge, and Territory of Montana; also an undivided one-third interest in placer mining lot number thirty-eight (38), situated in Pioneer Mining District, in township nine (9) north of range eleven (11) west, containing an area of one hundred and fifty and $\frac{10}{100}$ acres ($150\frac{10}{100}$) in the county of Deer Lodge, and Territory of Montana, together with all and singular the spurs, dips, and angles, and appurtenances thereunto belonging.

To have and to hold the property aforesaid unto him the said John T. Murphy, his heirs and assigns.

In witness whereof we have hereunto set our hands and seals this the twenty-eighth day of January, A. D. 1876.

(Signed) J. C. C. THORNTON. [SEAL.]
(Signed) LOUISA A. THORNTON. [SEAL.]

TERRITORY OF MONTANA,
County of Deer Lodge, ss:

On this, the 28th day of January, A. D. 1876, before me, H. S. Clark, county clerk and recorder in and for said county, personally appeared J. C. C. Thornton and Louisa A. Thornton, his wife, personally well known to me to be the persons described in and who executed the
105 foregoing conveyance; and the said John C. C. Thornton acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned; and the said Louisa A. Thornton, wife of said J. C. C. Thornton, upon an examination by me had separate and apart from and without the hearing of her said husband, after being made acquainted with the contents of said

instrument, acknowledged to me that she executed the same freely and voluntarily without fear, compulsion, or undue influence of her said husband, and that she does not wish to retract the execution of the same.

In testimony whereof I have hereunto set my hand and affixed the seal of said county the day and year in this certificate above written.

SEAL OF DEER LODGE CO., M. T.

(Signed) H. S. CLARK,
County Clerk & Recorder in & for Deer Lodge County, Montana Territory.

Filed for record January 28, A. D. 1876, at 9 o'clock a. m.
(Signed) H. S. CLARK,
County Recorder.

To the introduction of which record plaintiff, by his counsel, objected on the grounds that the evidence was not sufficient to show that the original deeds were lost or destroyed, or could not be obtained,
106 and that there was no subscribing witness to such deeds, and that there were no names signed to such deeds; which objections of plaintiff the court then and there overruled; and to the ruling of the court in overruling plaintiff's objection the plaintiff then and there excepted, and asked the court to sign this his bill of exceptions, which is done this 19th day of December, A. D. 1877.
(Signed) HIRAM KNOWLES, *Judge.*

(Endorsed:) 1137. John C. Belk vs. Henry Meagher et als. Plaintiff's exceptions No. 4. Filed December 19, '77. O. B. O'Bannon, clerk, by Geo. W. Irvin, II, deputy.

Bill of ex., No. 5.

In the district court, 2nd judicial district, Deer Lodge County, Montana Territory.

JOHN C. BELK, PLFF.,
vs.
HENRY MEAGHER ET AL., DEF'TS.

Be it remembered that on the trial of this cause Lin. McFarland, being a witness on the stand, after testifying that he was a surveyor by profession, was asked the following question for the purpose of showing the boundaries of the ground in dispute, and further showing that the pit upon which work to represent the said ground had been done
107 was upon the ground of the National Mining and Exploring Company, and not upon ground owned by defendants, or J. C. C. Thornton, at the time it was represented.

1st. Did you do any surveying on said property?

I did.

When?

To-day.

Did any one point out to you the line between the The National and Exploring Company's ground and defendant's; and, if so, whom; and do you know where this said line is now?

To which question defendants objected, which objection was sustained, and said witness not permitted to answer; to which ruling of the court

plaintiff excepted, and this his bill of exceptions is signed, sealed, and made a part of the record.

(Signed) HIRAM KNOWLES, *Judge.*

(Endorsed:) 1137. John C. Belk vs. Henry Meagher et al. Pl'ff's exception No. 5. Filed Dec. 18, 1877. O. B. O'Bannon, clerk.

And after said evidence had closed, said plaintiff filed his motion to strike out certain portions thereof, which motion and exception
108 entered thereon were in words and figures as follows, to wit:

Bill of ex., No. 6.

In the district court, 2nd judicial district, Deer Lodge County, Montana Territory.

JOHN C. BELK, PLAINTIFF,
vs.
HENRY MEAGHER ET AL., DEFENDANTS.

Now comes the plaintiff, & moves the court to strike out the following evidence, introduced under objections, and exceptions of plaintiff, to wit:

1st. The copies of the records of the Original lode, for the reason that no foundation was laid for the introduction of the same; no mining laws, rules, or regulations, or customs, local or otherwise, sought to be proven, or proven, authorizing such records, or not shown by defendants to be out of their possession or control; and the further reason assigned in plaintiff's bill of exceptions, No. 1, herein.

2nd. The testimony respecting the location, staking, and recording of said Original lode for the foregoing reason, and the further reason that said defendants do not claim under said location, or in any manner connect themselves with the title to the same; and said evidence tends to mislead and prejudice the jury.

3rd. The copy of deed from Allison & wife to Binns, for the
109 reasons assigned in bill of exceptions No. 2, and the further reasons that it was not properly proven or acknowledged as required by the statute of this Territory.

4. The copies of deeds from the predecessors in interest in said Original lode of the grantee, Murphy, and each thereof respectively, for the reasons:

1st. Said defendants do not connect themselves with the title to said lode.

2nd. Said deeds have not been proven or acknowledged so as to operate as a transfer of said property or any interest therein.

3rd. Said deeds or records do not impart any notice to plaintiff, and no actual notice is shown or sought to be shown in reference to such conveyances, or the title to the property sought to be conveyed.

4. All evidence tending to show representation of said Original lode in the spring of 1875, for the following reasons:

1st. Said defendants do not connect themselves with the title to said property.

2nd. Said Thornton was not the owner thereof & held no title thereto at the time of the alleged representation.

3rd. Said evidence was wholly immaterial and incompetent under the issues in this case.

110 4. Said evidence did not tend to prove a representation of said property within one year next preceding the 19th day of December, A. D. 1877, the date of plaintiff's location.

6th. The testimony of defendant Meagher, as to the amount of work and labor done by him upon the alleged Gagnon lode since the pretended (location) of the same, for the reason that said did not contribute to or detract from defendant's title to said property, and tended to mislead the jury.

7th. The evidence tending to show the staking of said Gagnon lode, for the reason that the same was not subject to relocation, and plaintiff asserted his claim thereto within the time prescribed by the statute of limitation of this Territory by the institution of this suit, and the same was not marked out by any natural object or permanent monument.

8. The evidence of the contents of the notice posted upon said Gagnon lode, for the reason, 1st, the original was not shown to be out of the possession or under the control of defendants; and for the reason last above given; also said original record of said Gagnon lode,
111 for same reason, and further reason that said record does not give a description of the claim located by reference to some natural object or permanent monument that will identify the claim.

(Signed) A. E. MAYHEW, SHARP AND NAPTON.
JOHN F. FORBIS & E. W. TOOLE,
Att'ys for Plaintiff.

Motion overruled and ruling excepted to.
(Signed) HIRAM KNOWLES, *Judge.*

112 And afterwards said plaintiff offered the following instructions, which were given by the court, to wit:

Instructions for plaintiff.

In the district court, second judicial district, Deer Lodge County, Montana Territory.

JOHN C. BELK, PLAINTIFF,
vs.
HENRY MEAGHER ET AL., DEF'TS.

1st. A relocation of a quartz mining claim is made by marking distinctly on the ground so relocated the boundaries thereof so that the same can be readily traced, and by making a record thereof in the office of the county clerk and recorder of the county in which such claim is situated. The record and declaratory statement shall contain the name of the lode; the name of the relocator; the date of the relocation, and a description of the claim relocated, by reference to such natural objects or permanent monuments as will identify the claim, which record shall be duly verified by the oath of the party before some one authorized by law to administer oaths, and then recorded in said clerk and recorder's office in twenty days after such location. A similar notice shall be posted upon the claim except the verification or jurat.

113 (The 2, 3, 4, 5, 6, 7, 8, and 9th instructions offered by plaintiff are refused by the court.)

10. If you find that the Original lode was not located or represented according to law, you will entirely ignore said claim, and proceed to consider the respective relocations of plaintiff and defendants under the rules heretofore given you.

(The 11th instruction offered by plaintiff is refused by the court.)

12. It devolves upon the defendants to show that the claimants or locators of the original lode located and acquired a right to the possession of said lode under the law in force at the time of such location; and if they have not so shown you, they cannot avail themselves of said location.

(The 13th and 14th instructions offered by plaintiff are refused by the court.)

15. The Original lode claimants must have done a sufficient amount of work; that is to say, ten dollars on each claim in each year after January, 1875; or, if several claims or parts of claims are owned by one person or several persons jointly, then, enough work to represent the whole upon some portion thereof, in order to hold the whole thereof; and if they had not done so for the year 1875, and said reloca-
114 tion was made as heretofore given you in the first instruction herein, plaintiff would be entitled to such unrepresented portion.

(The 16th instruction offered by plaintiff is refused by the court.)

And the said plaintiff at the same time duly offered certain other instructions (hereinbefore referred to), which were refused by the court, and a bill of exceptions thereupon duly taken and signed; which said bill of exceptions was in words and figures as follows, to wit:

Bill Ex. No. 7.

In the district court, 2d judicial district, Deer Lodge County, Montana Territory.

JOHN C. BELK, PLAINTIFF,
vs.
HENRY MEAGHER ET AL., DEFENDANTS.

Be it remembered that on the trial of this cause plaintiff requested the court to instruct the jury as follows, to wit:

2d. A relocation of the mineral lands of the United States is good and valid against all the world, excepting an adverse claimant existing at the time of such relocation, (and in the absence of the assertion of a claim by the said United States,) when made by a citizen of the United States, or one who has declared his intention to become such, by
115 distinctly marking out on the ground so relocated its boundaries, so as that the same can be readily traced, and by making a record thereof in the office of the county clerk and recorder of the county in which such claim is situated, which record and declaratory statement shall contain the name of the lode, the name of the relocator, the date of the relocation, and a description of the claim relocated, by reference to such natural objects or permanent objects as will identify the claim, which record shall be duly verified by the oath of the party before some one authorized to administer oaths, and recorded in said clerk and recorder's office within twenty days after such location, a similar notice of which shall be posted upon said claim, except the verification or jurat thereto.

Which said instruction was considered by the court and refused, and not given to the jury as requested. To which ruling and refusal plaintiff then and there and now excepts.

And likewise the said plaintiff separately and severally requested the court to instruct the jury as contained in the several instructions hereinafter set forth, which were as follows, to wit:

116 3rd. If you believe from the evidence that the plaintiff entered upon and relocated the property in controversy, in accordance with law, on the 19th day of December, A. D. 1876, and that there was a valid, subsisting, adverse claim to said property in the owners of what is known as the Original lode, then said defendants, as subsequent relocators, cannot avail themselves of such adverse claim unless they connect themselves with such title, which is not claimed in this case.

4. If you believe from the evidence in the case that plaintiff, on the 19th day of December, A. D. 1876, made a relocation of the property in controversy in the manner prescribed by law, as heretofore given you, and that the claimants of the Original lode had not represented the same by any work or labor upon the same, or with direct reference and in proximity thereto since June, A. D. 1875, then said claimants of said Original lode had forfeited their claim to said lode at the date of said relocation, and the entry of defendants thereon was a trespass and their relocation thereof invalid.

5. If the jury believe from the evidence that plaintiff, on the 19th day of December, A. D. 1876, relocated the property in controversy,
117 as heretofore prescribed, and that the claimants of the Original lode had represented their claim in accordance with the requirements of law, up to January 1st, 1876, and you further believe that said claimants of said Original lode failed and neglected to enter upon and resume or commence work thereon during the year A. D. 1876, then the failure so to do gave said plaintiff a right to the possession of said property, and the subsequent entry and relocation thereof by defendants was a trespass, and said plaintiff is entitled to recover.

6. If the jury believe from the evidence that plaintiff made a valid relocation of the property in controversy on the 19th day of December, A. D. 1876, and that the claimants to the Original lode claim had represented the same according to law, up to the 1st day of January, A. D. 1877, and you further believe that said plaintiff had occupied and worked said claim according to law up to the 21st day of February, A. D. 1877, and that on said 21st day of February, A. D. 1877, defendants entered thereon, their entry would be a trespass, and plaintiff should recover, provided you further find that said claimants of the Original lode had not themselves, or by or through any one, worked on said ground
118 or been in the actual possession thereof for one whole year next preceding the entry of said defendants.

7. If you believe from the evidence that plaintiff relocated said ground in controversy as aforesaid on the 19th day of December, A. D. 1876, and held and worked the same as required by the laws of the United States and of this Territory, up to the 21st day of February, A. D. 1877, and that the claimants of the Original lode had not worked upon or been in the actual possession of said property since the month of June, A. D. 1875, then their claim to said property was barred, and the entry and relocation of defendants on said 21st day of February invalid and a trespass upon the possession of plaintiff, and he is entitled to recover.

8. The question in this case is, what was the status of plaintiff's rights at the time of defendant's entry? And the defendants cannot avail themselves of any outstanding title in a third party unless it was a valid subsisting one, and capable of being enforced by ejecting plaintiff at the time of defendants' entry.

9. The defendants in this case must show that there was a valid location made of the Original lode by a substantial compliance with
119 the local laws or regulations in force where such lode was situate, in order to become entitled to the benefit of the laws allow-

ing a representation of said ground. They must show a compliance with the law in order to invoke its benefits and protection; and if defendants have failed to show you what the local laws or regulations were, applicable to the location and recording of said Original lode, they are not entitled to rely upon the same; and if plaintiff made a lawful location of the same, or a part of the same comprising the ground in controversy, you will find for the plaintiff.

10th. (Given by the court.)

11. If the jury believe from the evidence that the claimants of the Original lode claim did not represent the same since June, A. D. 1875, and did not re-enter and resume work thereon in 1876, and up to the time of defendants' entry on the 21st day of February 1877, had not so re-entered or resumed work, the law implies and presumes conclusively that they had abandoned the same; and if this is the case, you will proceed to enquire as to the validity and priority of the respective relocations of
120 plaintiff and defendant, wholly disregarding said original location and claim.

12th. (Given by the court.)

13. If any record of such Original lode was made and the same was not made in conformity with the statute of the Territory in force at such time, defendants must show under what local rule or regulation or custom it was made, and what such rule was.

14. Defendants, in order to show a valid subsisting claim to the Original lode was in existence at the time of plaintiffs' relocation thereof, if made, must show that the same was made in conformity with the law, or local rules, regulations, or customs in force at the time such location was made, and if made under a local rule, regulation, or custom must show what such local rule, regulation, or custom was.

15th. (Given by the court.)

16. If defendants are only entitled to a portion of the ground in controversy, and plaintiffs are entitled to the residue, it devolves upon the defendants to show the particular portion thereof to which they are entitled; that is to say, they must show the portion they claim and are entitled to hold.

121 And the court, upon considering said instructions, each severally and separately, refused each and every one thereof, and did not give any of said instructions to the jury; to which ruling of the court in refusing said instructions and each severally and respectively, plaintiff then and there and now duly excepts, and asks that this his bill of exceptions be signed, sealed, and filed before the submission of this cause to the jury, which is done accordingly, this 19th day of December, A. D. 1877.

(Signed) HIRAM KNOWLES, [SEAL.]
Judge 2nd Dist. M. T.

Filed Dec. 19, 1877.

And at the same time said defendants offered certain instructions, to which plaintiff separately and severally objected when offered, and likewise reduced to writing his exceptions, which were duly signed and filed, which said exception was in words and figures as follows, to wit:

Bill of Ex. No. 8.

And after said court had so ruled upon the instructions offered by plaintiff as aforesaid, defendants offered the following instructions, to wit:

122 *Defendants' instructions.*

In district court, second judicial district.

JOHN C. BELK
vs.
HENRY MEAGHER ET AL.

1st. The jury are instructed that it devolves on the plaintiff to make out a title to the property in controversy in himself, and that unless he does, he cannot recover; and that if he fails in this, it is not necessary for the defendants to show any title in themselves. They being in possession, they are in law presumed to be rightfully so till plaintiff shows to the contrary.

2nd. That if you believe from the evidence that Humphreys and Allison, in August, 1864, made a discovery of a quartz-lode, and located the ground in controversy, by placing substantial stakes not less than three inches in diameter at each end of each two hundred feet claim taken by them, and put on said stakes written notices, specifying the name of the locator, the number of feet claimed, with the date the same was taken; and that they afterwards recorded their said claims in the mining
123 district records of the district, and that said mining district records were at any time prior to the 17th day of April, 1865, deposited in the office of the county recorder of Deer Lodge County, then you will find that said Humphreys and Allison made a valid location and appropriation at that time of the ground in dispute.

3rd. That if you find from the evidence that in August, 1864, Humphreys and Allison made a valid location of the ground in dispute, and that they or their successors in interest of all or an undivided interest of said property did, or caused to be done thereon in 1875, fifty dollars' worth of work or improvements, they will find for defendants.

Filed Dec'r 20th, 1877.

And the court, upon consideration of said instructions, severally and separately, did give the same, which were read to the jury in said cause. To the giving of which said instructions, each severally and separately, and to the whole thereof, plaintiff then and there duly and now duly excepts, and asks that this his bill of exceptions be signed, sealed, and filed, and made a part of the record herein, before the submission of the cause to the jury, which is done accordingly this 19th day of December, A. D. 1877.

12 (Signed) HIRAM KNOWLES, [SEAL.]
Judge 2d Jud. Dist. M. T.

Filed Dec. 19, 1877.

And the court, after the foregoing instructions were passed upon, and said bills of exceptions taken, of its own motion gave to the jury the following instructions, to wit:

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vs.
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1. What is required of Allison and Humphreys by law in making a location of the mining ground in dispute is stated to you in instruction

2, given on the motion of defendant, and instructions 10 and 12, given on the part of plaintiff, should be construed in reference to said instructions.

2. Instruction 3, given on part of defendant, informs you of the amount of labor that should be performed in order to prevent a forfeiture of said claim; and instruction No. 15, given on the part of plaintiff, should be considered in reference to said instruction No. 3.

3. The jury are the judges of the credibility of the witnesses
125 who have testified in this case, and must determine what weight should be given to the evidence of each. And when the jury are satisfied that any witness deliberately sworn falsely upon any point in the case, they are at liberty to disregard his evidence entirely. The jury must rely upon their own memories as to what evidence was given before them.

The form of your verdict should be, if you find for the plaintiff—

JOHN C. BELK
vs.
HENRY MEAGHER AND ANTOINE GAGNON.

"We, the jury, find for the plaintiff and assess his damages at $."
If for the defendants—
"We, the jury, find for the defendants."

Filed December 20th, 1877.

And the foregoing constituted all the instructions offered and refused on the part of the plaintiff and offered and given on behalf of defendants, and those given by the court. And after the arguments of counsel for the respective parties, the jury return into court the following verdict:

126 JOHN C. BELK
vs.
HENRY MEAGHER AND ANTOINE GAGNON.

We, the jury, find for the defendants.
(Signed) Z. BROWN,
Foreman.

Filed Dec'r 19, 1877.

And after said verdict was duly recorded the following judgment was thereupon entered, to wit:

Judgment.

In the district court of the second judicial district of the Territory of Montana in and for the county of Deer Lodge.

JOHN C. BELK
vs.
ANTOINE GAGNON AND HENRY MEAGHER.

This action came regularly on for trial. The said parties appeared with their attorneys, John F. Forbis, esq., Mess. Sharp & Napton, Alex. E. Mayhew, esq., and E. Warren Toole. esq., counsel for plaintiff; and J. C. Robinson and W. W. Dixon, esq'rs., for defendants. A jury of

twelve persons was regularly empaneled and sworn to try said action.

Witnesses for plaintiff and defendants were sworn and examined.

127 After hearing the evidence, arguments of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court with the verdict signed by the foreman, and being called, answer to their names and say, "We, the jury, find for defendants." Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged and decreed that the defendants, Antoine Gagnon and Henry Meagher, do have and recover of and from John C. Belk the sum of one hundred eighty-three and $\frac{80}{100}$ dollars, defendants' costs and disbursements incurred in this action.

Judgment rendered December 19, A. D. 1877.

And the said plaintiff, for the purpose of moving for a new trial herein, asks that this his bill of exceptions be signed, sealed, and made a part of the records herein, which is done accordingly this 29 day of December, A. D. 1877.

(Signed) HIRAM KNOWLES, [SEAL.]
Judge 2nd Dist. Court, M. T.

And after signing the foregoing bill of exceptions herein, plaintiff filed his notice of motion for a new trial, which said notice was in words & figures as follows, to wit:

128 *Notice of motion for new trial.*

In the district court, second judicial district, Deer Lodge County, Montana Territory.

JOHN C. BELK, PLAINTIFF,
vs.
HENRY MEAGHER ET ALS., DEF'TS.

Now comes the plaintiff in the above entitled cause and gives notice of his intention to move for a new trial therein upon a bill of exceptions in said cause, and for grounds upon which said motion will be made designates the following, to wit:

1st. Errors in law occurring at the trial and excepted to at the time by said plaintiff.

(*a.*) The court erred in admitting the copy of the records of the Original lode, for the reasons assigned in bill of exceptions No. 1.

(*b.*) The court erred in admitting in evidence the records of a deed from William Allison and wife to Joseph D. Binns, for the reasons assigned in bill of exceptions No. 2.

(*c.*) The court erred in admitting in evidence the deed from said Binns to John C. C. Thornton, for the reasons assigned in bill of exceptions No. 3.

129 (*d.*) The court erred in admitting in evidence the deed from C. E. Humphreys et als. to said Thornton, for the reasons assigned in bill of exceptions No. 4.

(*e*) The court erred in not permitting the witness McFarland to answer the interrogatories, or either of them, to him propounded, as disclosed by bill of exceptions No. 5, for the reasons therein stated.

(*f.*) The court in overruling plaintiff's motion to strike out severally and separately the following evidence, particularly set out in said motion to wit:

(*g.*) The copies of the records of the Original lode.

(*h.*) The evidence respecting the location, staking, and recording the same.

(*i.*) The copy of deed from Allison and wife to Binns.

(*j.*) The copies of deeds to the predecessors in interest of Murphy to said Original lode.

(*k.*) The evidence tending to show a representation of said Original lode in the spring of 1875.

(*l.*) The testimony of defendant Meagher as to the amount of work and labor done by him on the Gagnon lode since his pretended relocation.

(*m.*) The evidence as to the staking of said lode.

(*n.*) The evidence of the contents of the notice posted on said lode.

130 (*o.*) The records of said lode, for the reasons separately and severally assigned in said motion and bill of exceptions No. 6.

(*p.*) The court erred in refusing the instructions offered separately and severally by plaintiff, and refused separately and severally, and numbered 2, 3, 4, 5, 6, 7, 8, 9, 11, 13 14, and 16, as designated by bill of exceptions No. 7.

(*q.*) The court erred in giving separately and severally, and each and all thereof, offered by defendants, numbered 1, 2, and 3, and designated in bill of ex. No. 8.

(*r.*) The court erred in giving instructions Nos. 1 and 2, and each thereof, upon its own motion. 2nd. Insufficiency of the evidence to justify the verdict; and the same is against law in this, to wit:

(*a.*) The evidence showed that plaintiff's relocation was prior in time to defendants, and was in accordance with law.

(*b.*) The evidence does not show that defendants connect themselves with the title to the Original lode.

(*c.*) The evidence shows that said Original lode was forfeited and abandoned, and that the owners or claimants thereof were barred by the statute of limitation of this Territory from maintaining an action
131 therefor at the time of plaintiff's relocation and at the time of defendant's first entry upon the same.

(*d.*) The evidence shows that plaintiff was in possession under a valid relocation of said Original lode against defendants, and that the owners of said Original lode had forfeited the same whilst so held by plaintiff, and prior to defendants' entry or pretended relocation.

(*e.*) The evidence shows that said lode was not subject to relocation at the time of the pretended relocation by defendants, and that defendants had notice of plaintiff's claims.

(*f.*) The evidence does not show any notice, constructive or actual, of any claim or title to the said Original lode prior to plaintiff's relocation thereof.

(Signed)

SHARP AND NAPTON, A. E. MAYHEW,
JOHN F. FORBIS AND E. W. TOOLE,
Attorneys for Plaintiff.

To Mess. J. C. ROBINSON AND W. W. DIXON.
Attorneys for Defendants.

Service accepted and copy waived this 29th day of December, 1877.
(Signed) W. W. DIXON AND J. C. ROBINSON,
Att'ys for Defendants.

Filed Dec. 29, 1877.

132 And afterwards said plaintiff, in pursuance of said notice, filed his motion for a new trial herein, which was in words and figures as follows, to wit:

Motion for new trial.

In the district court second judicial district, Deer Lodge County, Montana Territory.

JOHN C. BELK, PLAINTIFF,
vs.
HENRY MEAGHER ET AL., DEFENDANTS.

Now comes the plaintiff, and in pursuance of his notice of motion herein, and moves the court for a new trial in the above entitled cause for the following reasons, to wit:

First. Errors of law occurring at the trial and excepted to by plaintiff, a particular designation of which said errors are set out in said notice.

Second. Insufficiency of the evidence to justify the verdict; and that said verdict is against law. The particulars wherein said evidence is insufficient are designated in said notice.

This motion is based upon a bill of exceptions in said cause.

(Signed) SHARP & NAPTON, A. E. MAYHEW,
JOHN F. FORBIS AND E. W. TOOLE,
Att'ys for Plaintiff.

133 Service accepted and copy waived this 29th day of December, 1877.

(Signed) W. W. DIXON AND J. C. ROBINSON,
Att'ys for Defendants.

Filed December 29th, 1877.

And afterwards, said motion for a new trial coming on to be heard, the same was duly considered by the court and overruled, for the reason that no errors were disclosed or good cause shown to authorize the court to grant the same, to which ruling of the court plaintiff duly excepted; and this his bill of exceptions is signed, sealed, and made part of the record herein, this 29th day of December, A. D 1877.

(Signed) HIRAM KNOWLES, [SEAL.]
Judge 2nd District, M. T.

(Endorsed:) 1137. John C. Belk vs. Henry Meagher et al. Bill of exceptions on motion for a new trial. Filed Dec. 29, 1877. (Signed) O. B. O'Bannon, clerk.

And afterwards, to wit, on the 31st day of December, A. D. 1877, the same being one of the days of the December term, A. D. 1877, of the said court, the said plaintiff filed with the clerk of the said court his notice of appeal in the said cause, which said notice of appeal, with
134 the endorsements thereon, is in the words and figures following, to wit:

In the district court, 2nd judicial district, Deer Lodge County, Montana Territory.

JOHN C. BELK, PLAINTIFF,
vs.
HENRY MEAGHER, ANTOINE GAGNON, AND Louisa A. Thornton, defendants.

To the above named defendants, and John C. Robinson and William W. Dixon, attorneys for defendants.

You will hereby take notice that the above named plaintiff appeals from the judgment in this cause, entered on the 19th day of December, 1877, in favor of defendants and against plaintiff, and every part thereof, and from the order of the court overruling plaintiff's motion for a new trial, and every part thereof, to the supreme court of Montana Territory; said appeal is taken and based upon both questions of law and fact.

(Signed) JOHN F. FORBIS, E. W. TOOLE,
A. E. MAYHEW, AND SHARP & NAPTON,
Att'ys for Plaintiff.

Dated this 31st day of Dec'r, 1877.

135 Service accepted and copy waived of the above notice of appeal, this 31st day of Dec'r, 1877.
(Signed) J. C. ROBINSON AND W. W. DIXON,
Att'ys for Defendants.

(Endorsed:) 1137. John C. Belk vs. Henry Meagher et al. Notice of appeal. Filed December 31st, 1877. O. B. O'Bannon, clerk, by Geo. W. Irvin, II, deputy.

And on the same day, to wit, on the 31st day of December, A. D. 1877, the aforesaid plaintiff filed with the clerk of said court an undertaking on appeal herein, which said undertaking, with the endorsements thereon, is in the words and figures following, to wit:

In the district court, second judicial district, Deer Lodge County, Montana Territory.

JOHN C. BELK, PLAINTIFF,
vs.
HENRY MEAGHER, ANTOINE GAGNON, AND Louisa A. Thornton, defendants.

Know all men by these presents that we, John Noyes and Benj. C. Kingsbury, of the county of Deer Lodge, Montana Territory, hereby undertake and promise to pay the above named defendants the sum of three hundred dollars, upon the following express conditions, how-
136 ever, to wit: That whereas the above named plaintiff is desirous of, and is about to appeal from the judgment herein against him and the order overruling his motion for a new trial, entered on the day of December, 1877:

Now, therefore, if the said John C. Belk shall pay all damages and costs which may be awarded against him on appeal, or on the dismissal thereof, not exceeding the sum of three hundred dollars, then this undertaking to be null and void, otherwise to be and remain in full force and effect.

Witness our hands on this 27th day of December, 1877.

(Signed) JOHN NOYES.
(") BENJ. C. KINGSBURY.

TERRITORY OF MONTANA,
County of Deer Lodge, ss:

John Noyes and Benj. C. Kingsbury, being first duly sworn, says, each for himself, that he is a resident and householder in the county and Territory aforesaid, and is worth the sum of $300 in property situated in said county & Territory over and above his debts and liabilities and exclusive of property exempt by law from execution.

(Signed) JOHN NOYES.
137 (Signed) BENJ. C. KINGSBURY.

Subscribed and sworn to before me this 27th day of December, A. D. 1877.

[NOTARIAL SEAL.] (Signed) CHARLES L. WARREN,
Notary Public.

I hereby approve the foregoing undertaking, and the sureties thereto, this 31st day of December, A. D. 1877.

(Signed) O. B. O'BANNON,
Clerk Second Jud. Dist., M. T.

(Endorsed): 1137. John C. Belk vs. Henry Meagher et al. Undertaking on appeal.

Filed Dec. 31st, 1877. O. B. O'Bannon, clerk, by Geo. W. Irvin, II, deputy.

138 Office of clerk of dist. court of 2nd judicial dist. of M. T., in and for Deer Lodge County.

I, O. B. O'Bannon, clerk of the district court of the second judicial district of the Territory of Montana, do hereby certify that the foregoing pages, numbered from 1 to 136, inclusive, contain a full, true, and correct copy of the pleadings, testimony, and other papers in the cause of John C. Belk vs. Henry Meagher et als. (No. 1,137), described in and referred to in plaintiff's bill of exceptions in said cause, of the notice of appeal and undertaking on appeal therein, and of the whole thereof, as the same appears on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court this 31st day of December, A. D. 1877.

{ SEAL OF COURT OF } O. B. O'BANNON, *Clerk.*
{ 2D JUD. DIST. M. T. }

Filed in the office of the clerk of the supreme court M. T., January 2, 1878.

J. R. ALDEN, *Clerk.*

139 In the supreme court of the Territory of Montana. January term, A. D. 1878.

JOHN C. BELK, PLAINTIFF AND APPELLANT,
vs.
HENRY MEAGHER ET ALS., DEFENDANTS AND respondents.

Appeal from 2nd district, Deer Lodge Co.

Be it remembered that on the 2nd day of January, A. D. 1878, the

above entitled cause was brought into the supreme court of Montana Territory by virtue of an appeal from the judgment rendered and entered therein on the 19th day of December, A. D. 1877, in the district court of the second judicial district of said Territory, agreeably to the statute of said Territory and the rules of said supreme court in such case made and provided.

And, afterwards, to wit, on the 14th day of January, 1878, the said respondents, by their attorneys, filed herein their objections to the right of said appellant to be heard in said cause on appeal, of which said objections, in words and figures, the following is a copy, to wit:

140 In supreme court, Territory of Montana. January term, A. D. 1878.

JOHN C. BELK, APPELLANT,
vs.
HENRY MEAGHER ET AL., RESPONDENTS.

Now come said respondents and object to the right of said appellant to be heard in said cause on any other errors than such as appear in the judgment roll of said cause, for the reason that there is no specification of errors in the statement or bill of exceptions on motion for new trial, as required by law.

Respondents' authorities in above objection: Practice act; sec's 281, 287, 419; Ferrer vs. Home Mutual Ins. Co, 47 Cal., 427; Frohner vs. Rodgers, 2 Mont., 179.

W. W. DIXON & J. C. ROBINSON,
Att'ys for Resp'd'ts.

Which said objection coming on to be heard before the court, the same were overruled.

And on the same day, to wit, the 14th day of January, A. D. 1878, the said appellant, by his counsel, filed herein his brief of points and authorities relied upon, in words and figures following, to wit:

141 *Points and authorities of appellant.*

In the supreme court of Montana Territory. January term, A. D. 1878.

JOHN C. BELK, APPELLANT,
vs.
HENRY MEAGHER ET AL., RESPONDENTS.

1st. The first error assigned was in the admission of copies of the original records of Summit Valley district, as appears upon the record (pages 75 to 81). It will not be contended that there is any statute making this copy, if it was one, competent evidence. In order, therefore, to make it admissable these two things were absolutely necessary: 1st, to show that there was an original record of such district; 2nd, that it was lost or destroyed; 3rd, that the record offered is a correct copy. Records made by officers authorized by law to make them may, upon proof of loss or destruction of the originals, become of itself evidence; but when there is no law, as in this case, authorizing such officer to make such record or copy, it loses authenticity as an official

copy and must be proven as if made by a stranger. Here the party claimed to have made the copy was not introduced, nor was any one who had compared it or knew that it was a copy. Ignoring this
142 as an official act, and the case stands thus: A employed B to make a copy of a record, and believes that he did his duty. The belief of A amounts to nothing, and the law raises no presumption, as it was not an official act.

2nd. The second error assigned was in the admission of the copy of the deed from Allison and wife to Binns, for the reasons assigned on pages 88 and 89 of record; also deed from Binns to Thornton (see record, page 94); also deed from Humphreys et al. to Thornton (see record, pages 105 & 6). These deeds were introduced for the purpose of tracing the title of the Original lode down to Murphy, the grantee of Thornton, in order to show a representation of said lode by Murphy in the spring of 1875, and that there was an outstanding title in him at the time of plaintiff's relocation, thereby establishing a link in the chain of defendants' title, whereby plaintiff's claim was defeated. There were no subscribing witnesses to some of these deeds, nor were they properly acknowledged or proven as required by the statute; and defendants did not claim under this title, except as above stated. Were they admissable under our statute? We say not; and in support of this position
143 cite the following authorities, to wit: See—

Making quartz lodes real estate.

See Cod. Stat's, page 396, sec's 1, 3, 23.
" 4 American Reports, 430.
" 6 Wheaton " 577; Clark vs. Graham.
" 2 Montana " 59 et seq.; Barkley vs. Teileke.
" 3 New Hampshire, 234.
" 5 Ohio (Hammond), 190.
" 82 Massachusetts, 48; Kellog vs. Loomis.
" 22 Pickering, 295; Estee " Cook.
Dole " Thurston.

If these deeds amounted to anything under our statute, they only tended to establish an equitable title in Murphy or his predecessors in interest. As such a title was unavailable against plaintiff in an action of ejectment against him, it would seem utterly untenable that a stranger not claiming under such title could make it available against plaintiff by evicting him and invoking such title. See 5th Hammond (Ohio State), 194. And if such deeds could operate as an abandonment, the grantees never made any relocation by reason of which they were entitled to hold or represent under the laws of the United States or this Territory.
144 3. The laws of the United States clothe the occupant of mineral lands, in certain cases, with an incohate title to the extent of a right to occupy as against others asserting a right to the same property, but it parts with no title until the money is paid and certificate issues. Until this is done, the highest title of either occupant or claimant is a possessory right (94th U. S., 4th Otto, 762), and so the statute defines it. In such a controversy it is incompetent to show title in the government or a stranger, especially a stranger whose title would have been unavoidable against plaintiff at the time of his entry or his eviction by defendants. The very object in all such cases is to show that the parties' entry was a trespass upon the rights of the true owner; as in this case, such title, if any existed, is unavailable to defendants.

See 10 California, 30; 24 California, 347-8.
28 " 323 & 4, 219; 47 do., 257.
45 " 101-2-3-4 & 5.
Tyler on ejectment, 72, 73, and 74.
38 Cal., 370.

145 4. The next error assigned, as disclosed by the record on pages 106 and 107, is in refusing to permit the surveyor, McFarland, to testify as to any one pointing out to him where the boundaries of ground owned by National Mining and Exploring Co. was. This was a link in the chain of evidence for the purpose of showing that the work claimed to have been done was not on the ground that was being represented. We could not establish all the facts by him, but could have shown by persons who knew the lines that the proper ones were pointed out. This is what we desired to do. (See record referred to.)

6. The court erred in permitting the defendants to testify as to the amount of work done by them, and money expended by them since they were in possession. None was required, and the evidence was about equally balanced so far as the representation of the original lode was concerned; and such evidence ought not to add to or detract from the title of either.

See 42 Cal., 407. 38 Cal., 278.
Sec 2 Colorado, 19. 37 New York, 407.

146 7. We call attention of the court especially to plaintiff's motion to strike out certain evidence for the reasons therein specified. (See record 108 to 111.)

8. We submit that this case has been tried entirely upon the wrong theory, in permitting the stale claim of Murphy to the original lode to figure at all in it, and the instructions of plaintiff upon this point should have been given.

9. Even admitting that the claim of Murphy to the original lode had not been forfeited at the time of plaintiff's relocation, it became so while he was in possession under claim of title by boundaries and record made according to law. This forfeiture occurred nearly two months before defendants' entry. There was no title in Murphy at that time. Upon this point the court should have given the instruction asked for by plaintiff.

10. It seems to us cl'ar—1st. That the deeds, if they show anything, disclose only an equitable title in Murphy that was unavailing in an action of ejectment against plaintiff by reason of his possession
147 and relocation, and that such equity is equally unavailing to defendants. 2nd. That this equitable title had been forfeited whilst the plaintiff so occupied said property, and at the time defendants entered, and was worthless to defendants or any one else. 3rd. That under the statutes of the United States and this Territory, the claim of Murphy had become forfeited and was barred by the statute of limitation; and was unavailable against plaintiff's relocation at the time it was made. Upon this last proposition, we cite:

See Codified statutes page 591, sec. 2.
2 Montana, 394.
U. S. Rev. Stat's, sec's 2332, 2324.
2 Black (U. S.), 605.
9 Nevada. 43 Cal., 65, 73, 251 and 252.

11. It will be seen by U. S. Rev. Stat's, page 428, Sec. 2324, that the only inhibition against territorial or local regulations is in reference to the amount of work required. In all other respects the provisions of the local statutes are recognized, imposing upon the claimant the necess

sity of being in the actual possession within one year before he
148 could make his claim good against the plaintiff in this case, is clearly within the scope of territorial legislation, and should be upheld. If the rights, then, that the plaintiff acquired were maintainable against the claimants of the Original lode, it is difficult to see how it could be made to yield at the instance of defendants. The right of the original claimants asserted by one not claiming under would be made good as to strangers, whilst not if sought to be enforced by the party himself. Such a position is certainly not founded on principles of law or justice. Plaintiff's instruction offered upon this point should have been given.

12. We submit that plaintiff was first in time and first in right, and, as against defendants and all others upon doing the requisite amount of work, is entitled to a patent from the Government of the United States.

FORBIS, MAYHEW, SHARP AND
NAPTON, AND E. W. TOOLE,
Att'y's for Appellant.

And on the 15th day of January, A. D. 1878, the said respondents filed in said cause their brief, in words & figures following, to wit:

149 *Respondent's points and authorities.*

In the supreme court of Montana Territory. January term, A. D. 1878.

JOHN C. BELK, APPELLANT,
vs.
HENRY MEAGHER ET AL., RESPONDENTS.

The records offered and admitted in evidence as to the location of the ground in controversy by Humphreys and Allison in 1864 were part of the county records of Deer Lodge County, and as such entitled to be admitted; and were the only and the universally acknowledged records of mining claims in Summit Valley district. (See evidence of recorder Clark and of G. O. Humphreys.) The objection that the records in evidence were what purported to be copies of the district records, and not copied by the recorder, is not tenable, as it was shown that the first records were made on sheets of paper (not a book), though fastened together, and that Humphreys was the county recorder when they were copied from the sheets of paper by Fisk, and that Fisk was at such time deputy recorder, and that such sheets of paper were destroyed.
150 (Pages 24, 25, 26, and 27 of transcript.) Conceding, for argument, that, as appellant claims, it were necessary to establish the three facts to entitle the records to be admitted, we claim that they were so established. 1. That the first or district records were on the sheets of paper. 2. That they were destroyed, and 3 that the records offered were copies. As to the latter, it being shown that Fisk, who, as Humphreys testified, was a deputy recorder, and that the records were in his handwriting, the legal presumption is that he made true copies; and it devolved on appellant to show to the contrary. All district records existing in December, 1864, and deposited with county recorders prior to April 17, 1865, became county records. (Statutes 1864–'5, 374. (See also 328, same statute.)

As to appellant's second point we claim that the deeds conveyed title and were properly admitted in evidence. Under our statute a deed need not be witnessed or acknowledged to convey title as between the

parties thereto. (3 Wash. on Real Property, 321, last ed., and authorities therein cited.) Landers vs. Bolton, 26 Cal., 393; Hastings
151 vs. Vaughn, 5 Cal., 315; Ricks vs. Reed, 19 Cal., 551; 4 Kent., 456; Taylor vs. Holter, 1 Mont., 688.

Conceding that the deeds from Allison and wife to Binns, and from Binns to Thornton, conveyed no title by reason of defective acknowledgements, the deed from Humphreys to Thornton, which is unobjectionable, conveys an interest in the property which would make Thornton a tenant in common with the owners, legal or equitable, and would entitle him to represent the property. Though the deeds would convey but an equitable title to Thornton he would be entitled to represent the property. And if the deeds conveyed no title at all then Humphreys and Allison were the owners, and Humphreys could have represented and did represent the property in 1875.

3. As to appellant's third point we claim that defendants did not attempt to show outstanding title as appellant insists, and to which he has cited authorities. In this the appellant has mistaken the position assumed by respondents. That we claim that at the time of appellant's attempted location December 19, 1876, the ground in controversy
152 was not subject to relocation; that it was located in 1864, and that location was kept alive by representation in 1875 by a party having the right to represent (no matter who the party was), and that thereby such party held under a grant from the United States, and at the time of plaintiff's attempted location there was nothing for the United States to grant or for plaintiff to locate, and he therefore took nothing by his attempted location. As sustaining respondents' views of this see Bird vs. Lisbors, 9 Cal., 1; Dison vs. Bradshaw, 23 Cal., 528; Roberts vs. Chantin Pen, 23 Cal., 259; 36 Cal., 333 & 635; 49 Cal., 653; 43 Cal., 65-73 & 251; 2 Colorado, 424.

That defendant may show that plaintiff or his grantors lost their title by abandonment or conveyed it away. (See Hart vs. Burnett, 15 Cal., 530, 518; Landers vs. Bolton, 26 Cal., 393.)

That defendant may show invalidity of title see also Mallet vs. Uncle Sam M'g Co., 1 Nevada, 156; Shisler vs. Chissire, 7 Nevada, 427; Tyler on ejectment, 564.

4. As to the surveyor's testimony it was properly excluded.
153 He knew nothing of the boundaries in 1875. (See his testimony, page 69, transcript.) Humphreys testified that the boundaries had been changed since the original location, page 27, transcript, and plaintiff testified that the hole where the representation was done in 1875 was on the ground in dispute. (See page 17 of transcript.) Plaintiff made no offer to connect this testimony with the original lines or to show its relevancy thereto.

6. There was no error in permitting defendants to prove what work they did after their location; it was competent to show their possession and good faith, and could not have injured plaintiff, and plaintiff testified as to what work he did after his location.

7. The court did not err in refusing to strike out the testimony as embodied in his motion. (See page 107 of transcript.) After a party permits testimony to be introduced without objecting he cannot afterwards move to strike it out. (People vs. Long, 43 Cal., 444; Owen vs. Frink, 24 Cal., 171; Good vs. Smith, 13 Cal., 81; Mayo vs. Mazeaux, 38 Cal., 442.)

154 8th. Appellant insists that the case was not tried on the correct theory. We submit that it was. The theory on which the case was tried was, that the ground was located in 1864 by Humphreys and

Allison, and was in 1875 represented by their successors in interest, which kept alive the rights of said parties until January 1, 1877; and plaintiff's location having been made on the 19th of December, 1876, twelve days before any forfeiture occurred, plaintiff's location was absolutely void, and that he acquired no title whatever. This was the theory on which the case was tried, and if correct, then there was no error. We maintain that it was, for these reasons:

First, conceding the location to have been made by H. & A. in 1864, then if they or their successors in interest represented the ground in 1875 at any time during the year, then it was not open to relocation till January 1, 1877. On this, see Wicks on Mineral Lands, 119 & 120.

That a location made before a forfeiture occurred is void, and the party acquires no rights whatever. (See Copps' U. S. Mining Decisions, page 188; Wicks on Mineral Land, 109, 157, 150; decision of
155 U. S. Commissioner U. S. Land Office in Semour vs. Woods, in National Union newspaper of Nov'r 1, 1877, page 24, and reported in Copps' Land Owner for Sept., 1877, page 82, and Pralus vs. The Pacific G. & S. M. Co., 35 Cal., page 30.)

There is nothing to locate before forfeiture. The mining law of Congress is a grant by the United States of an easement (that of mining) on the public lands to persons qualified under the law. (Robertson vs. Smith, 1 Montana, 410.)

The laws or customs as to locating mining ground are conditions precedent to the grant; those requiring work to be done are conditions subsequent. (King vs. Edwards, 1 Montana, 235.)

The first qualified party regularly locating acquires the grant from the government, and by the act of 1872 the grant is on condition subsequent that he perform a certain amount of work each year, and on failure to perform this condition the land becomes public and subject to relocation, as if no location had ever been made.

The government itself does not take advantage of the forfeiture, but gives any person qualified by the act a right to do so by relo-
156 cating. The forfeiture is not absolute and does not occur unless another person relocates after the forfeiture and before the original locator resumes work. (See Mining Act of Congress, May 10, 1872.)

A condition subsequent does not defeat the estate by its breach until entry by the grantor or his heirs.

4 Kent, 127–8.
1 Wash. Real Property, 478–482.
2 " " " 12.

And this entry must be after breach of condition, and a landlord taking possession of leased premises cannot take advantage of breach of condition of lease occurring while he is in possession. (1 Wash. Real Property, 477; 2 Greenleaf on Ev., sec. 323.)

Plaintiff having entered before a breach of condition acquired no title, and cannot take advantage of a subsequent breach occurring while he was in possession.

As to the statute of limitation—1st. It could not affect a right given by act of Congress. 2nd. Such statute only goes to the remedy, and was repealed before plaintiff had acquired any right under it. 3. That if Murphy could not have maintained an action that did not di-
157 vest his title, nor invest any right in plaintiff, and to give plaintiff any right under such statute he must have been in adverse possession for one year.

W. W. DIXON & J. C. ROBINSON,
Att'ys for Respondents.

And on the 16th day of January, 1878, the said appellant, by his counsel, filed herein a reply to the said brief of the respondents, in words and figures following, to wit:

Appellant's reply to respondents' brief.

In the supreme court, Montana Territory. January term, A. D. 1878.

JOHN C. BELK
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If Fisk was deputy recorder of the county no law authorized him to transcribe these district records. All he could do was to file them, which the evidence of Clark, county recorder, shows was not done. He only found this copy in his office not filed, and no time stated when it was received as required by the statute. Therefore, no verity attaches; Fisk should have been personally present to testify as to this
158 book being a copy, or his deposition should have been taken. (See Stat's of Mont., 1864–5, pages 374 and 328.)

2. The deed conveyed no title and Humphrey's work for other parties would not put life into the corpse he had long since abandoned. These deeds, under any circumstances, could only be admitted to show the extent of Murphy's actual possession at the time of Belk's entry. (See Kern vs. Conover, 21 Cal., 291.

3. An outstanding equitable title in a third party is never sufficient to defeat an action of ejectment or one testing the right to the possession. (See Hubbard vs. Barry, 21 Cal., 321; 5 Hammond, page 194, & 1st Id., 330.)

4. Respondents claim they did not attempt to show an outstanding title. This is a thin subterfuge. What was Thornton and others representing? A supposed title, and by virtue of that title defendants defeated the action.

159 5. If we should admit that the location made by Belk was prior to the forfeiture of the title of Murphy, still his title thus acquired is not void, but voidable only by Murphy coming in prior to January 1st, 1877, and performing the requisite amount of work. Belk, as shown by the testimony, continued in possession up to the middle of February, 1877, and Murphy never represented the ground. Besides this the statute of limitations of Montana were against the title of Murphy, and he could not have ejected Belk at the date of his location. (See Nevada, 9th ; 2 Black (U. S.), 605.) There is no grant from the government without procuring a patent. (See 94th U. S. Reports, page .)

As to the breach of a condition subsequent, the authorities cited by respondents only apply as between the parties to the case.

In this case neither party connects himself with this title of Murphy. Murphy himself makes no claim in this action, and the plaintiff should have recovered upon the familiar maxim, that he who is prior in time is better in law.

160 NAPTON & TOOLE,
Att'ys for Appellant.

And afterwards, to wit, on the 18th day of January, 1878, said cause coming on to be heard before the court, on the transcript of record filed herein, was argued by counsel and submitted.

And afterwards, viz, on the 25th day of January, 1878, the said cause come on for the decision of the court on appeal, whereupon the court delivered in said cause its opinion in writing, in the words and figures following, to wit:

Opinion of the court by, Wade, chief justice.

In the supreme court of Montana Territory. January term, A. D. 1878.

JOHN C. BELK, PLAINTIFF AND APPELLANT,
vs.
HENRY MEAGHER ET AL., DEFENDANTS AND respondents.

Appeal from Deer Lodge Co., 2d district.

In this action the plaintiff avers that he is the owner of and entitled to the possession of a certain quartz lode claim known as the Anna Maria lode claim, situate in the Summit Valley mining district,
161 Deer Lodge County, which claim of ownership is disputed by defendants, who, as the plaintiff alleges, are now wrongfully in the possession, claiming title; and in order to a proper solution of the questions of law arising in the case, a statement of the facts becomes necessary. It appears from the evidence that on the 19th day of December, 1876, the plaintiff located the ground in dispute, after having discovered a lead thereon, by posting notices of location and marking the boundaries thereof as the law requires, which notice of location was, on the 21st day of December, 1876, filed for record in the recorder's office of Deer Lodge County. Subsequently to the location of the claim, the plaintiff worked thereon at different times, in all amounting to about two days' work, the last of which work was performed on or about the 15th day of February, 1877. It further appears that the defendants, Henry Meagher and Antoine Gagnon, on the 21st day of February, 1877, located the ground in question, after the discovery of a lead thereon, under the name of the Gagnon lode claim, by posting notices of location and marking the boundaries thereof, and have since their location worked and mined the claim. The defendants, to defeat the title of the plaintiff, and to show that at the time he made his location
162 and claim to the ground in dispute, the same was not subject to location, but, on the contrary, that the possession, right, and title to the same was held and owned by third persons, by virtue of a location long prior to that of the plaintiff, which right had been kept alive and in full force by proper representation and labor thereon, and therefore that the alleged right and title of the plaintiff was void, introduced in evidence and established the following facts which appear from the testimony of WILLIAM O. HUMPHREY as follows:

I am acquainted with the ground in dispute and with the old Original lode. I know the ground Mr. Clark now owns, and also the ground of the National Mining and Exploring Co. Am acquainted with the ground lying between these claims. The ground here in dispute is what is known as the west one-half of discovery claim, claim No. one and part of claim No. two west from discovery on Original lode. These claims were located by William Allison and myself. We located discovery claim and claims No. 1 and two west. We staked and recorded these claims. The hole I sunk then is on west half of discovery
163 claim. I think we located claims in July or August, 1864. When

I sunk discovery hole, I found a pretty good copper vein carrying silver. I found what I call wall rock and staked the ground. I think we put up a stake at each end of discovery claim, and a stake at the end of every 200 feet claim after. We put up notice claiming discovery claim and claims one and two west. We recorded claims in district records on sheets of paper attached together in book form, and it was understood at the time that the district records were made on slips of paper; that they were to be copied into a book as soon as we got one. This (referring to a book of records taken from the county recorder's office) was the first book we got, and it was copied into this book, which was the first book of county records, and these records were afterwards copied into county recorder's records. I was county recorder, and turned records over to Judge Lewis, my successor. I would know district records if I could see them. (Records produced.) I think that is the book. I think the handwriting in the book is that of Mr. Fisk. He was doing work for me. I believe this is the book in which district rec-
164 ords were copied. I think this is the book I had when county recorder. Mr. Fisk was deputy recorder and did most of the work. I won't be positive that the original lode was recorded in this book. It may be that it was recorded in a smaller book used for district record and then copied into this book. Mr. Allison was district recorder, I think, when original lode was recorded. These district records were kept until a county recorder was appointed. I was appointed county recorder by Gov. Edgerton. I think I received my appointment about December, 1864. Part of this book is copied from district records. District records were delivered to me when I was appointed county recorder. All that was in old district records up to time of my appointment was copied into this book. We issued certificates of location from such records copied into this book. The signature in back of book purporting to be mine is not mine. I think same party that wrote rest signed my name. (Referring to page 30 of book, witness said:) I wrote name of G. O. Humphreys on this page, but no other names that appear on page. I cannot say why I have written some and other parties have written rest. I think district records were copied
165 just as they appeared on old records. I turned this book over to Judge Lewis, county recorder, who was my successor, in the winter of 1864–'65, or spring of '65. These books were recognized as the records of the district by the miners generally. I gave the book to Judge E. E. Lewis, county recorder, at Butte or Silver Bow. He moved his office from Butte to Silver Bow. The county seat was where the records were. I was appointed county recorder by Gov. Edgerton during session of legislature; I think about December, 1864. I think I entered upon the discharge of my duties about one month after my appointment. I did some recording in district records after I was county recorder, and made entries on record after my appointment. I can't fix date exactly when I delivered district records to Judge Lewis, county recorder. This book is partly copied from old district records. I don't know what became of old district records after they were copied. I do not know where they are. I think they are lost. I haven't them in my possession. The old records were partly on slips of paper fastened together and made into book form, and then copied into this book. I think these slips are lost. They came into my possession in 1864.
166 I got them as soon as I went into office. I think papers are not in existence. I think Mr. Fisk copied records of Original lode. He was deputy recorder. I cannot say that I was present when he copied record or that I compared it. I think it is a true copy, but cannot

say positively. I cannot say that I know that it is a true copy. I think it is a true copy because Mr. Fisk copied it. I authorized him to make copy. If I had not thought Mr. Fisk would make correct copy, I would not have employed him. Mr. Fisk is somewhere in the Eastern States."

HENRY S. CLARK testified: "I am county recorder of Deer Lodge County. This is one of the books of record in my office. I found this book in the office when I took charge of the office. I have no slips of paper attached together in book form or otherwise purporting to be the records of Summit Valley mining district.

The book was then received in evidence as containing a record of the location of the Original lode and claims thereon. It further appears that on the 22nd day of June, 1872, by deed of that date, William Allison and wife conveyed to Joseph D. Binns all their interest in the Original lode, being an undivided one-half of the property described
167 in the deed, except as to claim No. 2 west, which deed was signed and sealed by the grantors, but not witnessed, and the certificate of acknowledgment to the same was defective. On the 5th day of September, 1872, Binns, by his deed, conveyed to John C. C. Thornton, which deed was signed and sealed by the grantor, but not witnessed, and the certificate of acknowledgment to the same was also defective. On the 31st day of May, 1872, G. O. Humphrey and others, by their deed of that date, conveyed their interest, being an undivided one-fourth interest in the property described in the deed, except as to claim No. 1 west, to John C. C. Thornton, which deed was properly signed and acknowledged, but the signatures thereto were not witnessed. The property described and conveyed in these deeds as parts of the Original lode, is a part of the same ground and property claimed by the plaintiff and defendants in their respective locations. In the spring of 1875, Thornton caused the ground and lead in question to be properly represented, and Humphrey and others to perform the necessary labor thereon for that purpose. On the 28th day of January, 1876, Thornton and wife conveyed to John T. Murphy, and neither Murphy or Thornton represented the ground for the year 1876. Upon these facts several questions
168 arise. Was the book containing a record of the Original lode properly received in evidence? Were the deeds from Allison and wife to Binns, from Binns to Thornton, and from Humphreys and others to Thornton, admissible in evidence? What interest does a person locating a mining claim upon the public mineral lands in pursuance of the law, and the local rules and regulations, acquire therein, and how is such interest kept alive so as to present a forfeiture and defeat a relocation?

1. As to the admissibility of the book of records, several facts in this connection are not controverted. The act of the legislature of January 17, 1865, required all mining district records to be deposited in their respective county recorder's office, and when so deposited that they become part and parcel of the county records. Probably under the operation of this statute the district records of the Summit Valley district, which had been kept on sheets of paper fastened together in book form, found their way into the recorder's office of Deer Lodge County and became a part of the records thereof. This district record contained the original record of the Original lode, and the claims thereon. This record is lost. When it reached the office of the county re-
169 corder, that officer had it copied into a book of records, which has since been recognized by the miners of the Summit Valley district as the record of such district, and from which certificates of location of

claims issued. There is no direct proof that this record is a copy of the original. This book of records, containing a record of the Original lode, was found in the office of, and among the records of the county recorder. This is prima facia proof that the record is genuine and correct. Mr. Fish was deputy recorder, and probably sworn to a faithful discharge of his duties. He copied the old district record into the county record introduced in evidence, and though the recorder could not say that he was present when this copy was made, or that he had compared it, yet he believed it to be correct, and it was so recognized. Records when lost or destroyed may be proved either by copy or by the recollection of witnesses, (1 Whart. Evi., sect. 135, and cases there cited). And the question we are to consider is, whether or not the record as introduced in evidence was better evidence of the location of the Original lode than the recollection of witnesses would have been? It was necessary to introduce the best evidence, and the original record being lost and the testimony tending strongly to show that the copy preserved in
170 the county records is correct, we think such evidence better and of a higher grade than would have been the bare memory of witnesses. We are satisfied that the record received in evidence as proof of the location of the Original lodewas the best evidence that the nature of the case admitted of, and therefore that it was properly received.

2. As to the admissibility of the deeds. The deeds from Allison and wife to Binns, and from Binns to Thornton, were defectively acknowledged; we have held that the acknowledgment is no part of a deed, and that, as between the parties thereto, a deed would be good without any acknowledgment (1 Montana, 688, Taylor vs. Holter et al.), and as against third persons who were seeking to locate the ground, if the grantees in such defective conveyances had represented the ground named therein according to law, and a forfeiture had thereby been prevented, such deeds and representation would defeat any relocation of the ground. The original location being valid, and the ground having been represented as the law requires so that no ferfeiture has occurred, a defective conveyance would not create such a forfeiture and subject the ground to relocation. Even if the Allison and Binns deeds were void and the deed from Humphrey to
171 Thornton, being for an undivided one-fourth interest in the property, was valid, such deed would preserve the right of Thornton to represent the ground and prevent a forfeiture. There were no witnesses to the deed from Humphrey to Thornton. Did this fact invalidate the deed under our statute? The statute provides, sect. 3 (Cod. Stat's, page 396): "Every conveyance in writing whereby any real estate is conveyed or may be affected, shall be acknowledged or proved and certified in the manner hereinafter provided." The statute then provides who may take the proof of acknowledgment, requires the officer taking the same to grant a certificate thereof, which shall be endorsed or annexed to such conveyance, what the certificate shall contain, and the form thereof. And section 10 is as follows: "The proof of the execution of any conveyance whereby any real estate is conveyed or affected, shall be, first, by the testimony of a subscribing witness; or, second, when all the subscribing witnesses are dead or cannot be had, by evidence of the handwriting of the party and at least one subscribing witness." The statute then provides, in substance, that no proof of a subscribing witness shall be taken unless such witness be per-
172 sonally known to the officer taking the proof to be the person whose name is subscribed to the conveyance as a witness thereto, or shall be proved to be such by the oath or affirmation of a credible

person; that no certificate of such proof shall be granted unless such subscribing witness shall prove that the person whose name is subscribed thereto as a party is the person described in, and who executed the same, and that such person executed the conveyance, and that such witness subscribed his name thereto as a witness thereof. The statute then provides what the certificate of such proof shall contain, and how the proof of the handwriting of the party, or of the subscribing witness shall be taken; and section 18 is in the following words: "A certificate of the acknowledgement of any conveyance, or the proof of the execution thereof, as provided in this act, signed by the officer taking the same, and under the seal of the officer, shall entitle such conveyance, with the certificate or certificates as aforesaid, to be recorded in the office of the recorder of any county in this Territory." The provisions of the statute, when taken and construed together, are not ambiguous or uncertain. It is evident that the object and purpose of the certificate of acknowledgement and also of proof of the execution of a deed,
173 as the statute contemplates, is to authorize the deed to be recorded. In the absence of a certificate, and there being no proof of the execution of the deed, the same cannot be recorded. But either a certificate of acknowledgement or proof of execution under the statute, so authenticates the deed as to qualify it for record. And so when there is proof of acknowledgement and a certificate thereof, annexed or attached to the conveyance, no witnesses are required, and the conveyance is entitled to be recorded. And when there is no certificate of acknowledgement, but proof of the execution of the deed can be made by the subscribing witnesses thereto in the manner provided by the statute, then the conveyance is also entitled to record. The object of the record of a deed, and hence of the certificate of acknowledgement and proof of the execution thereof, is to impart notice to third persons; and hence it follows that neither the certificate of acknowledgement nor the attestation of subscribing witnesses are necessary to the validity of a deed as between the parties thereto. And in no case where there is proof of acknowledgement and certificate thereof annexed or attached to a deed, and the same has been admitted to record by virtue of
174 such certificate, are subscribing witnesses necessary to the validity of such deed as to third persons?

Section 24 of the statute is as follows: "Every conveyance and instrument in writing, acknowledged or proved and certified and recorded in the manner prescribed in this act, from the time of filing the same with the recorder for record, shall impart notice to all persons of the contents thereof; and subsequent purchasers and mortgagees shall be deemed to purchase and take with notice." And so it is obvious from the statute, when taken as a whole and construed together, that the object of a certificate or proof of execution is to entitle a deed to record, and that when, by virtue of such certificate or proof, a deed is entered of record and recorded, it is good, and imparts notice to third persons in the absence of a certificate of acknowledgement, but accompanied with proof of execution; or in the absence of proof of execution, but accompanied with a certificate of ackowledgement. It follows, therefore, that the deed from Humphrey to Thornton, which had no subscribing or attesting witnesses, but was properly acknowledged as the statute requires, and recorded, was good as between the parties
175 thereto and as to the third persons, and imparted notice to all the world.

3. This deed being good to all intents and purposes, and conveying to Thornton an interest in the property in question, which he rightfully

held and owned in the spring of 1875, when he caused the ground to be represented, it follows that he had the right to make such representation in order to protect and to save from forfeiture his interest in the property. Having made the representation in the spring of 1875, when, under the law, was it necessary for him to again represent the ground in order to prevent its relocation?

Section 5 of the act of Congress of May 10, 1872, entitled "An act to promote the development of the mining resources of the United States" provides as follows: "On each claim, located after the passage of this act, and until a patent shall have been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to this act (which is applicable to the case we are considering), ten dollars' worth of labor shall be performed, or improvements made each year for each one hundred feet in length along the vein, until a patent shall
176 have been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made: Provided, that the original locators, their heirs, assigns, or legal representatives have not resumed work upon the claim after such failure and before such location." Under this statute representation is the muniment of title. If representation fails the title is gone. If there is a forfeiture the claim becomes again subject to location, unless, after the forfeiture, work is resumed before the rights of third persons intervene by relocation. On each claim located prior to the passage of this act, ten dollars' worth of work shall be performed or improvements made during each year for each one hundred feet of such claim, in order to prevent a relocation. The person making the location has one whole year in which to make the representation, and, after having made one representation, he has the whole of the next year in which to make the next representation. Having the whole year in which to make the represent-
177 ation, there can be no forfeiture until the full time has expired. If a claim is represented on 30th day of December, 1877, such representation would save a forfeiture for that year, and would secure the party in his title until the 31st day of December, 1878, when the probability of making representation for that year had expired. While the right of representation remains there can be no forfeiture, and so long as there is no forfeiture the title of the person entitled to make representation is complete. The title only expires when the right to make representation is entirely gone. Thornton having represented this ground in the spring of 1875, he or his grantee had the whole of the year 1876 in which to again represent it, and his right thereto was not forfeited until the expiration of that year. It follows, therefore, that location of the ground by the plaintiff on the 19th day of December, 1876, was made while yet the title of Thornton's grantee remained inviolate, and before there was any forfeiture of his right whereby the claim became subject to relocation.

4. Thornton and his grantee having failed to represent the ground during the year 1876, did any rights thereby attach to the plaintiff by virtue of his location on the 19th day of December, 1876? And
178 this leads us to an inquiry as to the nature and extent of the title of Thornton's grantee upon the day of the plaintiff's location. What estate or interest does a person acquire by locating a mining claim according to law upon the public mineral lands, and holding pos-

OFFICE SUPREME COURT U. S.
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IN THE

Supreme Court United States.

No. 69.

JOHN C. BELK, Plaintiff in Error,

vs.

HENRY MEAGHER AND OTHERS, Defendants in Error.

ERROR TO THE SUPREME COURT OF MONTANA TERRITORY.

Brief for Plaintiff in Error.

By SHELLABARGER & WILSON.

Thomas McGill & Co., Law Printers, Washington, D. C.

Supreme Court of the United States.

No. 69.

JOHN C. BELK, Plaintiff in Error,

vs.

HENRY MEAGHER and others.

Error to the Supreme Court of Montana.

Brief for the Plaintiff in Error.

The Facts.

I. On the 25th of October, 1877, in the District Court of the second district of Montana, the appellant filed his amended complaint against the appellees, Meagher and Gagnon, for possession of the mining claim described in the complaint, and for $1,000, value of rents, issues, and profits, alleging that they owned, and were entitled to possession, and that defendants, ever since 12th February, 1877, have withheld possession of said premises. (Record, pp. 1, 2.)

II. On 31st October, 1877, said defendants filed answer denying the averments of complaint. (Record, p. 3.)

III. On 11th December, 1877, plaintiff replied to the answer. (Record, p. 4.)

IV. On 14th December, 1877, the trial to a jury was begun, (Record, p. 4,) and on 20th December, 1877, jury rendered a verdict for defendants, (Record, p. 46,) and on the verdict a judgment was rendered for defendants. (Record, p. 46.)

V. Bills of exceptions were duly taken by complainant and allowed; No. 1 being as to the admissibility of record of "Original lode"; (Record, pp. 28, 29;) No. 2 being to the admission of an alleged record of a deed from William Allison and wife to Joseph D. Binns, dated 22d June, 1872, alleged to be lost, (Record, p. 30,) purporting to convey an undivided *half* of certain mining claims on "Original lode," in Summit Valley district, Deer Lodge county, amongst which was the claim in dispute; and the plaintiff's objections to the introduction of this record are stated at page 32 of the record, and the bill shows (Record, p. 32) that "*it was duly entered as an admission that the defendants did not claim as successors in interest to the said Binns, nor did they intend to connect themselves with any title coming from him.*"

VI. No. 3 excepts to the admission of an alleged copy of a deed, dated 5th September, 1872, by said Joseph D. Binns to John C. C. Thornton, conveying Binns's interest, being an undivided half of, amongst others, the property in dispute. The objections of plaintiff to the admission of this deed are on pages 34 and 35 of record. (Record, pp. 33 to 35.)

VII. No. 4 excepts to the admission of the following records of deeds:

(A) One by C. E. Humphreys and wife and O. G. Humphreys, dated 31st May, 1872, to said John C. C. Thornton, conveying their interest, being undivided half of, amongst others, the property in dispute.

(B) One by said J. C. C. Thornton and wife to John T. Murphy, dated 28th January, 1876, conveying the Claim No. 1 west from discovery, 200 feet; also west half of "Discovery Claim," 100 feet; also 75 feet of east end of "No. 2" west—in all 375 feet, all on "Original lode"; and also other named claims. This deed covered claim in dispute. The plaintiff's exceptions to this evidence are at page 39 of the record.

VIII. No. 5 contains exceptions by plaintiff to the court's exclusion of the evidence of McFarland, surveyor, offered to show the boundaries of disputed ground, and that the work done in 1875 by G. O. Humphreys (Record, p. 20) *was not on the land in dispute*, and could not "represent" it. (Record, p. 39.)

IX. No. 6 excepts to overruling of motion of plaintiff to strike out evidence admitted against plaintiff's exceptions. (Record, pp. 40, 41.)

X. No. 7 excepts to refusal of certain instructions to jury asked by plaintiff. (Record, pp. 42, 43, 44.)

XI. No. 8 excepts to the giving of certain instructions asked by defendants. (Record, p. 45.)

XII. The chain of title relied on, by defendants, as showing that on the 19th December, 1876, the premises in dispute were not vacant or open to Belk's location of that date, but, on the contrary, that the title thereof was then unforfeited and in John T. Murphy, is claimed by defendant to be as follows:

(A) LOCATION by William Allison and G. O. Humphreys of land in dispute, July or August, 1864, alleged to have been filed, on sheets "stitched together," in recorder's office, and copied, by Fisk, in county records, (R. 9–10–11,)

and which original sheets were lost. (R. 10.) The only copy of this alleged record of the said alleged LOCATION of the land in dispute is that on pages 10 and 11 of record, being the record of what is called "Original lode," of which the claim in dispute is said to be a part; that in dispute being *west* ½ of "discovery claim 200 feet," (see bottom of page 10,) claim also No. 1, (see bottom of page 10,) and also part of claim No. 2 west from "discovery claim," all on "Original lode." (See G. O. Humphreys' deposition, R., p. 9.) For objections to this record of "original" lode, see bill of exceptions No. 1, R. 28–29.

(B) Said William Allison and wife, to James D. Binns, conveyed undivided half of disputed premises. (R. 12 and 13; also 30–31.) And for exceptions to this deed see Record, 32. *Acknowledgment not good.* (So held by court below, R. 62.)

(C) Said Binns to John C. C. Thornton, on 5th September, 1872, conveyed undivided half of disputed premises. (R. 14–15; also 33–34.) The objections to this deed, see R. 35.

(D) Said O. G. Humphreys and E. C. Humphreys and wife, 31st May, 1872, conveyed one undivided fourth of the premises in dispute to John C. C. Thornton. (R. 16–17–18; also 36–37.) The objections to this deed, see R. 36 and 39.

(E) Said John C. C. Thornton and wife, on 28th January, 1876, conveyed to JOHN T. MURPHY said "claim No. 1" west from discovery, being 200 feet; also west half of discovery, being 100 feet, and 75 off "No. 2 west," making in all 375 feet, all on "Original Lode"; also other claims there named. (R. 38 and 18–19.) See objections to this deed, R. 39.

(F) The *last work claimed*, by defendant, as done on the premises in dispute, and relied on *as "representing" and keeping alive the entry* of "Original Lode," made by Humphreys and Allison tn August, 1864, is that testified to by

G. O. Humphreys (R. 20) as done by him, on employment of Colonel Thornton, *from early in spring of* 1875 *until June of that year.* No work was done on it after this, either during Thornton's ownership, up to his grant to Murphy on the 28th of January, 1876, or after that date. (See R., bottom of page 23 and top of 24.) Murphy never did any work at any time on it, was never in possession, and his whereabouts were unknown at time of trial.

XIII. Plaintiff's title is one arising out of a location (and possession thereunder up to 21st February, 1877) made upon the land in controversy, (100 feet by 340,) entered along with or as part of an entry made by appellant, Belk, on 19th of December, 1876, as "Ann Maria Lode Claim," the location being about 600 feet wide and 1,500 feet long. The proof of this entry *was complete*, and *no question* disputing its validity is made by this record, save the point that the mine belonged to Murphy, and was not forfeited at the date of the Belk location, 19th December, 1876. (R. 5, *et seq.*)

XIV. Defendants claim title in virtue of an alleged entry of this same premises made by Henry Meagher and Antoine Gagnon, defendants, in February, 1877, (R. 22 and 23,) such locator swearing (R. 23) *that when he located he saw before he located the notice of location by Belk on the ground, and thought Belk had located* "TOO SOON." (R. 23.) The forfeiture of Murphy's claim, as shown by defendants, occurring January 1, 1877, while plaintiff was in possession under his location of December 19, 1876. The trespass upon Belk's actual and known possession is thus admitted, and is justified by the plea that Belk located "*too soon.*"

XV. There is not only no evidence tending to connect the defendants with the alleged title originated by the location in 1864 by Humphreys and Allison, but such connection

and privity is expressly negatived by the record. (R., bottom of 32.)

XVI. There was a notice by plaintiff of motion for new trial after verdict and before judgment, assigning grounds fully, (R. 47 and 48.) and a motion for new trial based on grounds stated in notice, (R. 49,) and the motion was overruled and exceptions taken and preserved by bill. (R. 49.)

XVII. The case was duly appealed 27th December, 1877, to the Supreme Court, (R. 50 and 51,) where the judgment below, for the defendants, was affirmed. (R. 67.)

XVIII. On 28th January, 1878, plaintiff filed motion for rehearing, which was refused. (R. 67 and 68.)

XIX. February 7, 1878, writ of error was allowed and attested by chief justice to Supreme Court of the United States, (R. 68,) bond given and approved, (R. 69, 70,) citation issued for defendants in error by chief justice, (R. 69,) value of property in dispute proved $100.000, (R. 70,) and record certified to this court 23d May, 1878. (R. 71.)

XX. The bill of exceptions embodies all the evidence introduced in the trial court. (R. 27.)

Assignments of Errors.

1. The Supreme Court of the Territory erred in sustaining the ruling of the District Court in admitting against plaintiff's exceptions the record and evidence offered by defendants as set forth in bill of exceptions No. 1; (R. 27–30;) also in bill of exceptions No. 2; (R. 30–32;) also in bill of exceptions No. 3; (R. 33–35;) also in bill of exceptions No. 4. (R. 35–39.)

2. In sustaining the ruling of said District Court excluding against plaintiff's exceptions, the evidence of Lin. McFarland as set out in bill of exceptions No. 5. (R. 39–40.)

3. In sustaining the ruling of said District Court in overruling the plaintiff's motion to strike out evidence offered by defendant as set forth in bill of exceptions No. 6. (R. 40, 41.)

4. The Supreme Court erred in sustaining the ruling of the District Court refusing instructions to the jury as asked by the plaintiff and set out on pages 42, 43, 44, record, in bill of exceptions No. 7, being numbered 2, 3, 4, 5, 6, 7, 8, 9, 11, 13, 14, 16.

5. The court erred in sustaining the ruling of the District Court in giving to the jury, on request of the defendants and against the objections of the plaintiff, the instructions to the jury as set forth in bill of exceptions No. 8. (R. 44, 45, charges Nos. 1, 2, 3.)

6. The court erred in sustaining the ruling of the District Court in overruling the plaintiff's motion for a new trial as set out in the Record, pp. 47, 48, 49.

7. The court erred in refusing a rehearing to the plaintiff and in overruling the plaintiff's motion therefor, as set out in the Record, pp. 67, 68.

9. The court erred in affirming the judgment of the District Court.

10. There are other errors appearing in said record, and especially in the court's deciding that the court would not pass upon but would treat as immaterial in the case the question presented by said fifth bill of exceptions. (R. 39, and bottom of page 66.)

BRIEF.

I.

One of the questions made by this record, as preserved by exceptions to the court's refusal of plaintiff's request for instructions Nos. 5, (R. 43,) and especially 11, (R. 44,) and by plaintiff's exceptions to the giving of defendant's instructions Nos. 2 and 3, (R. 45,) may, we think, be fairly stated thus:

Where a party, (Belk,) on the 19th of December, 1876, makes a relocation of a mining claim in accordance with law, on a lode at the time not, in *fact*, occupied, and on which no possession had been held or work done since June, 1875, and no possession was taken or work done thereon, or claim thereto set up, by the first locator or assigns in any year or time after June, 1875, and the forfeiture became complete January 1st, 1877, and where such relocation was made *bona fide*, on the supposition that the ground was abandoned or forfeited, or both, and where no force was used or dispossession of prior claimant occurred, and where such relocator, in good faith, continued to occupy and work his relocation from December 19th, 1876, to on or about the 21st of April, 1876, in such case has the relocator such interest in the claim, so located, as that he can recover possession of the claim against one who has no sort of title derived from the original locators, and who dispossesses the *actual* occupant and relocator by another relocation made on or about the 21st of February, 1877?

In this question we mean to assume, for the sake of the point, that the ground in dispute was lawfully located, in 1864, by Allison and Humphreys; that their claim was kept alive until 1875, and that J. C. C. Thornton then held an interest therein, which authorized him to hire "G. O.

Humphreys to do work on and represent" this claim in spring of 1875, and that he did it, (R. 20.) and that there was no technical "abandonment" nor forfeiture of the claim until January 1st, 1877, eleven days after Belk relocated, and that the forfeiture became complete on the last-named day.

We submit that, under these facts, though the location was made just before the forfeiture occurred, yet, having been made when the claim had been *actually* unoccupied and untouched for a period of at least eighteen months, when Thornton had abandoned it by his deed of 28th January, 1876, (R. 18,) to Murphy, an l Murphy totally disappeared, and neither he nor any one under him ever reappeared, then the location of 19th December, 1876, is made good by the continued possession and work after January 1st, 1877, and Belk had such an interest as that he could maintain his possessory action as against the trespass of the defendants, committed against his possession, in February, 1877.

We rest this assertion upon the principle stated in *Atherton* v. *Fowler*, 6 Otto, 516, where the court recognizes the principle that, although a pre-emption right cannot be initiated by a settlement which involves a trespass upon the actual possession of a prior pre-emptor, yet where the junior settler makes his settlement in good faith, not, either in intention or in fact, interfering with a prior settler's occupation, and the senior settlement fails and passes away, then the junior settlement shall be held good. The court says:

"In such cases the settlement of the *later* of the two may be *bona fide* for many reasons. The first party may not have the qualifications necessary to a pre-emptor, or he may have pre-empted other land, or he may have permitted the time for filing his declaration to elapse, in which case the statute expressly declares that another person may become the locator, or it may not be known that the set-

tlements are on the same quarter. Johnson *v.* Towsly, 13 Wall., 72."

The rights growing out of actual and first occupancy, as between such occupant and a trespasser, are, under the pre-emption laws, analogous to those applicable to mining claims.

In United States *v.* Stanley, 6 McLean, 409, the court held that where, in a pre-emption case, the first occupant either gives way to a second or abandons his prior right, then that of the second is good *against all the world* except the first occupant, and no one save the first occupant can question the second occupant's right. This is just what is held in the above quotation from Atherton and Fowler, with the additional and material qualification found in the last-named case, that the second settlement must be on lands in *fact* not actually occupied, and when the junior settlement, owing to non-occupation, &c., can be and is settled on in good faith and without actual trespass or force.

We submit that any other construction of the statutes than such as is indicated by what we above quote from the case of Atherton would result in a violation of the whole spirit and purpose of the acts bearing on this point, which is not to exclude, for long periods, *bona-fide* possession and development of mines which are not worked or occupied. According to the position we resist, "A" may, on 1st of January, 1875, locate a claim and do the amount of work required for that year, and may then die or wholly disappear, as Murphy did, (R. 24,) or be away forever after, and no one can come upon or work the mine after January 1, 1875, and that occupation, for that one day, would exclude all others from touching it until the 1st day of January, 1877, two entire years. We think the better construction of these laws is, that a location made in absolute good good faith on a lode actually vacant and apparently aban-

doned—made without actual trespass, and on the faith that it was abandoned or forfeited, becomes valid *after the forfeiture is complete, provided the possession and work is continued and done after forfeiture is complete, the first locator or his assigns never returning or making any claim.*

II.

Another but analogous question is presented by the charges Nos. 5 and 6 (R. 43) asked by plaintiff and refused.

The said 5th instruction asserts this proposition: If the plaintiffs made a relocation 19th December, 1876, lawful in every respect, as defined in instruction 1, (R. 41,) except that the forfeiture of the "Original" lode did not become complete until January 1, 1877, and claimants of Original lode did not resume work or take possession in 1876, then plaintiffs' *possession* in 1877 was rightful, and defendant's subsequent entry was a trespass upon such lawful possession, and plaintiffs can recover against such trespassers in this possessory action. The same question is raised by defendant's instruction No. 1, (R. 45,) which deprives plaintiff of all benefit of his lawful possession.

Stated in another way, the question thus presented is: Where a miner in good faith makes a relocation on a lode actually not occupied or touched for eighteen months previously by any other one, and the prior location is completely forfeited by lapse of time eleven days after such attempted and *bona-fide* relocation, and such relocator *continues* his possession and work in good faith *after* the forfeiture is complete, has such relocator such possessory right after the forfeiture is complete as that on *it* he can recover against one who dispossesses him, and who is in no way in privity with the first and forfeited location?

This is but another form of the question whether one in possession of land may, on his possessory right, recover in

ejectment one of these mining claims against a mere trespasser: May the trespasser assail and defeat the right of recovery by showing that, though the possession of plaintiff was lawful when invaded by the trespassing defendant, yet the legal title of the plaintiff was, under the mining laws, defective?

We submit that this question is answered in the negative by the case of *Campbell* v. *Rankin*, 9 Otto, 261, 262, and the cases cited on page 262.

There the question arose in a mining case coming from the same Territory—Montana—whence the present case comes, and where neither party had the legal title, the miner's possessory right alone being involved.

The second paragraph of the syllabus is in these words:

"In trespass *quare clausum fregit*, actual possession of the land by the plaintiff is *sufficient* evidence of title to authorize a recovery against mere trespassers."

This proposition of the syllabus expresses the decision of this court. And what is here said regarding recovery in trespass is equally applicable to ejectment. This is shown by the following from the opinion of the court, page 262:

"In actions of *ejectment* or trespass *quare clausum fregit*, *possession* by the plaintiff at the time of eviction has always been held *prima facie* evidence of the legal title, and as against mere trespassers it is sufficient. (2 Greenl. Evid., sec. 311.) If this be law when the right of recovery depends on the strict legal title in the plaintiff, *how much more appropriate is it as evidence of the superior right of possession, under the acts of Congress, which respect such possession among miners.* If this plain principle of the common law needed support from the adjudged cases, as applicable to the one before us, it may be found in Atwood *v.* Tricot, 17 Cal., 37; English *v.* Johnson, id., 107; and Hess *v.* Winder, 30 id., 355."

We submit that this decides the present case. The court, against the exceptions of the plaintiff, wholly deprived the

plaintiff of not only all benefit of the "color of right," (9 Otto, 262,) which the plaintiff derived from his said location and possession, in December, 1876, but also of all benefit of his actual peaceable possession, and of his work, in 1877, *after* the forfeiture of the first location of 1864 was confessedly complete!

We submit that, even if plaintiff, in January, and first half of February, 1877, had no other rights on this claim than that given by prior peaceable and *bona-fide* possession, then such possession gave to plaintiff such right as supports ejectment, (9 Otto, 261.) and protected plaintiff from the forcible trespass of the defendants, they having no manner of claim except the alleged right to locate it in February, 1877, as vacant public land. It was not in fact vacant, and could be possessed only by turning plaintiff out, and hence was not open to relocation by defendant whilst so actually occupied by one claiming under, at least, color of right.

And this is precisely what, in *principle*, the court decided in *Atherton* v. *Fowler*, 6 Otto, 513, where this court held that though Paige, after this court's judgment, (1 Black, 541,) had no title to the lands, and they then became public lands, yet Paige being in possession, that possession put the lands in a *status* in which "no right of pre-emption could be established by settlement and improvement," because such seizure of possession involved a trespass upon and dispossession of a party in possession.

If such (as said by this court in 9 Otto, 262) is the law as between pre-emptors, how much more ought it to be the law as in favor of these mining claims, where conflicts are so much more frequent and resorts to forcible dispossession of parties in actual and *bona-fide* possession so much more dangerous, and where Congress has, in express words, (Rev. Stats., sec. 910,) carefully protected the miner's possessory rights of action.

It will be observed that the uses we make of this case of

Atherton and Fowler are emphasized by the fact that the majority of the court and the dissenting judge differed on the very point here involved, to wit: Can a pre-emption right be *initiated* upon lands which are *public* lands, and where there is no *other* impediment in the way of settlement, for pre-emption, than that such settlement is impracticable except by a trespass upon one in actual and *bona-fide* possession?

The dissenting opinion answered this question in the affirmative. The court answered it by saying that whilst a junior settlement, when made in good faith on lands previously occupied, but made without actually interfering with the senior's *possession*, may initiate a pre-emption right, which may be perfected if the senior right has or should fall away and perish, (6 Otto, 516,) yet such initiation of a junior right is impossible whenever the junior settlement is one which invades the *actual* and known possession of another. In this case the defendant Meagher swears (R. 23) "Belk's notice was on my ground." * * * "I saw Belk's notice—thought he had located the ground *too soon*, and went on and located it myself." * * * "I did not see Belk's notice until the day *before* I located the ground, or on the same day."

This is not pointed to here for the purpose of showing the weakness of defendants' title in any other sense than this: that it shows defendants knew of our possession; that they trespassed upon it; and that, as against *such* trespasser upon an actual known and peaceable possession by plaintiff, the plaintiff can recover by means of his possession alone, as was held in Campbell *v.* Rankin, 9 Otto, 262.

III.

We submit there was error in excluding the evidence of the surveyor McFarland, as set out in the fifth bill of exceptions. (R. 39.)

It is not disputed that it was *essential* to the defense, which sought to show that Belk's entry 19th December, 1876, was void as one made *before* the forfeiture of the first location, by Humphreys and Allison, in 1864, that work was done *on* said disputed claim, by parties holding under the said first locators, during 1875. This the defendants claimed they had shown by Humphreys. (R. 20.) To meet this, and show that this work of 1875 was not done *on* the said claim, but on that of "The National Mining and Exploring Company," McFarland's testimony was tendered. Plaintiffs thus distinctly stated the purpose and relevancy of this proffered testimony. (See R. 39.) The excluded question contained two distinct branches, both directed to the precise point which plaintiff stated as the object of the evidence, to wit, to locate the boundary between the "Ann Maria lode," of the plaintiff, and that of the National Mining and Exploring Company. These two branches of the question were:

1. "Did any one point out to you the line between 'The National Mining and Exploring Company's' ground and the defendants'; and if so, whom?"

2. "Do you know where this said line is now?"

Both these questions, manifestly, asked for answers perfectly competent and material.

Suppose the answer had been to the first branch of the question, "Yes, the defendants did," would this not have been good evidence as to the location of the line, and would the answer have been hearsay? The first branch of the question was not objectionable, because it not only did not call for a pointing out of the line by one whose statements would be hearsay, but it guarded against hearsay by asking whom the pointing out was done by; and the second branch asked simply and directly about the state of the witness's own knowledge.

It is difficult to see why this question was refused, unless on the ground stated by the Supreme Court (bottom

of page 66), which was the marvelous one that, since work was shown *by defendants* to have been done in 1875 *on* this claim, which kept it alive until the end of 1876, and thus rendered Belk's entry of 19th December, 1876, "too soon," and void, therefore evidence by plaintiff directed to show that no work was done *on* the claim in 1875, and that defendants' evidence on this was not true, was immaterial in the case! The court decided the case wholly on the *strength* of defendants' proof showing that O. G. Humphreys, in 1875, did work for Thornton *upon*, and which "represented," this claim, and then held that the rejection of plaintiff's evidence, however competent, showing that Humphreys did no work *on* the claim, was an *immaterial* exclusion—so immaterial, as not affecting the result, as that the court was excused from deciding whether the exclusion was right or wrong. The only grounds which occur to us on which the Supreme Court of the Territory, had it considered this fifth exception, could have refused to reverse, on account of this rejection of evidence, would be either (1) that plaintiff was required to say to the court that, by other evidence, he would show that the line pointed out to McFarland was the true one, and not having done this he loses the benefit of the exception, or (2) that the bill of exceptions fails to *affirmatively* show that the answer to the excluded question would have been competent (as, under the invitation of the question, it clearly *might* have been,) and material.

Touching the first of these, it is enough to say that the questions invited an answer which, *by itself*, and independently of *any* and all *other* evidence, was perfectly competent and very important. Had the answer been, "Yes, the *defendant* pointed out the line to me; and I also made surveys and *myself know* where it is," then no other evidence need be called to make that evidence proper.

As to the other reply, to wit, that the bill of exceptions fails to show what the answer would have been, and, there-

fore, fails to show that the exclusion was injurious, it will be observed that the court, *in limine*, excluded all inquiry regarding what *any one* pointed out as the line; and also excluded all answer as to what the witness *knew himself* about its location. It was a ruling which said to plaintiff, at the outset of this line of evidence, going to show that the work by Humphreys in 1875 was not on the land in dispute—"You cannot, with this witness, go into that inquiry. You may not ask the witness, 'do you know where the line now is?' You may not ask him, 'who told you—including the defendant—where the line is?'" It did against plaintiff precisely what this court said it was error to do in Deery *vs.* Cray, (5 Wall., 808,) where the court says what is equally true in this case—

"The plaintiff, by reason of the error of the court, has never been permitted to introduce the *first step* in her proof of her case."

So here plaintiff, was cut off from proving by this witness, "*the first link*" in the chain going to show that work was not done on this claim in 1875.

This, we think, was error.

Where competent evidence is excluded, or incompetent is admitted, and the record duly preserves the exception, then the law presumes harm was done, unless there is that in the record which negatives the possibility of harm beyond a reasonable doubt. The language of this court is, in Smith *vs.* Shoemaker, 17 Wall., 638:

"We repeat the doctrine of this court, laid down in Deery *vs.* Cray, 5 Wall., 795, that while it is a sound principle that no judgment should be reversed on error, where the error complained of worked no injury to the party against whom the ruling was made, it must appear beyond reasonable doubt that the error did not and could not prejudice the right of the party."

This presents a wholly different question from that ruled in Lovell *v.* Davis, 11 Otto, 541, and Nailor *v.* Williams, 8

Wall., 107, where the court held that, where an improper question was permitted *and answered*, the court would not reverse unless the answer given was in the bill of exceptions—this because, the answer being given, it may not have been injurious, and it was perfectly easy for the party excepting to show how this was, by setting the actual answer out.

Here *no* answer was given or permitted, and it was impossible to set one out, or to go on with a further development of what *other* answers might have been elicited, because the court cut the plaintiff off at "the first step," and refused any answers regarding either what any party whomsoever (either defendants or others) said, or regarding witness's *own* knowledge as to where the line was.

IV.

Instructions 2 and 3, (R. 45,) given on defendants' request, we think were manifestly erroneous, because they instructed the jury to find for defendants if they believed that the original locators did $50 worth of work *in* 1875 and made a location in 1864; whereas the statute expressly requires the requisite amount of work to be done on mines located prior to May 10th, 1872, *before* the 1st of January, 1875. (Act of 6th June, 1874, 18 Stats., 61.) This was an extension of the time, as fixed in 5th section of act of 1872, from 10th June, 1874. (Rev. Stats., 2324.) The charge dispensed, wholly, with proof of *any and all work*, on this 1864 location, *prior to* 1875. The statute required it, proof was given regarding it, but it was a disputed fact in the case which plaintiff had a right to and did insist on being proved, and in the instructions asked by the plaintiff (as in instructions 8–9, R. 43, and 13–14, R. 44) the plaintiff sought in various forms to have the court say to the jury, in substance, that defendants, not claiming under the original location, could not use it to defeat the plaintiff's loca-

tion in December, 1876, *unless* they showed, affirmatively, a compliance with the law as to everything required to keep alive the location. But these instructions 2 and 3 (R. 45) completely relieved the jury from even considering whether *any*, and if so, how *much*, work was done on locations made in 1864 on the land in dispute prior to 1875. The fact of work prior to 1875 was a disputed fact in the case—the burden of proving it was on defendants in order to defeat our location of December 19th, 1876—the court's charges 2 and 3 (R. 45) dispensed with all proof of work *prior to* 1875, and no other part of the charge given neutralized the effect of this charge dispensing with work prior to 1875. If the defendants failed to make this proof of work prior to January 1st, 1875, then these lands were thenceforward open to settlement. (St. John *v.* Kidd, 26 Cal., 264.)

V.

The following statutes are here introduced to establish that (1) in this Territory mining claims can be conveyed *only* as other real estate is required to be conveyed; (2) that the deeds named in bills of exceptions Nos. ——, having no attesting witness and defectively acknowledged, were worthless as conveyances of title; (3) that they were not instruments entitled to be recorded; (4) that, therefore, exemplified copies thereof were not evidence; and (5) that they were not good between the parties:

"SEC. 8. And conveyances of quartz claims shall hereafter require the *same formalities*, and shall be subject to the same rules of construction as the transfer and conveyance of real estate." (Sect. 8, page 523, Codified Stats., 7th Sess. of 1871 and 1872.)

"The term real estate, as used in this act, shall be construed as co-extensive in meaning with lands, tenements, hereditaments, and *possessory titles* to public lands in this Territory." (Sect. 34, page 402 of above vol.)

"The term 'conveyance,' as used in this act, shall be construed to embrace every instrument in writing by which any real estate, or *interest* in real estate, is created, alienated, mortgaged, or assigned; except wills, leases for a term not exceeding one year, and *executory* contracts for the sale or purchase of lands." (Sect. 35, page 402 of above volume.)

The foregoing sections show conclusively that the present claim or possessory title comes within the express words of the statute, and can be conveyed only as all other real estate is required to be conveyed.

Now, how could other real estate be conveyed in that Territory?

There is such multiplicity of statutory provision regarding the execution, proof, and recording of deeds in this Territory that it is impracticable to set them *all* out in this brief; but the following are enough to fully possess the court of the legislation which controls the questions both as to whether the *certified copies* of the records of the deeds which the Supreme Court held to be, and which were, clearly defective in these acknowledgments, (to wit, Allison et al. to Binns and Binns to Thornton, R. 62,) were competent evidence, and also as to whether they, each, any, or all, *conveyed an interest* to Thornton which enabled him to "represent" or work the claim in 1875.

As bearing upon the question whether the last-named deeds were entitled to be recorded, the following section decides:

"SEC. 23. Every conveyance of real estate, and every instrument of writing setting forth an agreement to convey real estate, may be *effected, proved, acknowledged, and certified in the manner prescribed in this act* to operate as notice to third persons, shall be *recorded* in the office of recorder of the county in which such real estate is situated; but shall be valid and binding between the parties thereto without such record." (Sec. 23, p. 400 of above vol.)

This section is here set forth as showing two things: (1) that to be entitled to *record* at all (and hence to be proved by a certified copy) the instrument must be *proved, acknowledged, and certified* as in the statutes stated; and (2) that to be *good, between the parties*, it need not be recorded, but must be otherwise duly "executed, proved," &c., &c. Under the rule "*expressio unius*," &c., the statute saying that an unrecorded deed, *if* duly acknowledged, &c., shall be good between the parties, is equivalent to saying that those not so acknowledged are *not* good between the parties. To be good between the parties, only the "record"—not the proof, &c.—is dispensed with.

"SEC. 28. Every conveyance, or other instrument conveying or *affecting* real estate, *which shall be acknowledged or proved* and certified as hereinafter prescribed, may, together with the certificate of acknowledgment or proof, be read in evidence without further proof."

"SEC. 29. When any such conveyance or instrument is acknowledged or proved, certified and recorded in the manner hereinafter prescribed, and it shall be shown to the court that such conveyance or instrument is lost, or not within the power of the party wishing to use the same, *the record thereof, or the transcript of such record*, certified by the recorder under the seal of his office, may be read in evidence without further proof."

This section 29, taken with section 28, again shows that a certified copy of *no* deed can be made evidence unless (1) it is duly acknowledged, &c.; and also (2) there is proof that it is lost, or not within the power of the party wishing to produce it.

The following sections control the matter of what is a good deed:

"SECTION 1. Conveyances of land, or of any estate or interest therein, may be made by deed signed by the person from whom the estate or interest is intended to pass, being of lawful age, or by his lawful agent or attorney, and acknowledged *or* proved and recorded as hereinafter directed."

"SEC. 2. A husband and wife may, by their joint deed, convey the real estate of the wife, in like manner as she might do by her separate deed if she were unmarried."

"SEC. 3. Every conveyance in writing, whereby any real estate is conveyed, *or may be affected*, shall be acknowledged *or* proved *and* certified in the manner hereinafter provided."

"SEC. 4. The proof of acknowledgment of every conveyance, affecting real estate, shall be taken by some one of the following officers: First. If acknowledged or proved within this Territory, by some judge or clerk of a court having a seal, or by some notary public, or some justice of the peace within this Territory; and the certificate of such acknowledgment or proof shall be made under the hand of such judge or clerk and the seal of such court, or under the hand of such justice of the peace; and if the property affected by such conveyance is not in the county of which such justice is an officer, the official character of such justice shall be certified to under the hand and official seal of the county clerk of the county within and for which such justice may be elected or acting. Second. If acknowledged or proved without this territory, and within the United States, by some judge or clerk of any court of the United States, or of any State or Territory, having a seal, or by a notary public or a justice of the peace, or by any commissioner appointed by the Governor of this Territory for that purpose; and the certificate of such acknowledgment or proof shall be under the hand of such judge or clerk and the seal of such court, or under the hand of such notary public or commissioner and his official seal, or under the hand of such justice of the peace; and, in all cases, the official character of such justice shall be certified under the seal of the court, tribunal, or officer within and for the county in (which) such justice of the peace may be acting which has cognizance of the official character of such justice."

"SEC. 5. Every officer who shall take proof or acknowledgment of any conveyance affecting any real estate shall grant a certificate thereof, and cause such certificate to be endorsed, or annexed to such conveyance. Such certificate shall be, when granted by any judge or clerk, under the hand of such judge or clerk, and the seal of the court;

when granted by any officer who has a seal of office, under the hand and official seal of such officer."

"SEC. 6. No acknowledgment of any conveyance whereby any real estate is conveyed *or may be affected* shall be taken, unless the person offering to make such acknowledgment shall be personally known to the officer taking the same to be the person whose name is subscribed to such conveyance, as a party thereto, or shall be proved to be such by oath or affirmation of a credible witness."

"SEC. 7. The certificate of acknowledgment shall state the fact of acknowledgment, and that the person making the same was personally known to the officer granting the certificate to be the person who subscribed to the conveyance as a party thereto, or was proved to be such by the oath or affirmation of a credible witness, whose name shall be inserted in the certificate."

"SECS. 8 and 9"—give the forms of certificates.

"SEC. 10. *The proof of the execution of any conveyance whereby any real estate is conveyed or affected shall be: First. By the testimony of a subscribing witness, or second, when all the subscribing witnesses are dead or cannot be had, by evidence of the handwriting of the party and* AT LEAST ONE *subscribing witness.*"

"SEC. 11. No proof of a subscribing witness shall be taken unless such witness shall be personally known to the officer taking the proof to be the person whose name is subscribed to the conveyance as witness thereto, or shall be proved to be such by the oath or affirmation of a credible person."

"SEC. 12. No certificate of such proof shall be granted unless such subscribing witness shall prove that the person whose name is subscribed thereto as a party is the person described in and who executed the same, that such person executed the conveyance, and that such witness subscribed his name thereto as a witness thereof."

"SEC. 13. The certificate of such proof shall set forth the following matters: First. The fact that such *subscribing witness* was known to the officer granting the certificate to be the person whose name is subscribed to such conveyance as a witness thereto, or was *proved to be such* by oath or affirmation of a witness, whose name shall be inserted in the certificate. Second. The proof given *by such witness* of the execution of such conveyance, and of the facts that

the person whose name is subscribed to such conveyance as a party thereto is the person who executed the same, and that such witness subscribed his name to such conveyance as a witness thereof."

"SEC. 14. No proof of evidence of the handwriting of the party and of *a subscribing witness* shall be taken, unless the officer taking the same shall be satisfied that *all the subscribing witnesses to such conveyance are dead, or cannot be had to prove the execution thereof.*"

"SEC. 15. No certificate of such proof shall be granted unless a competent and credible witness shall state, on oath or affirmation, that he personally knew the person whose name is subscribed thereto as a party, well knew his signature, (stating his means of knowledge,) and believes the name of the person subscribed thereto as a party was subscribed by such person, nor unless a competent and credible witness shall, in like manner, state *that he personally knew the person whose name is subscribed to such conveyance as a witness*, well knew his signature, (and stating his means of knowledge,) and believes the name subscribed thereto as a *witness* was thereto subscribed by such person."

Does this system of laws require a mining claim to be conveyed by deed having witnesses?

And first we think this court is not bound by the territorial decisions regarding the true construction of the territorial statutes as this court is by the final decisions of State courts construing valid State statutes.

These territorial laws do not come within the 25th section of the judiciary act. (10 Wall., 510; 10 How., 8.)

Next it must be observed that when this court, in Mining Co. *vs.* Taylor, 10 Otto, 42, cites Table Mountain Mining and Tunnel Co. *vs.* Stranhan, 20 Cal., 198, holding that mining claims could be transferred without writing, the court was speaking of the law in the absence of statutes requiring writing. This, and said cited case, *is so explained in Patterson* vs. *Keystone Co.*, 30 Cal., 363. And the court,

in this last case, intimates that since the act of 1860, saying that "mining claims may be conveyed by bills of sale," this was no longer the law. But in Meton *vs.* Lambard, 51 Cal., 208, and other cases, the courts of that State have steadily held that the statutes, regulating such transfers, must be strictly complied with in order to pass a mining claim title.

Now, please observe that defendant relies for the defeat of plaintiff's case wholly on the allegations that Murphy's right to the land (as assignee of the location of Allison and Humphreys, in 1864,) was yet in force when plaintiff located the claim, 19th December, 1876—that to show it thus then in force defendant is compelled to show to the court that C. C. Thornton, in spring of 1875, held an interest in the claim which, in law, enabled him to do work on it for the purpose of preventing forfeiture.

The title said Thornton claimed to show to the court was as follows:

1. Through the deed to Binns, (R. 12 and 13,) and from Binns to C. C. Thornton, (R. 14 and 15,) he claimed to hold one-half of this mine in spring of 1875, when he claims to have right to hire O. G. Humphreys (R. 20) to represent the mine by work upon it. Neither of these deeds had any attesting witness, and the acknowledgment of each is defective, as declared by the court below. (R. 62.)

2. The only *other* interest which C. C. Thornton claimed to hold in the spring of 1875 in said mine is that undivided one-fourth which he claimed under the deed of G. O. Humphreys and others of 31st May, 1872. (R. 17–18.)

This had no attesting witness. These are necessary, as is clearly implied by the provisions of section 10 (*supra*)

and the other sections above as a requisite of every conveyance "affecting" real estate, and the deed was otherwise defective, as stated in exceptions on page 39 of Record.

For fuller comment upon this and other questions in the record, we will refer the court to the argument of our associates, hereto appended.

SHELLABARGER & WILSON,
Of Counsel for Plaintiff.

Supreme Court of the United States.

ERROR TO SUPREME COURT OF MONTANA TERRITORY.

JOHN C. BELK, PLAINTIFF,

vs.

HENRY MEAGHER ET AL.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR, BY E. W. TOOLE.

The following suggestions were prepared after reading the brief of Shellabarger & Wilson, of counsel for plaintiff, and are meant as additional and supplementary to that brief:

Besides the error of the court in refusing to permit the surveyor McFarland to testify as to any of the matters about which he was interrogated, there was manifestly error in permitting defendants to testify as to the amount of work done and money expended by them since their location of the property and eviction of the plaintiff. The only question involved under the issues (as will be seen from R., p. 3) was the *right* or *title* of the respective parties *to the possession* of the property in controversy. The complaint clearly defined that portion of the plaintiff's claim upon which defendants had entered and taken possession, which is admitted in the answer, and a justification sought to be made on account of defendants' right of posses-

sion. This constituted the issue in the case, and the evidence thus admitted must have been considered in reference to it, in the absence of any instruction limiting its effect. In fact there was nothing else to which it could apply. It stood as other evidence in the case, to be considered by the jury in determining the issues involved, without in any manner being limited or explained. The evidence under the theory upon which the case was tried, as to the right of possession of the respective claimants, was about equally poised. No such work or expenditure of money was required by either party in support of their right; and it would be difficult to say that the jury did not give it some consideration, as bearing upon the issues, after it had been declared legitimate evidence, by the action of the court in overruling plaintiff's objection to it. It is easy to see how this testimony, under such circumstances, would tend to build up an equity for defendants in the minds of the jury. We think the true rule is, that the court in such cases will not attempt to determine what, if any, effect this evidence may have had on the trial. It is enough to know that it was inadmissible and may have influenced the jury in some way. Nor was it admissible upon or confined to the question of good faith on the part of defendants. This is tested by their knowledge, or rather want of knowledge, or notice of the rights of other parties in cases where it is involved *at all*. Defendants testify that they knew of plaintiff's claim and saw his notice of location before their entry upon the property. This, to say the least of it, put them in a situation where they were required to act at their peril. The question of good faith, therefore, as evidenced by work and expenditure of money by them thereafter, should neither add to nor detract from the title of either. And if admitted for this purpose, it was manifestly erroneous and injurious to plaintiff. The only issue in the case was, as to that character of title incident to the right of possession;

to this it must be construed to apply, and in that it was clearly inadmissible. The bearing this evidence may have had, on account of the great pecuniary loss defendants would sustain, in the event of a recovery by plaintiff, is quite analogous to that involved in the case of Pennsylvania Co. *v.* Ray, 12 Otto, pp. 451, 458, 459, and 460.

I.

The deeds, which were admitted in evidence, were invalid to invest Thornton or Murphy with the title, if any, acquired by their grantors and predecessors to the Original lode—as is shown by the statutes of the Territory, and McGarrahan *v.* Mining Co., 6 Otto, 320, and Clark *v.* Graham, 6 Wheaton, 577, *supra*. If they were admissible at all, it could only have been to show an abandonment and put the grantees in a situation to initiate a title by relocation, which they did not do; (see Barkley *v.* Tulish, 2 Montana, 59;) or to work an *estoppel as between the parties to them*. To this extent alone do any of the authorities we have found go.

Besides, the court passed upon the validity of these deeds, as well as the copy of the record of the Original lode, and admitted them as competent and valid evidence, against the objection and exception of the plaintiff. It was for the jury, under proper instructions of the court, to pass upon the sufficiency of the evidence, as to these deeds, and the accuracy of the copy of that record of the Original lode.

II.

It would seem clear, upon principle and authorities, that Belk could stand upon his location and possession, until his disseizors showed a right within themselves. Even if it was clear that he had gone into possession under an invalid location, or void deed, it devolved upon defendants,

in order to justify an eviction of him, to show sound right or title in themselves, to justify their action. (See Campbell *v.* Rankin, 9 Otto, 262–264, *supra;* Walsh *v.* Hill, 38 California, 488–489; Low *v.* Lewis, 46 California, 549, *et seq.;* Moon *v.* Rollins *et al.*, 36 California, 333; 3d Washburn on Real Property, 4th Ed., p. 134, and p. 3, 1st Ed.)

Yet the court, by instruction 3, (Record, p. 45,) utterly ignored Belk's rights and possession; and directed a recovery, even though defendants had no right or title at all. By it the court shut out all the evidence, so far as the defendants were concerned, under instruction 1, page 41 of record, and confined said instruction in its application to the case of the plaintiff alone. By this action defendants were relieved from showing any title under the laws of the United States, the Territory of Montana, or local rules or customs of miners.

If defendants were required to show title to justify their eviction of plaintiff from his prior possession and location of the property, then instruction 1 (Record, p. 41) properly stated the law applicable, under the evidence defendant had already introduced to show his title. They were met, at the very threshold, with a record which was fatally defective under the law and principles announced by this instruction, and certainly could not have recovered if permitted to apply to the defendants in the case. The injury resulting from this action of the court will be readily perceived when we examine the record of the Gagnon lode (Record, p. 24) in connection with section 2324, Revised Statutes of the United States, and section 1, Laws of Montana, 9th session, 1876, page 127. Compliance with these statutes was decided by the court from which this appeal is taken (in this very case, and, as we think, correctly too) to be a condition precedent to the grant of the United States of the right to occupy mineral lands. The act of Congress in express terms recognizes the laws of the Territory in

reference to the recordation of lode claims. Among other fatal defects in this record of the Gagnon lode (p. 24 of R.) is the total want of an affidavit to its contents. The affidavit appended to it contains not a single fact necessary to be stated in the record, *which* facts are alone expressly required to be sworn to by the locator. Were it the province or disposition of the court to inquire into the *propriety* of this legislation, abundant reasons might be given in support of it. It puts the party upon his oath as to his acts of location. It prevents incumbering the records with fraudulent and invalid locations. It prevents dating back locations upon the ground so as to intercept an elder location. It makes the notice by staking on the ground correspond with the record, so as to impart the notice it was intended to give. It makes the record notice correspond with that actually on the land claimed, so as that a competent surveyor can easily identify the property. It defines the quantity he has taken up, and prevents a fraud upon the rights of those invited to develop and locate the mineral lands of the United States. It is to prevent the evil consequences that might ensue by permitting a party to make the record here made without the requisite affidavit to it, that this statute was enacted. We say that this instruction of the court was of material consequence under the evidence in this case, and that, by said instructions 1 and 3, p. 45 of the Record, defendants were permitted to recover under it, which they could not otherwise have done.

III.

In the admission of the printed copy of the original records of the "Original lode," upon which this outstanding title, if any, in Murphy depended, we submit there was error. By the statutes of the Territory of 1864 and 1865, the *Original District Records*, deposited in the office of the county recorder, became county records, and consequently

competent evidence in the case. The defendants introduced evidence tending to show that the originals were lost, and were permitted to introduce in evidence what is claimed to be a copy of them. To the introduction of which plaintiff objected, (among other things,) for the reason that the evidence did not sufficiently, or at all, establish that it was a correct copy. (See Bill of Ex. No. 1, Record, pp. 27, 28, 29, and 30.) It will be observed that these records and copies were not compared in the *usual way*, nor compared at all; that Humphreys, one of the pretended locators of the ground in question, wrote his own name on this copy; that, as to the accuracy of it, he simply gives his opinion, because Fisk, his deputy, was employed to, and did, copy it. It will not be contended, we apprehend, that there is any statute of the Territory authorizing this copying of the record, or making it the duty of the county recorder or his deputy to record or copy it. It was not, therefore, an official act, from which its accuracy or authenticity is to be presumed. In order, therefore, to render it admissible, three things were indispensable: 1st, that there was an original record of the district deposited in his office; 2d, that it was lost or destroyed; 3d, that the copy offered is a correct one. We concede the general proposition that records made by officers authorized by law to make them may, on that account, upon proof of the loss or destruction of the originals, become evidence. But, as in this case, where there is no law authorizing or requiring an officer to make such record or copy, it loses authenticity as an official act, and must be proven as if made by a stranger. Here the party alleged to have made the copy was not introduced, nor was any one who had compared it with the original, or knew in any other way that it was a copy. It is true that it was among the books of record of the proper recorder. This might raise a presumption, in the absence of evidence to the contrary, that it was the original record of the district. But when shown to be a

copy, the necessary proof of its correctness cannot be dispensed with. Our statute, like others, provides what particular records or copies are competent evidence. This does not come within its provisions, and is consequently excluded from it, and must be established according to the ordinary rules of evidence applicable in such cases. We think too much care cannot be taken in enforcing the strict rule under such circumstances. Here Humphreys seems to have written his own name, *for some cause*, as a locator of the property in question, and the property involved is of great value. The precedent established in this case would open wide the gates to fraud, and invest the recorder (Humphreys) with power to defeat many valuable titles by the acquisition of the same for himself and friends. We think that this copy, for this reason, in connection with the fact that defendants in no way connect themselves with the title sought to be secured by it, should not have been admitted in evidence. (See Coolidge *v.* N. Y. Fireman's Ins. Co., 14th Johnson, [N. Y.,] 308, and authorities there cited.)

If this record copy was inadmissible in evidence under the proof introduced, Murphy and Thornton had no title, or possession, either constructive or actual. And the title of plaintiff and defendants would stand or fall upon the priority of their respective locations and possessions.

IV.

We come now to consider the merits of this controversy under another phase, by which we contend that the plaintiff, at the time of his eviction by defendants, was invested with a right of possession to this property by a grant directly from the Government of the United States, and was at *that time* entitled to a *patent for it.* Nowhere in the record are any of the *acts* of plaintiff, which were necessary to constitute a valid location of the property, questioned. On

the contrary, it is conceded that he did everything required to secure a valid location. (See opinion of court, page 59 of Record.) Nor is it anywhere claimed that whatever rights he acquired were abandoned, forfeited, or lost *at the time of his eviction, or the institution of this action.* The only claims of defendants are, that the title of Murphy and Thornton, with whom they in no manner connect themselves, was not extinct at the date of plaintiff's location and occupancy of the property; and that, notwithstanding it had become extinct for one and a half months before their entry, they were entitled to oust plaintiff; and that, too, without showing any title whatever in themselves.

Upon this state of undisposed facts we submit:

1st. That the laws of the United States clothed the locator of mines made in conformity to it, (*not strangers thereto,*) with an inchoate title, by which such locator (*not strangers thereto*) could protect their possession and right of possession thereto; and such is the effect of the decision in Forbes *v.* Gracy, 94 U. S. R., p. 762, *et seq.* These lands are thrown open for exploration and settlement; and it is of no consequence to the government who acquires the right. The law nowhere prohibits the original occupant from surrendering or abandoning his title to a *bona-fide* locator of the same property.

2d. The location of plaintiff was adverse to and an eviction of Murphy and Thornton, (Golden Fleece *v.* C. C. M. Co., 12 Nevada, 312, *et seq.*,) and put defendants to proof of their title. (Campbell *v.* Rankin, *supra;* Hunnicutt *v.* Peyton, 12 Otto, 333, *et seq.*, 368; Walsh *v.* Hill, 38 Cal., 488–489, *supra.*)

3d. The statutes of limitation of the Territory are expressly applicable under the act of Congress. (See 420 Mining Co. *v.* Bullion Mining Co., Copp's U. S. Mineral Lands, last edition, pp. 363, 364, and 365, reported in full in 3 Sawyer, 634, *et seq.*)

The mineral lands of the United States are thrown open

to exploration and occupancy, and it is of little consequence to the government who it is that secures the right to them. The law nowhere inhibits the original locator of a mining claim from forfeiting or abandoning his claim to a *bona-fide* locator of the same property. Nor can it, in any reason, be said, when such forfeiture or abandonment occurs, leaving such subsequent locator in possession of the claim, that it thereby becomes vacant lands, and as such is restored to the public domain in the sense used in the statute. These lands are at all times open to location and occupancy so far as the government is concerned, subject only to be defeated by the assertion of title or right of possession by the party who has him evicted. The law clothes the locator of a mine (not a stranger thereto) with an inchoate title, by which such locator (not a stranger) can protect *his* right of possession thereto.

In this view of the case, testing the plaintiff's title, in a legal sense, without reference to his *prior actual possession*, we submit the following points and authorities:

First. That the entry of Belk upon the claim in controversy, by distinctly marking its boundaries, so as that the same could be readily traced upon the surface, and the recordation of the same in accordance with law, operated as an eviction of Thornton and Murphy, and invested him with such a possession of the property as set the statute of limitation in motion, and upon it ejectment could be supported. (See Campbell *v.* Rankin, 99th U. S. (9th Otto) 261, *et seq, supra ; Hunnicutt* v. *Peyton*, 12th Otto, 333 ; Sears *v.* Taylor, 4th Colorado, 38 ; English *v.* Johnson, 17th Cal., 107 ; Wilson *v.* Madison, 55th Cal., 5.) It was sufficient for the possessor to maintain an action to quiet title. (Golden Fleece *v.* Cable Con. Co., 12th Nevada, 321.)

Second. That defendants having shown that the title of Thornton and Murphy was good at the time of Belk's

entry, (as determined by the verdict,) it became and was barred, before his eviction by defendants, under both the laws of the United States and of the Territory of Montana, and that their said title had inured to the benefit of Belk, and not defendants, long before any rights whatever of defendants had set in. (Leffingwell *v.* Warren, 2d Black, 605.) By reference to the record, heretofore cited, it will be seen that neither Thornton nor Murphy, nor any one for them, had been upon or represented the premises since June, 1875. That Belk made his location on the 19th day of December, 1876, and that his last work was done on the 15th day of February, 1877. That the attempted location of defendants was made on the 21st day of February, 1877. All these are properly stated in the opinion of the court on page 59 of the Record.

Upon these undisputed facts the court was requested to instruct the jury, in substance, that the eviction of Belk by defendants was a trespass and that he was entitled to recover.

Section 2, Codified Statutes of Montana, 7th Session, pages 591 and 592, is as follows: "No action to recover any mining claim, whether placer or quartz, or any quartz lead or lode, or any interest therein or possession thereof, unless the same be held under patent from the Government of the United States, shall be commenced or maintained, unless *that it is proved* that the plaintiff or his assigns or predecessors in interest were in the *actual seizin* or *possession* of such mining claim, quartz lead or lode, within one year next before the commencement of said action; and unless it is further proved that such plaintiff or his assigns or predecessors in interest have complied with the rules and customs of the mining district in which such placer claim is situated, or with the laws of the Territory relating to quartz leads or lodes, as to such claim, lead, or lode." Section 3 repeals, so far as quartz claims are concerned, the provisions of the statute defining the character of ad-

verse possession to be taken of real estate in order to set the statute of limitation in motion, and leaves it subject to those rules which by judicial decisions have been declared appropriate to this character of property. And this statute has long since received a construction, which has become a rule of property, by the Supreme Court of Montana, in accordance with our views, as will be seen by reference to Davis *v.* Clark, 2 Montana Reports, pages 94, 95, and 96. This statute was and is in full force and has not been repealed. See Laws, 10th Session, 1877, page 215, where chapter LXXX, being the law referred to, is shown not to be embraced in the repealing provision. Neither Thornton nor Murphy having made a re-entry, and upon whom under the law rested the burden of proof, the possession of Belk was good and valid against them; and was, at the time of defendants' entry and the introduction of evidence respecting their title, stale and unavailable. Their right to evict Belk by ejectment was gone. They never made re-entry; by reason of which both their right and remedy became extinct. To permit a stranger to the title of Murphy and Thornton, by his naked trespass, to acquire a title thereby, that was invalid in the true owner, would be an anomaly. Each would be invested with independent fragments of a title, neither of which, separately considered, was good,—one having a title only good upon reentry, and the other an entry without right. The two are not united in any one person. The causal connection is broken, and neither independently considered is good against Belk. But above and beyond all, while Belk was in possession under a location regularly made, and under title acquired by him by the statute of limitation of the Territory, by express statute of the United States Murphy and Thornton's title was absolutely declared extinct on the 1st day of January, 1877. Upon this there can be no difference of opinion. Then on the 21st day of February, 1877, at the time defendants ousted Belk, the title of Mur-

phy and Thornton, which they were permitted to show in this case, was "not a present, subsisting, operative, and available title." The instructions offered by plaintiff upon this subject should have been given, or a verdict in his favor directed by the court upon these undisputed facts. (See Jackson *v.* Hudson, 3d American Decisions, 500, or 3d Johnson, 375; 6th Peters, U. S., 302, 131.)

While we do not concede that this is a case in which title in a third party, or in the government, is available for any purpose to defendants, we contend that the foregoing authority correctly states the law in such cases; and that neither Thornton nor Murphy has any title, available to themselves or defendants, even had they become their successors in interest.

That the statutes of limitation of the State or Territory in which the mine in controversy is situate obtain, we think is no longer an open question. The act of Congress nowhere *expressly*, or even by unnecessary implication, curtails any of the legislative power conferred by the organic act of the Territory; or in any way inhibits it from imposing additional terms or conditions upon the claimant of a mine, other than that one hundred dollars' worth of labor, annually, shall not be dispensed with. It cannot successfully be contended that this possession of the mineral act in any way curtails the right of legislation upon the subject of limitations. Upon this point see *Copp's United States Mineral Lands*, last ed., pages 363, 364 and 365; 420 Mining Co. *vs.* Bullion Mining Co., 3d Sawyer, 364; 420 Mining Co. *vs.* Bullion Mining Co., 9th Nevada R., 240. Suppose that Belk, the disseizor of Murphy and Thornton, *had*, on the 20th day of February, 1877, instituted an action against the disseizees to quiet title, or had applied to the land office for a patent, and the disseizees had put in their adverse claim and brought ejectment against the disseizor. Evidently Belk would recover under the statute of limitation of this Territory, the laws of

the United States, and by this very judgment, under Sec. 2326 of the Revised Statutes of the United States, and would be entitled to a patent. Having acquired this status with respect to the property, it is difficult to see how he lost it by the intrusion of defendants or their grantors, on the 21st day of February. 1877.

Belk, under the allegations of his complaint in this very case, might, with propriety, have shown just what defendants did, *i. e.*, that Murphy and Thornton, at the time he dispossessed them, had a title which was valid, but which had become barred and unavailable under the statute of limitation of the United States and Territory, while he was so in possession of his property. (See Gillispee *vs.* Jones, 47 California, 259.)

By doing this, so to speak, he would be showing himself invested with an additional right to that secured by his relocation of the property. This title of the disseizees was lost somewhere at the time of defendants' location, and, if not vested in the disseizor, the title of it reverted to the Government, and was unavailable to defendants as a defense. It must have been somewhere vested from the date of the disseizin by Belk to the date of the intrusion by defendants. If Belk had no title at the time of the disseizin of Murphy and Thornton, after the statute had fully run, (*i. e.*, Jan'y 1st, 1877,) so as to effectually bar their claim, the disseizor acquired a *new title, founded* on *disseizin.*

Being thus vested with a new title, founded upon, and springing from, the disseizin, it must correspond to, and be co-extensive with, that of the disseizees. Any other construction, by which his title thus acquired would be curtailed or extended, would inaugurate a rule that would lead to inextricable confusion.

So far as the entry of Belk before condition broken is concerned, upon which considerable stress was put in the trial below, we contend it has nothing to do with this case.

Defendants do not connect themselves with the parties affected by it; nor did they, or the parties themselves, make re-entry upon the premises or do the requisite amount of work before the condition was broken and their right of entry barred and forfeited. The provisions of the United States statute, in reference to forfeiture and non-forfeiture, are made for the benefit of the party against whom it is claimed to have occurred (not a stranger). There is no condition subsequent involved. This entry and work was a condition precedent to their right of recovery against Belk, the disseizor; and this they never did, while the time for doing so had expired long prior to defendants' acquisition, or attempted acquisition, of any right whatever.

By his entry, Belk, the disseizor, had initiated a right that was good against all the world, except as against Murphy and Thornton, the disseizees, and which could only be defeated by them, in the manner suggested. They had no remedy under the statute of limitation of the Territory, and, on the 1st of January, 1877, all title they ever had was swept away. There is nothing in the position that Belk's entry and location was void. It was simply voidable at the option of the disseizor, and was of no concern to the Government or defendants. If the statutes of limitation of the States and Territories are to be maintained, the right to set such statutes in motion by a hostile entry and disseizin, must, from necessity, be recognized and upheld. If it be conceded that any one but the true owner may oust the disseizor, then the statutes of limitation are rendered absolutely nugatory, and the right to acquire title and patent by adverse possession, expressly recognized by the act of Congress, does not exist. He would have no repose or protection by which his fee could ripen into an absolute right.

The statute of limitation was certainly set in motion by the entry, location, and possession of Belk. It was such

an ouster as required the invocation of an action of ejectment to restore possession, which action could not at the time of defendants' entry be maintained; and it was of such an open, definite, and notorious character as to divest the owner of a right of action to quiet his title. The true owner was without a remedy; and this is the title relied upon by defendants to defeat the plaintiff in this action. To the extent that this right of possession had been vested in Murphy and Thornton by the Government, it had been enlodged in Belk. If this is not true, the statute referred to is but the outward semblance of a law, without any of the benefits it was intended to secure. Had Murphy and Thornton's title not became extinct under the act of Congress before defendants' entry, the bare fact that it provides a contingency upon which a forfeiture shall occur, must receive a construction in connection with the rights secured by the statute of limitation of the Territory. They are not in conflict with each other, but each can stand and subserve the purposes for which it was intended.

Indeed, the statute of limitation was a proper subject of legislation under the organic act and *the constitution* of the Territory, and has not been taken away by *express law*, or even unnecessary implication; and, as matter of political enactment, when applied to this character of property, should be administered with great liberality, unless manifestly in conflict with some superior law.

We think that the conclusions are irresistible. 1st. That Belk's location was good against all persons, except the true owner at the time—if there were any such—and which could only be defeated by such owners by re-entry on or before January 1st, 1877. 2d. That if there were any such owners, as they never made such re-entry, he became entitled to the possession of the property, and his eviction by defendants was a trespass. 3d. That at the time of defendants' location Belk was entitled to, and in possession lawfully, under the U. S. and territorial laws, and

was entitled to enter the property and receive a patent for it. 4th. That the whole merits of the controversy, legal and equitable, are with him; that by the verdict of the jury, under the theory upon which the case was tried, he has been unjustly deprived of his property, and it should be restored to him.

As it is claimed by the plaintiff in error that the last proposition discussed in this brief will in all probability determine this controversy without further litigation, they respectfully request that if the case is to be reversed upon any of the errors assigned, the questions involved in it be determined by this court, and that by its judgment the court below be directed to enter judgment for plaintiff upon the *undisputed* facts contained in the record.

E. W. Toole,
Of Counsel for Plaintiff in Error.

SUPREME COURT
FILED
NOV 2 1881
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

No. 69.

JOHN C. BELK, Plaintiff in Error,

vs.

HENRY MEAGHER et al., Defendants in Error.

In Error to the Supreme Court of Montana Territory.

E. W. TOOLE, for Plaintiff in Error, in Reply to Briefs of Merrick & Morris, and W. W. Dixon and J. C. Robinson, of Counsel for Defendants in Error.

Thomas McGill & Co., Law Printers, Washington, D. C.

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In Error to the Supreme Court of Territory of Montana.

Reply for Plaintiff in Error to Briefs of Counsel for Defendants in Error.

I.

The three briefs of the respective counsel for defendants in error having just been by us received, time will not permit us to review the points made separately and at length. We will, therefore, briefly consider them collectively under their appropriate headings. Counsel start out with the assumption that defendants in error are in possession of the property under a valid location made on the 21st day of February, 1877. (See Brief of Merrick & Morris, p. 3.) It is difficult to see upon what basis this assumption is made, under the records in this case. Ordinarily, it is safe to presume that all the issues are determined in favor of the successful party by the general verdict of the jury. But if it appear that some particular

issue was by the court withdrawn from the consideration of the jury, this presumption as to that particular issue no longer obtains.

It will be seen from the record (p. 3) that this is the very fact alleged in defendants' answer. This affirmative matter, which was rendered necessary on account of the prior possession of the plaintiff, was denied in the replication, as will appear by reference to Record, p. 4. Here was an issue of fact then to be tried by the jury. See 10th Session Laws of Montana, p. 98, secs. 239, 241, which are as follows:

"SEC. 239. An issue of fact arises: 1st. Upon a material allegation in the complaint controverted by the answer; and 2d. *Upon new matter in the answer controverted by the replication.* * * *

"SEC. 240. * * * In all cases where there are issues both of law and fact, the issue of law must be first disposed of; and in *all cases issues of fact must be tried by a jury,* (except in actions involving the settlement of accounts between parties,) unless a jury shall be waived by the parties."

Plaintiff considering the evidence as to the recordation, affidavit, and location of the property wholly insufficient under the laws of the United States and of the Territory, offered instruction No. 1, p. 41 of the Record, defining what was necessary to be done in such case. This the court gave; but, by instruction 3, p. 41 of the Record, it instructed the jury, in substance, *that, so far as defendants are concerned,* they need only show that there was an outstanding title under which *fifty dollars'* worth of work was done in the year 1875, then they would, *ipso facto,* find for defendants. By this the respective locations of plaintiff and defendants were alike ignored and withdrawn from the jury. The very facts that could alone extend the possession of either party beyond a *pedis possessio* were thereby eliminated from an action where the sole question involved

was that of possession and right of possession. (See law of Congress cited in same brief on p. 8, being sec. 910; also, see sec. 2326 of the Revised Statutes of the United States on the same subject.)

By this manifest error of the court the assumption made by counsel is erroneous, and the very elements necessary to support the respective titles or claims of the parties eliminated from the case. By this action of the court it denied the plaintiff the right to set in motion the statute of limitation as against the outstanding claim of Murphy, if he had any, which was expressly given to him under the statute of the United States, (sec. 2332,) and dispensed with all evidence tending to show a forfeiture of the title of Murphy, for the *patent* reason that under section 2324 of the Revised Statutes it was never extinguished until this relocation of the property was made. The court could not thus dispense with all the other issues of fact in the case, nor could it find part and leave part to the jury. There were other material facts aside from the question whether Murphy's title was forfeited or not. They were fairly raised by the pleading, necessarily arose in the trial, and could not thus be disposed of by the court. Indeed, counsel have labored to show that Murphy's title was still in existence, until a valid relocation was made after forfeiture, and before the resumption of work. The court, in effect, said to the jury, what is claimed by counsel, that Murphy's title was valid until a relocation of the property was made according to law, and in the same breath told them that they should not consider the relocations of either party in any respect whatever. This left the case thus: If Murphy ever had a title it could not be extinguished except by relocation. You shall not consider the relocation of either party, and his title is consequently still good. These questions were legitimately in the case, and should have been submitted to the jury. The Supreme Court of the Territory fell into a like error, and based its decision upon the

same premises. (See Record, top page 66, margin 183.) The foregoing is alike applicable to the point made by Mr. Robinson as to the possession of defendants. By plaintiff showing a prior possession, he proved a title that removed the presumptions of rightful possession in defendants, and made him a trespasser, until he produced such evidences of title that would give him a superior right to the prior possessor.

II.

Upon the questions as to the admission of the evidence touching the amount of work done, and the rejection of the testimony of McFarland, the surveyor, there seems to us no doubt but that there was error.

The proposition to avoid the consequences of these rulings (on page 4 brief of W. W. Dixon) is: 1st. Because the only proper evidence of the extent of defendants' possession, as well as their good faith, was their record, affidavit, and relocation. But this was by the court withdrawn from the jury. (See also brief of plaintiff in error, pp. 27 and 28.)

It is claimed that as plaintiff had introduced evidence of a similar character, which even though not objected to, for this reason the defendants were likewise entitled to introduce evidence upon the same point. This cannot be maintained, 1st, because it was necessary to show the actual possession and occupancy of Belk; 2d, because the amount and value of the work was drawn out on cross-examination; 3d, because to allow a party to set by and admit illegal evidence, waive his objection to it, and thereby open the door to introduce like incompetent evidence, would lead to interminable prolixity and delay. There might be some reason for it if such evidence was to rebut or disprove some incompetent fact. Plaintiff never waived his right to object to such evidence, and insists upon his objections to it.

It is claimed that this evidence was not objected to when offered, and consequently it is bad practice to allow a motion to be entertained thereafter to strike it out. While we are aware of the authorities cited by counsel, (p. 4, brief of Dixon,) we do not concede the proposition in the broad terms in which he states the rule, or that they go to that extent. We claim that the record nowhere discloses that the objection was not properly made at the time such evidence was offered, but, on the contrary, the motion then and there made during the trial shows that such objection was made, and the court indorsed and signed the exception upon the same. (See R., pp. 40–41.) This motion and the indorsement upon it became a bill of exceptions, which, under our statute, is not required to be in particular form. A motion purporting to be based upon the grounds that the evidence was inadmissible, and had been objected to when offered, if overruled generally, must be construed to be upon the basis that it was competent evidence. If for the *other reason* the *court should* have refused to entertain the motion *at all*, and the exception would then have been on that account, as it is, the presumptions are that the motion was decided upon its merits and on the facts stated in it.

III.

Authorities are cited to show that the copies of the rec ords of the Original Lode which were necessary to establish any title in Murphy, if such title was at all admissible, were recognized by the miners of the district, and were consequently valid. This would be true if it were not for the statute, (section 16, p. 525, Codified Laws of Montana,) which provides "that all mining district records of all leads or lodes * * * that are now or shall be deposited within the next ninety days after the passage of this act in their respective county recorder's office shall become a part of said county records, and shall be evidence in any court of

competent jurisdiction, and have the same force and effect as if such records had been recorded in the county recorder's office, and there first filed with the mining district recorder."

The doctrine of "*expressio unius exclusio utterius*" is especially applicable here. These were shown not to be the original records filed with the district recorder, but what purported to be copies of them. The question is not solely whether they would be admissible as copies at all, (*the originals not being filed as required by the act,*) but was the evidence that they were copies admissible, conceding that if they were such they were competent. In other words, was the evidence by which the alleged copies were established primary, or was the foundation for secondary proof laid? We say not. The copy not being made as an official act authorized and required by law, and the originals having been shown to be lost, the correctness of them should have been shown by the one that made the copy, or persons that compared it. Fisk, the man that made them, was living. There was no evidence that they were ever compared, and the only proof was that Humphrey believed they were copies, because he believed Fisk did his duty. (See original brief of plaintiff in error, pp. 31, 32, and 33, and authorities there cited.)

IV.

It is contended by counsel that the burden of proof rested upon plaintiff to show that the title of Murphy was extinct. We cannot see that this question is of any importance in this case. The record discloses the fact that defendants took it upon themselves to show that it was not. Plaintiff attempted to establish that it was, and there nowhere appears an exception upon either side as to the order of proof, which was really a matter of discretion with the court.

The question of the existence or non-existence of an outstanding title in Murphy becomes important in this case, upon the sole contingency that if plaintiff was in possession of the property at the time of defendants' entry, it became necessary for defendants to show two things:

1. That, by reason of the outstanding title in Murphy, plaintiff acquired no title by his location and possession.

2. That, after condition broken by Murphy, defendants made a valid relocation thereof, and were justified in the eviction of the plaintiff.

This leads us to the consideration of the character of plaintiff's possession and the rights, if any, he had secured thereby at the time of defendants' entry. We say the proposition is a plain one, and not at all in conflict with any of the authorities cited for defendants in error.

First of all, the questions decided by this court, and relied upon by the defendants in this case, can have no application whatever to it.

Whether a person can acquire any right by filing his declaratory statement upon public lands at the time not subject to entry, or whether such filing could be made available when these lands become subject to entry, are governed by the homestead and pre-emption laws upon that subject; while in this case the questions are controlled by the mineral land act and the construction to be placed upon it. By section 2332 of the Revised Statutes of the United States, the right to acquire a title to mineral lands *held by another under a grant from the government*, by adverse possession, is *expressly* given. Whatever, then, is required to be performed in order to establish an adverse possession necessarily follows by implication. Three modes of acquiring title to mineral lands are pointed out by the statute: 1st. An original location of claims never appropriated; 2d. A relocation of claims theretofore located, and which have become forfeited; 3d. By adverse possession. Counsel entirely lose sight of the fact that we had a right

to obtain a title to this ground by disseizin and adverse possession. They seem to entirely overlook the fact that in order to acquire the status, with respect to this property, of an adverse claimant, it was necessary that we should make our entry as hostile and notorious as that by which the claim is originally segregated from the public domain. The entry of plaintiff, his staking out of the claim, and the recordation thereof in the manner provided by law, was not, therefore, a nullity; it was one of the modes provided for acquiring title. It was voidable only at the option of Murphy. Murphy never did assert his claim, and one who does not connect himself with it is in no situation to avail himself of it.

The plaintiff was pursuing one mode recognized by the statute for acquiring a title, defendants another. In such case the doctrine of "*prior est tempore potior est jure*" must prevail.

The court, by its instructions, treated defendants as strangers, and allowed them to evict plaintiff without showing any compliance with any law. If a stranger can so evict one holding adverse possession against the true owner, he in turn may be evicted, and so on *ad infinitum*. There *would be* no such thing as acquiring title by adverse possession, which is given by express statute. The question of right of possession which is provided for by section 2326 R. S. of U. S. is set at naught, and the fortunate trespasser who is in possession would always recover.

A location, then, made in accordance with the statute is an adverse possession to the true owner, and continues to be such as long as the adverse claimant represents it according to law. Plaintiff, therefore, had acquired a status, to say the least of it, with reference to this property, which would ripen into an absolute right, even under the section of the law cited by Mr. Dixon in his brief for defendants, on page 9.

We can readily see how the two provisions of the stat-

utes referred to can be construed together, and both stand and subserve the purposes for which they were intended. If a title has been initiated by disseizin and adverse possession, as was this case, and the disseizee fails to do the work required and forfeits it, or does not assert his claim to it, it is not vacant and unoccupied lands, subject to relocation, in the sense used in the statute, but it is land in adverse occupancy of another, as provided by the statute. Upon the other hand, if there is no desseizor and adverse claimant at the time of forfeiture, it is open to relocation, and could be appropriated by defendants in the manner they sought to appropriate it. As it was, plaintiff was in possession by a claim that would ripen into a right, and the invasion thereof by defendants was a trespass.

It will be seen that this comports with the principles laid down by this court in the case of Atherton *v.* Fowler, 6 Otto, 513, and reaffirmed in several subsequent cases. The two statutes are thus made to stand together, and each receives a construction that commends itself to the dictates of justice. Counsel has labored hard to exemplify the distinction made by the authorities between actual and constructive possession; and that the possession, if any, acquired by plaintiff, was not sufficient to set in motion the statute of limitations under the rule declared by adjudicated cases. He does not mention the right of possession secured to plaintiff by adverse possession, as against everybody but the real owner, and that it is "for a court of competent jurisdiction to determine the question of the right of possession" under sec. 2326 of R. S. of U. S. referred to. It is not contended that plaintiff forfeited whatever right he acquired, or that he did not comply with the law as to work and representation. In fact, he had, under the law, until January, 1878, to represent this claim. (See sec. 2324 R. S. of U. S.) The same law of representation, and every thing else required, is applicable alike to an original locator, a locator after forfeiture, and a locator by adverse

occupation. The authorities cited by counsel for defendants are, of course, good in the absence of *any controlling* statutory provisions. There is no express provision of the statute making a relocation and record of a claim before forfeiture void, but it is claimed that by necessary implication it is so. This is not the case. By express provision of the statutes of the United States and Territory we have seen that such occupation by adverse possession is likewise recognized. Hence the implication does not obtain that such acts are void—both can stand together. Murphy could recover against plaintiff before the statute run, and plaintiff could in like manner recover, as he has sought to do, against defendants.

But, as we have seen by sec. 2332 R. S. of U. S., adverse possession, taken and held in accordance with the laws of the *Territory, entitles the holder* to a patent by that mode of of proceeding; and by sec. 4, Codified Statutes of Montana, 1871–2, p. 592, it is provided that such possession, in accordance with the *laws* of the *Territory*, (which, with reference to the mode of appropriating a quartz claim, are similar to the laws of the United States, except it provides the mode of recording,) that in case adverse possession is taken, the claimant must have been in actual possession within a year to maintain trespass against the occupant.

It is of no avail for defendants to complain of the impropriety of permitting a location and occupancy of this class of property by adverse possession, *i. e.*, before a forfeiture has actually occurred. It is a sufficient answer to this proposition to say that, by sec. 2332 of the Revised Statutes of the United States, the right of the Legislative Assembly of the Territory to enact laws upon this subject is expressly recognized. Under it the Territorial Legislative Assembly, finding the whole face of the country checkered over with locations, many of which had been made years ago, while a large portion of the locators had left the country, probably never again to return, and seeing the dire necessity of in-

augurating a system of laws that would relieve it from this stagnant condition of things and put it upon a footing that would result in the development of its mines, the principal resources of the country, saw fit to provide for the acquisition of a title under the statutes of limitation. Should the court be disposed to look at the policy of such legislation, thereby reaching beyond the *bare question* of *authority for it*, as contended for by the defendants in error, we submit that as matter of political enactment it was wise and salutary.

In order to avoid the consequences of the erroneous instruction of the court, relieving the defendants from showing a title of any kind, and taking away from the jury the question even of prior possession of plaintiff, by saying to them that all that it was necessary for them to find was that Murphy's title was not extinct at the time of plaintiff's entry, counsel for defendants in error claim that no *prima facie* case was made by plaintiff, by reason of which such instruction could work no injury.

Under the theory advanced by defendants, the court should pass upon the sufficiency of the evidence under the several issues, and not the jury. We have seen that, under the law, a relocation and record in conformity therewith would set the statute in motion, was an adverse possession as against the real owner. That the posting of the notice on the claim, record, and the marking of the boundaries in the manner required to segregate it from the public lands was all done; that the time for doing the amount of work required of plaintiff had not *expired* at the *time of defendants' entry*, by reason of which his adverse possession and right to possession was *continuous* and co-extensive with his claim, was all shown. Admitting that the records and surface location, as claimed, are irregular, they were of an open, notorious, and hostile character, and all-sufficient to establish an adverse claim, which, at all events, was for the jury to determine. (See 420

Mining Company *v.* Bullion Mining Company, and authorities cited in original brief.)

Defendants in error again claim that our entry as against Murphy's title was not in good faith, and consequently if we did acquire a possession prior to them, it is unavailing. And they cite cases to the effect that such a possession acquired before forfeiture would be declared void. Grant it. But at whose instance could it be so declared? Manifestly at the instance of Murphy and not a stranger. If the title of Murphy or his assigns is not invoked before the statute has run, it is clear that as against the grantees of the United States, the common source of title in this case, the plaintiff had inaugurated a title under the *laws* of the *United States* by disseizin and adverse possession which was prior in point of time to the entry and relocation of defendants, which right he asserts in this very action before the statute of limitation has run against him. This Murphy might have done but did not, which is of no consequence to defendants, and should not on that account have figured in the trial at all. The records show that it was objected to *in limine* by plaintiff, and carried through the trial down to and embracing the instructions. These objections were overruled and exceptions duly taken.

But it is also claimed that plaintiff intended to relocate and acquire a title to the Gold Hill and not the Original Lode, and that for this reason his relocation of the Original Lode was not in good faith.

It will be seen from the opinion of the Supreme Court of California, in Gillespie *v.* Jones, 47 Cal., 259, that plaintiff could in addition to other rights rely upon whatever claim he had to this property on account of adverse possession, which is good against all else, and may or may not, as the case may be, prevail against the true owner.

Many statutes make the question of good faith in the entry a condition upon which the statute of limitation is set in motion. Under the statute in question, as we view

it, all that is required of the adverse claimant is to show that his occupation of the property was in hostility to the title of the true owner, and the question of good faith is only involved when improvements are sought to be set off by such occupant against rents, issues, and profits. Defendants, as shown by the record in this case, have not even this right in law or equity.

But we contend that, in either view of the case, the deduction of counsel that the relocation and adverse possession of plaintiff as against the alleged title of Murphy was in bad faith, is not supported by the record. It is true that the plaintiff intended to relocate what he supposed was the Gold Hill Lode, yet he relocated the precise piece of property he believed to be vacant and that he intended to relocate. His mistake, therefore, in the name of it has no bearing upon the question of *good faith.* In good faith he located the *particular piece* of *property*, the *locus in quo* in question, and it certainly nowhere appears that his mistake in its name was in bad faith. (See Record, bottom of p. 7 and top of p. 8.) Besides, it is a fearful begging of the question for defendants to say that as your location was not in good faith to Murphy, we, with a knowledge of your claim, will on that account take it from you; we see Murphy won't do it, and appears willing for you to have it, but we are not.

It is also claimed that in so believing that it was the Gold Hill Lode that it was misleading. The statute requires the ground to be so marked out on the surface that its boundaries can be readily traced. It is this that makes the possession of the locator or relocator, as the case may be, co-extensive with his boundaries. This was done by the stakes and discovery notice at the discovery shaft, defendants saw it, were not misled, but located with a knowledge of plaintiff's claim. It would be a desperate search for ignorance and stupidity to say that the discovery notice was upon the ground claimed, gave direction to the par-

ticular stakes that designated its boundaries, and yet the one cognizant of these facts believed the claim so located or relocated was somewhere else. No; defendants relocated "because they thought plaintiff had relocated too soon." It was done with their eyes open; they were mistaken in the law applicable to the case and must suffer the consequences. It is asking that the plaintiff lose his right because defendants thought he had none. If the controversy was between Murphy and plaintiff, many of the authorities cited by counsel for respondent would be applicable; as it is, they are not in point. In fact, the statutes of the United States recognizing the initiation of a title by adverse possession, good against all the world except the real owner so long as it is kept alive by complying with the requirements of the law, is utterrly irreconcilable with the position advanced by defendants, that the acts necessary to so initiate such a right are void.

We repeat, then, that plaintiff being in the adverse possession of the property at the time of Murphy's forfeiture thereof, it was not vacant in the sense used in the statute so as to enable defendants to defeat such right, even if they had made a valid relocation, and that fact had been submitted to and found by the jury. If plaintiff on the 15th day of February, 1877, had applied for a patent under section 2324, Murphy would have been required to have interposed his adverse claim, and brought his suit to evict the plaintiff, or quiet his title, within the time provided for the publication of the notice of such application, or he would be deemed to have waived his claim; and under section 2325 plaintiff, by doing the $500 worth of work, and proof thereof to the satisfaction of the land office, would be entitled to his patent. If he interposed his adverse claim as provided by section 2325 and section 2326, and brought his suit as required by law, then under section 2 Codified Statutes of Montana, p. 591, his title was stale and unavailable; the plaintiff under this statute would have

defeated his action, and by section 2326 Revised Statutes of the United States, upon producing the judgment roll would have been entitled to his patent. This is the condition plaintiff was in, with respect to this property, at the time of defendants' entry, so far as Murphy was concerned, with the additional right to occupy as against every one else until the full statute of limitation run, *if this was necessary at all.*

Section 2, Codified Statutes, 591, *supra*, is as follows:

"No action to *recover* any mining claim, whether *placer* or *quartz*, or any quartz, lead, or lode, or *any interest therein* or *possession* thereof, unless the same be held under patent from the Government of the United States, shall be commenced or maintained, unless *it is proved* that the plaintiff or his assigns or predecessors in interest were in the actual seizin or possession of such mining claim, quartz, lead, or lode within one year before the commencement of such action, and unless it is *further proved that such plaintiff*, his assigns, or predecessors in interest have complied with the rules and customs of the mining district in which such placer claim is situated, *or* with the laws of the Territory relating to quartz, leads, or lodes, as to *such* claim, lead, or lode."

That the location, recording, and staking of the property in question gave plaintiff adverse possession of the property, see Golden Fleece Mining Co. *v.* C. C. M. Co., 12 Nev., 312 *et seq.;* Wilson *v.* Madison, 55 Cal., 5; Washburn on Real Property, vol. 3, 3d ed., pp. 3, 135, 136; Copp's U. S. Mineral Lands, last ed., pp. 363, 364, 365; English *v.* Johnson, 17 California, 107.

As bearing upon the same point, see Atherton *v.* Fowler, 6 Otto, *supra;* Hunnicutt *v.* Peyton, 12 Otto, 333; and 12 Nev., 321, *supra.*

That this statute of limitation is valid, in recognizing a relocation, unless the same before forfeiture is avoided at the suit of the real owner, see 420 Mining Co. *v.* Bullion Mining Co., 4 Sawyer, 634 *et seq.;* Sears *v.* Taylor, 4 Col., 38.

And this is not in conflict with the authorities cited by Mr. Dixon in his brief, pp. 13 and 14, but in perfect har-

mony with them, when considered in connection with the parties to the controversy and the rights of one claiming by adverse possession.

As to the effect of a title thus acquired by adverse pospossession, see 2 Black, U. S., 605 *et seq.;* Leffingwell *v.* Waneu, 9 Nev.; 43 Cal., 65, 73, 251 and 252.

That under the statutes quoted—*supra*—the claim of Murphy was stale and unavailable against plaintiff, on the 15th of February, 1877, at the time of the eviction by defendants, see Davis *v.* Clarke, 2 Montana, 394, 395, and 396. When the question came up on a motion for rehearing, involving the necessity of the adverse occupant possessing the property for one year, under section 4, cited by counsel for defendant, where the court say:

"The language of the law is plain and unambiguous, and there is no room for construction. * * * * The doctrine of the authorities cited was recognized by our courts, and it presumed that the party who had the record title had possession of the lode. These amendments were passed to obviate the mischief resulting from the enforcement of this rule, and the nature of evidence required in actions for the recovery of this character of property was changed.

The plaintiff in such a case is compelled to prove that he or his assigns, or predecessors in interest, was in the actual seizin or possession of the lode-claim within one year next preceding the commencement of the action, and the legal presumption of such possession has been rendered insufficient. Courts have no power to modify this statute." * * *

In accordance with this view of the case, plaintiff offered instruction Nos. 6, 7, and 8, (Record, p. 43,) which were refused by the court and exceptions thereto duly saved. (See R., 42 to 44.) The court by instruction 3 (p. 45) told the jury that all that was necessary for defendants to show was that Murphy did $50 worth of work in the year 1875. It appeared that this work was done in *June*, 1875, and de-

fendants recovered. According to section 2326 of the Revised Statutes of the United States, if Murphy had sued he would have had to recover upon his "right" to possession under the statutes of the Territory. This he could not do, and defendant, by the refusal of said instructions 6, 7, and 8, and the giving of said instruction 3, (*supra*,) was enabled to recover. It put defendant in a position to say that notwithstanding the title of Murphy was stale and powerless to him at the time our rights set in and this case was tried, yet it is a formidable and effective weapon in our hands in dispossessing you of this property. Yes, further than this: it puts them in a position to say that notwithstanding you have, under the statutes of the United States and section 4 of the Legislative Assembly of the Territory, referred to by counsel for defendants, initiated a title which might ripen into an absolute right and secure to you a patent, if no objection is interposed by Murphy, is unsatisfactory to us, although Murphy is willing and you shall recover. We submit that this is not law or justice; that the stale and worthless claim of Murphy should have not been permitted, and the court should have given instruction 8 (Record, p. 43) offered by plaintiff on this point. (See Jackson *v.* Hudson, 3 American Decisions, 500; 6 Peters, 302, 131.)

That the rights conferred by the three modes we have pointed out—original location, relocation after forfeiture, and adverse possession—(when, as in this case, no claim is asserted by the disseizee)—are co-ordinate, should be protected; all the provisions of the statute be permitted to stand together, and neither allowed to pinge upon the other. It is easy to perceive that under this construction of the whole law this can be done, and it is thereby made to harmonize and comport with the general principles that prevailed before its enactment.

We contend that in declaring certain acts in the relocation by plaintiff void regard must be had to the

surroundings and the persons against whom or in whose favor it may be so declared; and when the court, or officers of the land office, as in the cases cited by defendants' counsel, declare an act void, in the application of this rule it is necessary to ascertain to what extent these decisions go. It may be that the language used should be confined to the particular case on trial, and is inapplicable to another and different condition of affairs. It will be seen that the cases so cited by counsel are questions of relocation and adverse possession acquired *before forfeiture*, when the person against whom the forfeiture and adverse possession is sought to be enforced is a party asserting his right, or cases where no one is claiming by adverse possession, as does the plaintiff here. In this case Murphy asserts none; the analogy is incomplete, and the decisions are in perfect harmony with the interpretation given the statute under which we claim. Then to hold that it was necessary for plaintiff to establish that the property was vacant and forfeited, and *that this was necessary* in order to show a compliance with the law—in other words, that a relocation and adverse possession was void before forfeiture—would utterly annihilate the rights secured by sections 2332 and 2326. If an adverse claim is interposed, the case is determined then as any other case where the statute of limitation is involved.

Under another view of the case, and by a proper construction of the very statutes relied upon by defendants' counsel, we contend that the title of Murphy was extinct on the 1st day of January, 1875, which, if true, is fatal to the claim of defendants, under any aspect it may be considered.

Plaintiff having first proved such a location and record as was prescribed by law, that he did all the work required, and that defendants relocated over him and took possession, rested his case, and was of course entitled to recover. Defendants, to show that plaintiff's location was invalid,

introduced evidence only of work done in 1875, which was all that was required to be shown, as will be seen by instruction 3. (Record, p. 45.) No proof was made or *required* as to work or representation in 1874. If work was, therefore, necessary in 1874 to keep alive the title sought to be shown by plaintiff in Murphy, the defense must fail. (See opinion of court, 1st part, R., 59.)

The position of counsel, that under these circumstances it was for plaintiff to prove that the title of Murphy was extinct, is certainly untenable. The case in this respect was tried upon a different theory, and correctly, too. Had the course suggested by defendants' counsel been pursued by the court, plaintiff would have supplied this proof, and if not permitted by the court so to do, would certainly have withdrawn a juror, taken a nonsuit, and preserved his rights. It would be a monstrous position to assume that a court could hold the burden of proof of the existence or non-existence of certain facts to be upon the defendant, have the plaintiff relying thereon with ample evidence at his command to establish or disprove such facts, and then grant a nonsuit, or direct a verdict against him, on account of his failure to do so.

This court, we think, in such case would reverse it because tried upon the wrong theory.

We take it, then, as did the District and Supreme Court of the Territory, that by showing a location and record of the property in question, and a representation by all the work required, plaintiff was entitled to recover. That if the theory of counsel is correct, that this right could be defeated by an outstanding title in Murphy, it devolves upon them to show it. Was the ground required to be represented in 1874 by the expenditure of work and labor to the amount of $50 during that year? If not, was it forfeited and subject to relocation, or did Murphy have a right to do the $50 worth of work required in 1875, and thereby defeat the forfeiture? This wholly depends upon the con-

struction to be given the two acts of Congress upon this subject, to which we invite the attention of the court. By the act of May 10, 1872, which is correctly quoted in the opinion of the court (p. 64): "* * * On all claims located prior to this act, ten dollars' worth of labor shall be performed or improvements made *each year* upon each one hundred feet in length along mine until a patent shall have been issued therefor. And upon a failure to comply with *these conditions* the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had never been made: *Provided*, That the original locators, their heirs, assigns, or legal representatives, have not *resumed* work upon the claim after such failure and before such location."

By a subsequent statute, passed March 1, 1873, (Revised Statutes U. S., vol. 17, p. 483,) the time for the "first annual expenditure" upon claims required to be represented was extended to June 10, 1874. As another law, by which the time was again extended, was passed before any forfeiture could have occurred under this act, we omit copying it.

On the 6th day of June, 1874, the following statute was enacted:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:* That the provisions of the fifth section of the act entitled 'An act to promote the development of the mining resources of the United States,' passed May 10, 1872, which requires expenditures of labor and improvement upon claims located prior to the passage of said act, are hereby so amended that the *time* for the *first annual expenditure* on claims located prior to the passage of said act shall be extended to the first day of January, 1875."

As the defendants are seeking to defeat a title of the plaintiff which is made in good faith, first in time and first in right, by a technical construction of this statute, its terms should be certain and unequivocal, and they should bring

the case unmistakably within its provisions. Have they done this? No evidence of any work on the claim in the year 1874, prior to January, 1875, was introduced; and the jury were instructed by the court that if $50 worth of work was done in 1875 defendants should recover. This dispensed with representation, or, rather, the "*annual work*" required to be done in 1874.

It is plain to us that the words "*annual expenditure*," as used in both the acts quoted, does not comprise the proviso included in it; in other words, that it extends the time for the *annual expenditure* required, but does not continue in force the other provision of the statute that provides for keeping alive the claim by *resuming* work in 1875. There was no work done in 1874, and consequently none to be resumed in 1875. It was a matter of grace to the occupant in extending the time at all, and Congress did not feel disposed to go so far as to extend the terms of the proviso, left it out, and required the $50 of work to be done, or the claim to become vacant and subject to relocation as if no location had been made.

It required an actual occupancy of the ground by work each year, 1874 and 1875.

This is what is meant by "*annual expenditure*," and it is precisely what section 2 of the statutes of Montana required to keep Murphy's title alive to entitle him to recover in any form against plaintiff. The statute, then, has not extended the time for resuming work.

It is contended that the statute of the Territory by which Murphy's title is lost, is in conflict with the laws of the United States on account of this statute allowing a party to pass over one year and *resume* work the last, forsooth, of the ensuing year, if no relocation has in the meantime been made. This cannot successfully be maintained.

The act of the Legislative Assembly must be clearly in conflict with the act of Congress to render it void. *Annual labor* was required, and the word *resume* refers to it.

It means to recommence work, not commence the work required the previous year. The word resume would have to be given a forced meaning to bring about the conflict suggested. As we construe the word resume, there is no clash in the statutes of the United States and the Territory. At all events, the time even for *resuming* the work required to be done in 1874 was not extended.

Some cases of this court are cited to show that in the entry of agricultural lands declaratory statements and the like, made before the land is subject to entry, are void. That after the land is paid for, and a certificate issued to the settler, he has a grant or vested right in the property similar to that granted in the location of mining claims. And by analogy they say that Murphy, holding under a valid location, was invested with a title by grant which took the land out of the public domain, and, consequently, the relocation of plaintiff was void; but it must be remembered that in agricultural entries the title remains in the government until the money is paid and patent given, and no statute of limitation runs against it. After the money is paid and patent granted, the question of the availability of the statute of limitations becomes one between the individuals, and not the government.

This is what we are contending for: that the lands having been carved out of the public domain by a location of Murphy, he was invested with a grant, which could be defeated by adverse possession "*ex post facto*" the grant. Yes, further than this; that it is a grant upon condition expressed in the grant, in the law that his title may be lost by adverse possession. Plaintiff was in adverse possession of the property at the time he was evicted by defendants; was acquiring a title under one of the methods provided by law, if he had not already acquired one. It is too clear to admit of doubt that under the Territorial statutes of limitations, (sec. 2, page 591, 7th session, quoted in full in this brief,) and under the construction given it under the

decision of the Supreme Court in Davis *v.* Clark, 2d Montana, *supra*, the title of Murphy was extinct and unavailable, and his right of possession was gone. That plaintiff was invested with a perfect title under the principles announced in the decision of this court in 2d Black, 605, when defendant made his relocation on the 15th of February, 1877.

The status of the parties were fixed, with respect to this property, under the statute of limitation at this time. This, therefore, is the date at which to look in order to see what statute of limitation obtains, and not the day of trial, as claimed by counsel for defendants. We refrain from citing authorities to the effect that if Murphy's rights were gone on the 15th of February, 1877, when defendants relocated, and his remedy was then barred, that any subsequent statute could revive his right or remedy.

Sec. 2, Chapter LXXX, p. 591, Codified Stat., 7th Session Laws of Montana, cited in full in this brief, and under which Murphy's claim was barred on the 15th of February, 1877, the date of defendants' relocation over plaintiff, was not repealed until August 1st, 1877. At this time, and long prior, it had become extinct. The statute repealing the one above referred to is found in 10th Session Laws of Montana, page 215, and is as follows:

"SEC. 674. That chapters XLI and *LXXX* of an act entitled an act revising, re-enacting, and codifying the general and permanent laws of Montana Territory, approved January 12, 1872, relating to limitations, * * * be, and the same is, hereby repealed: *Provided*, That this act shall not be so construed as to affect any suit or proceeding that may be pending in any court of this Territory at the time this act shall take effect."

"SEC. 675. This act shall take effect and be in force from and after the 1st day of August, 1877, except chapter II, title XV, and III of title VIII, and section 84 of chapter II of title VI, and section 241 of chapter III of title VIII, which shall take effect from and after its passage."

So it will be seen that this law under which plaintiff's title became complete was in force at the time of defendants' entry, which was after Murphy's title was swept away, and his remedy and "right of possession" gone. No subsequent law could revive Murphy's rights, or take away those which had been acquired by plaintiff.

The laws in reference to the settlement and entry of agricultural lands cited by counsel, then, can have no application in this case. The title to them remains vested in the government until a patent issues, and the statutes of limitations do not consequently obtain until the title passes to the citizen, and it becomes a matter of individual right. Any other construction would interfere with the primary disposal of the soil by Congress. Besides, these lands are divided into legal subdivisions. The records of the local land offices disclose who the claimant is, and they cannot receive a declaratory statement from another until the former is cancelled. Not so with the mineral lands. They are all declared open for development and occupancy. The statute of limitation is by act of Congress made to apply while the title by grant is yet unforfeited in the locator and before a patent issues. Under it a title by adverse possession may set in before forfeiture, which will, if not already done, eventually secure a right to a patent if the disseizee does not, within the required time, assert his title. The conclusion is irresistible that the two sections must stand together. That the one declaring that, upon a failure to do the requisite work by the owner, it shall become vacant or subject to relocation does not in terms provide that it shall not become so in some other way; that it must be construed in connection with the other provision of the statute, and if in the adverse possession of another, and held by him in the usual manner by which that kind of property is held at the time of the forfeiture of the original locator, it is not vacant and subject to relocation, and that *pro tanto* the rule invoked by the defendants, and which

would otherwise obtain, is modified; that the location of plaintiff before forfeiture to set in motion the statute of limitation is not void, but voidable, and that in such case it could only have been avoided by Murphy or his successors in interest. To permit defendants to show title in a stranger and thereby defeat the statute of limitation, would make the *only* means of acquiring title under such statutes, destroy its effect. How could any statute of limitation obtain if proof of the facts necessary to acquire title under it operated to defeat the title sought to be acquired?

In fact, statutes of limitation are construed within themselves to define *who*, *when*, and *how* the claim of the adverse occupant will be defeated, and must be limited to *the person*, *mode*, and *time* designated.

We confidently submit—

1st. That by section 2319 of the Revised Statutes of the United States all the mineral lands of the United States were open to exploration and purchase.

2d. That by section 2322 of the Revised Statutes of the United States the original or any subsequent locator only secures a grant to occupy so long as he complies with the act of Congress and Territorial statute.

3d. That by section 2332 the statutes of limitation of the Territories are recognized as one of the modes by which a "*right to a patent*" is *secured*, and that this is the only right secured by either mode.

4th. That by the very grant from the government to Murphy, shown by defendants to be vested in and kept alive by him at the time plaintiff entered, is the sole condition of affairs that alone authorized plaintiff to invoke the statute of limitations.

5th. That under the statute of limitations and by the forfeiture of Murphy's title while plaintiff was in possession he acquired a grant co-extensive at least with that held by Murphy and his predecessors in interest; that he had not forfeited it by non-compliance with the requirements of the

law at the time of the defendants' location; has asserted his right in time, and must prevail.

The voluminous briefs, comprising in all forty-five pages, filed by counsel for respondents in this case, together with the great value of the property and importance of the questions involved, has led us to reply thereto much more at length than we should otherwise have done. In fact, the propositions presented by the various authorities cited by counsel, which we claim are inapplicable and controlled by the construction to be given the mineral land act, has demanded of us an extended analysis of those statutes and authorities in order to at all present our points intelligibly to the court, or satisfactory ourselves.

We submit that the claim of plaintiff is just and lawful, and that the property is detained from him by defendants wrongfully and without right, and that for the errors assigned the case should be reversed, or judgment ordered in his favor upon the undisputed facts in the record.

E. W. Toole,
Of Counsel for Plaintiff in Error.

OFFICE SUPREME COURT U. S.
FILED
OCT 28 1881
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

No. 69.

JOHN C. BELK, PLAINTIFF IN ERROR,

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Additional brief of Defendants in Error, by J. C. Robinson, of Counsel for Defendants.

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The plaintiff claims the property in controversy under a relocation of the Gold Hill Lode, made by plaintiff on the 19th day of December, 1876. See his notice of relocation page 26.

His complaint (page 1) shows that defendants were in possession, and are presumed in law to be rightly so, till plaintiff shows to the contrary, and he must establish a *prima facie* right, or our judgment should not be reversed.

That though there may have been error committed in the proceedings subsequent to plaintiff closing his testimony, yet, if plaintiff failed to establish such *prima facie* right to recover, the judgment will not be reversed.

Amarionneaux's case, 1 Wood's 33, 5th Cir. La.
Hebrard *vs.* Jefferson, G. & S. M. Co., 33 Cal., 290.
Enright *vs.* San Francisco R. R. Co., id. 230.

Defendants claim that plaintiff failed to establish such *prima facie* case as would entitle him to recover in this.

The plaintiff claims title to the premises in controversy by virtue of a relocation of the Gold Hill Lode, made by him December 19, 1876, and as appears by the evidence it was in fact an attempted relocation of the original lode, (see evidence of plaintiffs, pages 5, 6, 7, and 8,) and in attempting to make such location, he failed to mark the boundaries thereof, as required by law.

See Sec. 2224 U. S. Revised Statutes.

See also, evidence of plaintiff, pages 2, 6, 7, and 8.

That section provides that the location shall be distinctly marked on the ground, so that its boundaries can be readily traced. This requirement is mandatory, and cannot be dispensed with by local law or otherwise. In this we claim plaintiff failed as to what he did in this respect; see his testimony above referred to, *i. e.:* that he placed a stake at each corner of a piece of land 600 x 1500 feet, and made a mound. The stakes were 2½ to 3 feet high, and he posted a notice at the discovery shaft; this we claim to be insufficient. As this question has never come before this Court, and we are aware that there is a respectable authority against us, and owing to its importance, we ask a careful consideration of the question.

With all deference to the supreme court of Nevada, we claim that the case of Gleeson *vs.* Martin White Co., 13 Nev., 442, is not correct as to this point. We claim that if that decision is correct, the courts would be driven to the necessity of holding that to post notice at either end of a claim describing its extent as to length and width, would be a compliance with law as to marking of its boundaries, &c. The act of May 10th, 1872, above referred to, says: the location shall be *marked on the ground*, not *described.* There is a manifest difference between marking locations and describing them. Though it be conceded by counsel in the Martin White case that the putting of stakes at each corner was a sufficient marking, and the court adopting this

concession, it does not follow that it is correct. The attorneys thus conceding were placed in a condition where, if they did not thus concede they destroyed their own case. We claim that the act of May 10th, 1872, was in substance taken from the case of Hess *vs.* Winder, 30 Cal., 349, as to the mode of, or what was required in locating placer claims in the absence of local laws, and if that case lays down the correct rule, and which has always been recognized, it should have considerable influence in interpreting the section in question.

The mode of locating quartz lodes in California prior to May 10, 1872, was to post a notice in the vein designating the extent in the vein claimed, and the method of locating placer claims, as shown by all the decided cases, was to either comply with the local laws, &c., or to mark the boundaries as in Hess *vs.* Winder, *supra*, and even in all the local laws we have ever seen much stress was always laid on marking of boundaries as a requirement of the local laws, and when an attempt was made to locate by other means than by a compliance with local laws, the court, as in Hess *vs.* Winder, and in English *vs.* Johnson, 17 Cal., 115, and Altwood *vs.* Fricot, id. 43, seem to attach much importance to marking of boundaries; and now that in locating a lode, it is done by locating a piece of surface ground containing the lode, and the act of May 10, 1872, having prescribed the same thing to be done as was required in locating placer claims, those decisions should to great extent control in interpreting the act of 1872, unless they are against reason, and we cannot see that they are.

The cases of Gelrich *vs.* Moriarity, 53 Cal., 217, and Holland *vs.* M. A. G. Q. M. Co., id. 149, are against the Martin White case, and the foregoing California cases have been recognized by this court in Campball *vs.* Rankin, 9 Otto, 262.

Defendants further claim that the record of location of the Annie Maria, under which plaintiff claims title, is not suf-

ficient to give him any right to the property in this: that it does not describe the premises with reference to some natural object or permanent monument, as required by Sec. 2324 U. S. Revised Statutes.

The only attempt made in said record of location is that it is north of the Butte town site. (See record of location of Annie Maria lode, page 25, transcript.) This we claim is too indefinite to meet the requirements of the act of Congress. It cannot be identified by such reference. The records should contain such a description, as in case of deeds, that a surveyor could take a copy of the record, chain and compass, and find the location, unaided by directions from the locator.

Aside from the foregoing, if the court shall differ with us, and hold that plaintiff made out a *prima facie* case, we come to the points to be considered as involved in the subsequent proceedings in the case.

The plaintiff's location having been made December 19th, 1876, defendants claim that though he may have observed the forms of law in making his location, still it was void in this: that the premises were located in 1864 by Humphrey & Allison, and the title acquired by them was kept alive by them and their grantees until January 1, 1877, and when Belk located on the 19th of December, 1876, the claim was not subject to relocation, and his location is void. The defendants' location was made in February, 1877, the first after the old Humphrey & Allison title was forfeited. This involves a consideration of whether or not the ground was lawfully held by other parties when Belk located, whether his location was void, or would it attach as soon as the old title was forfeited; we claim that it was void, and he could claim no rights under such location whatever. The case was tried on this theory, and we maintain that it was correct for these reasons:

First, conceding the location to have been made by

Humphrey & Allison in 1864, then if they or their successors in interest represented the ground in 1875 at any time during that year, that title was kept alive till January 1st, 1877, and not subject of relocation till that time. Section 2324 U. S. Revised Statutes provides that, upon a failure to do the required amount of work, the ground shall be subject to relocation, &c., which is equivalent to saying that if the required amount of work is done it shall not be open to relocation, and if it is not open to location, no location can be made, and all attempts thereat are void, and the party takes nothing thereby.

The location of a mining claim is a grant from the government.

Chapman *vs.* Toy Long, 5 Sawyer, 34.

And that if the premises had been granted by the government to Humphrey & Allison, and held under that grant by their successors in interest, there was nothing for Belk to take by his location.

The plaintiff claims that defendant in proving such facts, attempted to show outstanding title to defeat the plaintiff. Such was not the case nor purpose of such testimony, but only showing a state of facts which would defeat the plaintiff and show he had no title. Then to this end plaintiff sought to prove the location of Humphrey & Allison, in 1864.

In this, as the claim of Humphrey and Allison was an old location and recognized by the miners of the district, very strict proof would be dispensed with.

Kenney *vs.* Cen. Va. Mo. Co., 4 Saw., 382.

The record sufficiently shows this to be an old location made in 1864, page 10, and was evidently recognized by the miners of the district as a valid location, and, too, that it was made before any government was organized, and everything in a crude state. Under such circumstances, such strictness in making a location should not be required.

Then if the location was made by Humphrey and Allison in 1864; the next question is, was it represented in 1875. No other rights attached prior to Belk's claim, and granting the court erred in admitting the deed in evidence. To exclude this, the record shows the representing was done in 1875 by Humphrey, one of the locators, which was effectual to keep the title alive, and it would not place plaintiff in any better position by excluding the deed, as the object was only to show a representation by one having a right to represent.

The jury were properly instructed as to what was necessary to make a location when Humphrey & Allison located the ground in 1864. (See defendant's 2d instruction, page 45 transcript.)

We claim that the instruction given at request of defendants, if correct, would control the case, and if the facts found were in harmony with them, that would control the case irrespective of anything else, and which facts were found by the jury for defendants, and the verdict will not be disturbed, though the evidence may have been conflicting.

Then if they found against defendant as to the location by Humphrey & Allison, or as to their representation in 1875, the instructions given for plaintiff guided the jury so as to enable them to find for plaintiff, and taking the instructions as a whole which were given, the jury could not have been misled. Though some of plaintiff's instructions refused, as abstract principles of law may have been correct. Yet if the ground was covered by others, this judgment will not be reversed.

What plaintiff claims as error, page 8 of his brief, is untenable in this: He assumes that plaintiff was in actual possession of the premises February 21, 1877, and was evicted by defendants, which assumption is not warranted by the facts. In the first place, if Humphrey and Allison made a valid location in 1864, and such location was kept alive till January 1, 1877, then it is certain that Humphrey

and Allison and their grantees had the right to possession till January 1, 1877, and unless an actual, open, and exclusive possession was taken by Belk of such hostile character as to amount to an actual ouster of Thornton, Thornton's title would carry with it the possession.

Then if Belk did so take possession he ousted Thornton and his entry was a trespass, and in any event whatever right he may have acquired was by committing a trespass, and as to this we invoke the principle laid down in Atherton *vs.* Fowler cited, which is a well recognized principle that no right can be founded on a trespass.

We claim that the fact of Belk going on the premises, and making his location, and doing the work he testified to without the knowledge of Thornton, was but a trespass, and did not constitute such adverse possession as claimed by plaintiff, it would not set the statutes of limitation to running. It is not shown that Thornton had any knowledge of Belk's entry, which in such cases is always a necessary element. His possession was but constructive. It is immaterial to this case whether Thornton's possession was actual or constructive, it was possession, and in either case Belk was a trespasser, and founded his alleged right on such trespass. If Belk could take nothing by his location founded on such trespass, he certainly did nothing after January 1, 1876, to acquire possession, and the theory of plaintiff in either case fails, and there could have been no ouster by defendants.

If as claimed by plaintiff, page 9 of his brief, the premises were actually unoccupied by Thornton, they were also actually unoccupied by Belk when defendants enterred. Belk was not actually on the premises, the last work, by his own statement, he did, was February 15, 1877.

Plaintiff assumes that Belk's location though void, was made good by Thornton's forfeiture, which is the only ground on which he can sustain his theory of possession or

eviction by defendant. Atherton *vs.* Fowler rests on undisputed actual possession.

The premises were not vacant and unoccupied when plaintiff went upon them, as plaintiff asserts, (page 11 of his brief,) nor were they apparently so, or abandoned; the law and facts of location and representation stood in Belk's way, and he could not have entered on the premises in good faith as he claims to have done, especially as he intended to relocate another mine, and located this by mistake.

Again on page 11, plaintiff's brief, plaintiff assumes that because Thornton had not actually worked the premises for 18 months he did not have possession; we maintain that where a party holds mining ground, according to the laws of Congress, and local laws, he is in possession unless there is an actual adverse possession in another, which does not appear in this case till Belk's intrusion on the 19th of December 1876.

The plaintiff in error is required to affirmatively show error, and that such error was injurious, or the judgment will be affirmed. This we claim he has failed in.

J. C. Robinson,
Of Counsel for Defendant in Error.

SUPREME COURT U. S.
OCT 28 1881
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

No. 69.

JOHN C. BELK, PLAINTIFF IN ERROR,

vs.

HENRY MEAGHER AND OTHERS.

In Error to the Supreme Court of Montana Territory.

BRIEF FOR DEFENDANTS IN ERROR, BY W. W. DIXON, OF COUNSEL.

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The following points and authorities for defendants in error are submitted in addition to those contained in the very able briefs of the other counsel. They cover mainly, but briefly, and without repetition, the same questions argued in those briefs. It is hoped they may be found of assistance to the Court.

I.

The so-called "copy" of the records of Summit Valley mining district was properly admitted in evidence.

It was really not a copy but an original. The records were made first on slips of paper and intended to be copied into a book when one could be procured. This was done. (Record, pp. 9, 27, and 28.)

But if it was a copy it was proved to be such and that the original was lost, and hence it was admissible.

1 Whart. Ev., Sec. 135, and authorities cited.
Hedrick *vs.* Hughes, 15 Wall., 123.
Cornett *vs.* Williams, 20 *Id.*, 226.

The loss of the original having been proved, if the copy was inadmissible, parol proof was competent to show the contents of the slips of paper and was sufficiently made. (Record, pp. 9, 10, 27, and 28.)

The main point is, however, that these records in the county recorder's office "*were recognized as the records of that district by the miners generally.*" (Record, pp. 10 and 28.)

As to district mining laws and records generally, and that they derive their force from recognition and use by the miners.

See Gore *vs.* McBrayer, 18 Cal., 583.
Pralus *vs.* Pacific Co., 35 *Id.*, 30.
Harvey *vs.* Ryan, 42 *Id.*, 627.
Sullivan *vs.* Hense, 2 Col., 424.
Kinney *vs.* Consolidated Co., 4 Sawyer, 382.

II.

The deeds were properly omitted in evidence.

That a deed conveys title, although not witnessed or acknowledged or recorded, and that, as plaintiff in error here does not claim under the locators in 1864, he cannot object to their deeds for want of acknowledgment or record.

See—

3 Washb. on Real Prop., 321.
4 Kent, 456.
Sicord's Lessee *vs.* Davis, 6 Peters, 124.
Wood *vs.* Owings, 1 Cranch, 239.
Goodenough *vs.* Warren, 5 Sawyer, 494.
In matter of Smith, 4 Nevada, 254.
Taylor *vs.* Holter, 1 Montana, 688.
Hastings *vs.* Vaughn, 5 Cal., 315.
Fogarty *vs.* Finlay, 10 *Id.*, 239.

Ricks *vs.* Reed, 19 *Id.*, 551.
Landers *vs.* Bolton, 26 *Id.*, 393.
Welch *vs.* Sullivan, 8 *Id.*, 165.
Webb *vs.* Denn, 17 How., 576.

It may be noted that the statutes of California and Nevada, under which the decisions in those States above cited were made, were the same as those of Montana.

This matter as to the deeds is really not material.

Suppose that the title never passed to Binns or to Thornton or to Murphy? Then it remained in Humphreys, one of the original locators, who did the work in 1875, and in his co-tenant. The material point is not in whom the title was, but was there, at the time of plaintiff's attempted location, an existing right in *any one* under a previous valid location.

The object of the evidence is as well attained if the right was shown to have been in Humphreys and his co-locator, to whose benefit his work would inure, as if it was proved by regular conveyances to have passed to Murphy.

III.

The Court properly sustained the objection to the question asked witness McFarland.

The question was *prima facie* incompetent.

The witness had stated (Record, p. 25) that he did not know where the boundaries of the ground in dispute were in 1875.

Plaintiff did not offer to prove or state that he expected to prove that any one who knew the lines in 1875 had pointed them out to the witness, nor that he would follow up the testimony in any way to show its relevancy, and the exception does not show that the answer of the witness would have been competent or material.

Besides, Humphreys testified that the boundaries had

been changed since the first location, (Record, p. 28,) and it seems, from plaintiff's own testimony, (Record, p. 7,) that the work done in 1875 was upon the ground in dispute.

IV.

It was not error to allow the testimony of defendant Meagher as to work done by defendants after their location.

The evidence was admissible to show possession and good faith.

Parvin *vs.* Ellison, 14 Nev., 60.

And if error, it was immaterial and could not have worked any injury to plaintiff or affected the result.

Plaintiff himself gave evidence of the same character as to work after his location. (Record, p. 6.)

Besides, plaintiff made no objection to the evidence when it was given. (Record, p. 23.)

He afterwards moved to strike it out. (Record, pp. 40–41.)

This practice is not permissible.

People *vs.* Long, 43 Cal., 444.
Sharon *vs.* Murdoch, 6 Nev., 377.
King *vs.* Haney, 46 Cal., 560.
Greenleaf's Lessee *vs.* Birth, 5 Peters, 132.

V.

It was immaterial to consider if any or how much work had been done upon the ground in dispute under the original location prior to 1875. No proof was made of any location after the first one in 1864, and prior to that of plaintiff.

If, therefore, the original locators or their grantees had resumed work and done the required amount in 1875, their

rights were preserved up to January 1, 1877, even if they had failed in some previous year to do the work.

Sec. 2324 U. S. Revised Statutes.

VI.

It is claimed by counsel for plaintiff in error that the location of the Gagnon lode was not good, because the record of it contained no affidavit to its contents as required by the laws of Montana.

It will be observed that the record was not objected to upon this ground, (Record, p. 24, where no ground of objection is stated,) nor in the motion to strike it out (Record, p. 41,) was this point made.

The affidavit to the Gagnon record is in identically the same words as that of plaintiff to the Anna Maria location, under which he now claims. (See Gagnon record, p. 24, and Anna Maria record, p. 26 of Record.)

If counsel's point is well taken he has shown that plaintiff's location and record is void, and that he has no rights, and can never recover.

VII.

Counsel for plaintiff in error also claim that the regularity of plaintiff's location is not questioned. Of course the objections and exceptions of defendants in the court below do not appear in this record.

Defendants claim, however, that if this Court can see from the record that upon plaintiff's own showing of his right he can never legally recover, it will not reverse this case and drive the parties to the useless formality of a new trial. It is apparent that plaintiff's location is void.

If the objection urged by plaintiff that the want of a proper affidavit to the record of the Gagnon location invalidates it, the same rule applied to the record of the Anna Maria location makes that void also. But waving this

point, the record of the Anna Maria location (Record, p. 26,) is fatally defective.

It does not contain any such description of the claim located by reference to any natural object or permanent monument as will indentify the claim.

Sec. 2324 U. S. Revised Statutes.

"On the north side of the Butte town site," is indefinite and does not comply with the law.

"And in a re-location of the Gold Hill lode claim." This is more than indefinite. It is untrue and misleading. Instead of serving to identify the claim it would deceive any one looking for it.

There is no further description in the record.

VIII.

Counsel for plaintiff in error dwell at length upon what they call plaintiff's "good faith" in his location and his work and possession.

As to his good faith, see his own testimony, (Record, pp. 7 and 8.)

He intended to locate the Gold Hill lode which he had heard was vacant. He thought it was the Gold Hill he located. He had heard of the Original lode—heard talk of it—that was all he knew. After he located he heard the ground was the Original.

Thus it appears that he did not know and had not inquired whether the Original lode was subject to re-location, and did not intend to locate it, but the Gold Hill, and he did not even know where either of them were.

This affords a striking example of good faith and honest intention.

As to plaintiff's work, take his own statement of it: (Record, p. 6.)

"The work I did was principally in prospecting and examining lode and rock. I was at that time working on the

Acquisition lode. I have worked as much as one hour at a time on the ground aside from putting up monuments. I probably put two days' work on said ground. I never did any hard work on the claim. I will swear I have done as much as ten hours' work on the claim."

This valuable work, it seems, then, amounted, "probably," to two days' work—certainly to as much as ten hours—and none of it was "hard work."

This was all the work done by plaintiff from December 19, 1876, to February 21, 1877, when defendants located—a period of over two months.

And upon this counsel claim substantial work, and try to infer actual possession from it. They argue that Murphy had done no work for eighteen months. True, but his work in June, 1875, was more in value for eighteen months than plaintiff's work was for two months.

Counsel argue from plaintiff's attempted location and scattering work that he had actual possession of the ground and base his right strongly upon this. They claim that if he had actual possession after the 1st of January, 1877, his location, although made before, would then attach and perfect his right. This last point will be noticed hereafter, but it is here to be noted that there is no *positive* evidence of any possession or any work by plaintiff after January 1, 1877.

But plaintiff never had any *actual* possession. Counsel confound the well settled distinction between *actual possesson* and *constructive possession*, or *the rights of possession*. One who legally locates a lode claim acquires a constructive possession and the right of possession. But he is not obliged to do any work for a year and need not have actual possession. Actual possession is entirely distinct from the right of possession, and may or may not co-exist with it.

To constitute actual possession of a lode claim the boundaries must be clearly marked and defined and substantial and continuous work done upon the claim. No

such scattering and trifling work as that of plaintiff—ten hours work in two mouths—has ever been held to constitute actual possession.

If plaintiff's location was valid he acquired the right of possession, but he never had such actual possession as to help him out if his location was void or as to make defendants' location a trespass.

Defendants' location was no more a trespass upon plaintiff's possession than plaintiff's location was a trespass upon Murphy's possession. Murphy had as good an actual possession when plaintiff located as plaintiff had when defendants located. In fact neither plaintiff nor Murphy had any actual possession.

The law in relation to what constitutes actual possession of mining ground, and the difference between actual possession and constructive possession, by virtue of mining laws, is well settled, according to the principles of the common law, and has been repeatedly stated in the decisions of the Supreme Court of California and of other courts.

Atherton *vs.* Fowler, 6 Otto, 516, and Campbell *vs.* Rankin, 9 Otto, 261, were cases of actual possession, and widely different as to the facts from the case at bar.

IX.

The statute of limitations of Montana of 1871–2 can have no bearing upon this case.

1st. It could not affect or destroy a right given to Murphy by act of Congress.

2d. It was repealed before this action was commenced and before plaintiff acquired any right under it.

3d. Admitting that the under the second section of that statute Murphy could not have recovered the ground in dispute from plaintiff, that did not vest the title in plaintiff.

The fourth section of that statute (Codified Statutes of Montana, 1871–2, p. 592) is as follows:

"SEC. 4. It shall be a valid and sufficient defence, if pleaded, in any action to recover any mining claim, whether quartz or placer, or any quartz, lead or lode, or interest therein, or the possession thereof, unless the same shall be held under patent from the United States Government, for the defendant to prove that his assigns or predecessors in interest have been in peaceful possession of such mining claim, quartz lead or lode, under a claim or right, interest or title, made and continued in accordance with the rules and customs of the mining district in which the claim (if a placer claim) is situated, or with the laws of the Territory, (if a quartz claim,) and adverse to the claim, title or interest of the plaintiff, for the period of one year next before the commencement of such action, and such adverse possession as above stated for one year shall be a bar to the action."

From this it will be seen that to vest any right in plaintiff, or to enable him to defend under this statute, he must have been in peaceful and adverse possession for one year.

As the statute was repealed shortly after plaintiff's location, and long before one year from the date of his claim had elapsed, he never acquired any right under it.

X.

The instructions given by the Court below, we think, stated fairly and correctly the law applicable to all the material facts in controversy in the case.

The instructions referred to were either not good law or, so far as they were, were substantially embodied in those given.

XI.

We come now to consider what is really the main question in this case. It is a question of great practical importance in all mining States and Territories.

It may be stated thus:

Under the mining act of Congress of 1872, can a valid location of a lode claim be made upon mining ground which, prior to such location, has been legally located and claimed, and the right to which has not, prior to such location, been lost by abandonment or failure to do the required work? Or more briefly: Can a mining location be legally made upon ground already located and claimed by another?

Defendants claim that the law answers this question in the negative.

The mining act of 1872 is a legislative grant to explore, occupy and purchase, in accordance with the provisions of the act, the mineral lands upon the public domain.

It applies as well to claims located before as after its passage.

It is a grant very extensive and liberal in its terms. It confers valuable rights. The legal designation of the estate it grants is not material, whether it be a mining easement, a possessory right, or some other title inferior to the fee. For mining purposes it gives practically all necessary rights. It also carries the right to a conveyance of the fee by patent from the Government, although, except that he acquires a title of a higher grade in law, and is released from the performance of some conditions subsequent, it is not easy to see what superior rights the patentee has in fact over the locator without patent.

This grant, however, takes effect only upon the performance of certain conditions precedent—discovering a vein, marking boundaries, record, if required by the local laws, &c. When these conditions precedent have been once performed the right vests under the grant. The ground thus legally appropriated is thereupon segregated from the public mineral domain, and the right to it is vested in the locator. Perhaps the United States could take it from him, but no private person can. The act gives him, so long as he complies with the law, "the exclusive right of possession."

(Sec. 2322, U. S. Revised Stats.) This is inconsistent with any right of possession in any third party, and hence the ground is not subject to re-location or entry while the right of the first locator continues.

But this grant is also made upon conditions subsequent. These are called in the act (Sec. 2324 U. S. Revised Statutes) *conditions*. The only material condition subsequent is the performance of labor or the making of improvements within certain periods and to certain amounts in value.

The rights acquired by the grant may, perhaps, be lost by abandonment, but that we need not here consider.

"Upon failure to comply with these conditions," (the conditions subsequent,) the claim becomes open to re-location in the same manner as if no location had ever been made. (Sec. 2324.) That is, it becomes again a part of the public mineral domain, and subject to be granted to the next qualified person who takes the necessary steps by location and entry. The Government does not itself seek to take advantage of the failure, or the breach of the condition subsequent, (except by restoring the ground to the public domain,) but gives it to other citizens to be exercised by location and entry.

The failure of the locator does not of itself, however, divest his rights. They continue after the failure until location and entry by some qualified re-locator, and are preserved if the first locator resumes work after failure and before re-location.

As to conditions precedent and subsequent under mining rules, &c., see—

King *vs.* Edwards, 1 Montana, 235.
Robertson *vs.* Smith, *Id.*, 410.

It will thus be seen that the rights conferred under the mining act of Congress are of the same character, and liable to be defeated in the same manner as an estate in land under a deed with conditions subsequent at common law.

To defeat such estate there must not only be a breach of the condition but an entry.

4 Kent, 127.
1 Washb. Real Prop., 478 and 482.
2 *Id.*, 12.

And this entry must be *after* breach of condition, and one entering before breach cannot take advantage of a breach occurring while he is in possession.

1 Washb. on Real Prop., 477.
2 Greenl. Ev., Sec. 327.

But aside from this, the act of Congress itself plainly shows that no re-location was contemplated or authorized until *after* failure to do the work.

The locators of all mining locations, *so long* as they comply with the laws of the United States, &c., are given "*the exclusive right of possession and enjoyment.*" (Sec. 2322.)

"*Upon* a failure to comply with these conditions," (not *before* or *in anticipation of* a possible failure,) the claim shall be open to re-location. (Sec. 2324.) "Provided that the original locators, their heirs, assigns, or legal representatives have not resumed work upon the claim *after* such failure and before such location." (Sec. 2324.) "Provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after such failure and before such location." (Sec. 2324.)

Does not this show clearly that the failure must precede the re-location?

How can the first locator ever avail himself of the opportunity which the act gives him to resume work after his failure and before the re-location, if a re-location made before the failure can (as plaintiff's counsel claim) take effect immediately upon the failure and thus shut him out.

The decisions of the Land Department of the United States are in accordance with our position.

See Sickels' Mining Laws and Decisions, pp. 55, 242, and 392.
Weeks on Mineral Lands, pp. 109 and 157.
Copp U. S. Mineral Lands, (Ed. of 1881,) 273.

See also Pralus *vs.* Pacific Co., 35 Cal., 30, that a plea of forfeiture, under local mining laws, is not good unless the party shows a *subsequently acquired* right.

In many respects the system provided by the act of Congress for acquiring rights to mining ground is similar to that established by Congress in regard to the pre-emption of agricultural lands.

In Walker *vs.* Henshaw, 16 Wall., 436, this Court held that no one could acquire any valid pre-emption right until the lands were thrown open to pre-emption, and that then the party who moved first in the matter acquired the best right.

In Lansdale *vs.* Daniels, 100 U. S., 113, this Court held that a declaratory pre-emption statement filed before the plats of the surveys were returned to the local land office was a nullity and conferred no rights, and that the party who filed first after such return acquired the best right.

Particular attention is called to these two decisions, as we believe them to be decisive of this question and we rely upon them confidently.

It is well known to anyone practically familiar with the habits and ideas of miners in reference to re-locating claims, that scarcely one of them would ever imagine that, either under the act of Congress or under their own local laws, forfeiting claims for failure to do work, a claim could be re-located before the failure had occurred.

Plaintiff himself when he re-located thought he was re-locating a claim upon which the required work had not been done. He had apparently no idea of re-locating in advance of a failure, as he now claims he had a right to do.

If the principle contended for by plaintiff's counsel were

the law, it would lead to great confusion and uncertainty and to evasion of the act of Congress.

A man could re-locate to-day upon a claim legally located and actually possessed and worked, upon the possible chance that at some future time a failure might occur, and that then his re-location would at once attach before the owner could resume work or any one else could re-locate.

So a party could himself (or by some one for him) re-locate his own claim before the expiration of the time to do the required work, and thus gain an indefinite time to do his work, and cut out any re-location after his failure.

In order to ascertain from the records or otherwise if a claim was subject to re-location, it would be necessary to go back indefinitely before the date of the failure to ascertain if some previous re-location did not come in.

Certainly the act of Congress did not intend such results. It is plain both in itself and according to legal construction. The spirit of it is to protect the rights of the first locator so long as he complies with it, and *upon* his failure only, and not before, to permit a third person to acquire any rights.

The location is the first and necessary step in acquiring a right. If the location is void when made it cannot become valid by any subsequent event.

See Walker *vs.* Henshaw, 16 Wall., 436.

And Lansdale *vs.* Daniels, 100 U. S., 113, above referred to

In this case the evidence shows that the ground in controversy was legally located in 1864; that Murphy was the grantee of the locators; that he complied with the law so as to continue his right up to January 1, 1877; and that before that time plaintiff re-located.

Upon these facts defendants claim that at the time of plaintiffs re-location, Murphy, having complied with the act of Congress, was the grantee of the Government, and

under the act had "the exclusive right of possession and enjoyment" of the ground; that the ground was not then a part of the public domain nor subject to re-location; that there was nothing for the Government to grant or for plaintiff to take; that his re-location was absolutely void and in violation of law, and conferred no right whatever; that, being so void, it was not and could not be made valid by the subsequent failure of Murphy to do the required work, and that defendants being the first regular re-locators after the failure of Murphy acquired the best right.

There is no equity in plaintiff's case. The law as we understand it is certainly not with him. There is no error in the record, and the judgment of the court below should be affirmed.

W. W. Dixon,
Of Counsel for Defendants in Error.

SUPREME COURT

OFFICE SUPREME COURT U. S.
FILED
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JAMES H. McKENNEY, CLERK

Supreme Court of the United States.

No. 69.

JOHN C. BELK, PLAINTIFF IN ERROR,

vs.

HENRY MEAGHER, ANTOINE GAGNON, AND LOUISA A. THORNTON.

In Error to the Supreme Court of the Territory of Montana.

Brief for Defendants in Error.

R. T. MERRICK,
M. F. MORRIS,
For Defendants in Error.

JUDD & DETWEILER, PRINTERS.

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In Error to the Supreme Court of the Territory of Montana.

BRIEF FOR DEFENDANTS IN ERROR.

I.

Statement of Case.

The suit is one in ejectment, instituted by the plaintiff in error, who was also plaintiff below, to recover possession of certain mining property in Deer Lodge county, in the Territory of Montana, designated in the pleadings as the "Anna Maria Lode Claim," about 1,500 feet long and 600 feet in breadth.

It appears from the record that, on the 19th day of December, A. D. 1876, Belk, the plaintiff, claiming to act under the mining laws of the United States, located, or rather relocated, the ground in question, recorded his location in due time, and performed two days' work upon the ground, the last of which was on the 15th day of February, A. D. 1877.

On the 21st day of February, A. D. 1877, the defendants, Meagher and Gagnon, supposing the location by Belk to have been null and void, located the same ground, duly recorded their notice of location, and thereafter continued to work the mine, and have held possession of it to the present time.

The invalidity of Belk's location was based upon the fact that, at the time at which it was made, there was an outstanding claim of title in one Murphy, in consequence of a prior location of the ground in July or August, 1864, by G. O. Humphrey and William Allison, from whom, through divers mesne conveyances, title was derived in 1872 to one Thornton, who, in the spring of 1875, caused the necessary amount of work for that year to be done, and who, on the 28th of January, A. D. 1876, conveyed to Murphy. But no work was done in 1876, either by Thornton or by Murphy; and, under the law their rights became forfeited on the first of January, A. D. 1877.

II.

Questions of Law.

1. The question of law of paramount importance in the case is, whether, on the 19th day of December, A. D. 1876, at the time of Belk's attempted location, the ground in question was subject to location or relocation.

2. The next question is, whether, in the supposition that Belk's attempted relocation in December, 1876, was a nullity as against Murphy, his subsequent occupation of the premises on the 15th of February, 1877, validated his unauthorized relocation so far as to give him title against a subsequent relocator.

The other questions of law involved arise in connection with the admissibility of certain evidence introduced by

the defendants, the refusal to admit certain evidence offered on behalf of the plaintiff, and the instructions asked for by the parties, and the charge given by the Court to the jury. These questions, in brief, are:

1. Whether certain records in the office of the recorder of Deer Lodge county, showing the record of the original location by Humphrey and Allison in 1864, and the transmission of their title to Thornton and Murphy, were properly admitted in evidence.

2. Whether certain testimony offered by the plaintiff in regard to the boundaries of the ground was improperly excluded, and certain testimony offered by the defendants in regard to the amount of work done by the defendants improperly admitted.

III.

Brief of Argument.

1.

The defendants are in possession of the property under a location made in accordance with the forms of law on the 21st of February, 1877. It is, therefore, incumbent on the plaintiff, under the rules of law applicable to ejectment, to show, not only a better, but a complete title in himself. He claims to show such a title by virtue of his location of the 19th of December, 1876, and his occupation until the 15th of February, 1877.

The first question, then, that arises, is, whether the land in controversy was subject to location, or relocation rather, on the 19th of December, 1876.

In answer to this question, it is submitted, in the first place, that, as the plaintiff expressly claims as a relocator and not as an original locator, (See his amended complaint,

Record, p. 1,) he admits the fact of a previous location, and it therefore became incumbent upon him to show that the rights of the previous locators had been forfeited, and it was not upon the defendants to show that they were valid and subsisting at the time of the attempted relocation by him.

Greenleaf on Evidence, vol. 2, Sec. 326.
Washburn on Real Property, vol. 2, p. 444, 445.

And, in the second place, it is submitted, that, at the time of the plaintiff's relocation in 1876, the Thornton-Murphy title was outstanding, the right of Murphy had not been forfeited, and the land therefore was not then open to relocation.

The history of this Thornton-Murphy title, as disclosed by the record, is briefly this: In July or August, 1864, G. O. Humphrey and William Allison located, according to laws then in existence, certain mining claims which included the property in controversy in this case. In 1872, Allison conveyed part of his interest to one Joseph B. Binns; and Binns soon afterwards conveyed to John C. C. Thornton. In the same year, also, Humphrey conveyed part of his interest to Thornton. In the spring of 1875, Thornton performed upon the ground the amount of work required by the fifth section of the mining act of Congress of May 10, 1872, (Revised Statutes of U. S., Sec. 2324,) to prevent the claim from being forfeited under the provisions of that act. On the 28th of January, 1876, Thornton conveyed to John T. Murphy. The property, which thus became vested in Murphy, was the same upon which Belk attempted to relocate in December, 1876. No work was done in 1876 either by Thornton or by Murphy; and their rights by reason of such failure became forfeited on the 1st of January, 1877, under the act of Congress to which reference has been made. Then, and not before, the ground became

subject to relocation; and it was accordingly relocated by the defendants on the 21st of February, 1877.

The testimony of Humphrey is conclusive to the effect that he and Allison located the ground in controversy in July or August, 1864.

In 1864, the western part of Montana, in which Deer Lodge county is included and the property in controversy was situated, was contained within the territorial limits of the Territory of Idaho. That territory was organized and its powers and limits defined by the act of Congress of March 3, 1863, (12 Statutes, p. 808.) The First Legislative Assembly of Idaho met on December 7, 1863; and on the 4th day of February, 1864, it enacted "An act relating to the discovery of gold and silver quartz leads, and of the manner of their location." This act is in the following terms:

"*Be it enacted by the Legislative Assembly of the Territory of Idaho, as follows:*

"SECTION 1. That any person or persons who may hereafter discover any quartz lead or lode, shall be entitled to one claim thereon by right of discovery, and one claim each by location.

"SEC. 2. That a quartz claim shall consist of two hundred feet in length along the lead or lode, by one hundred feet in breadth, covering and including all dips, spurs, and angles, within the bounds of said claim, as also the right of drainage, tunneling, and such other privileges as may be necessary to the working of said claim.

"SEC. 3. The locator of any quartz claim on any lead or lode shall, at the time of locating such claim, place a substantial stake, not less than three inches in diameter, at each end of said claim, on which shall be a written notice specifying the name of the locator, the number of feet claimed, together with the year, month, and day when the same was taken.

"SEC. 4. All claims shall be recorded in the county recorder's office within ten days from the time of posting

notice thereon: *Provided*, That when the claim located is more than thirty miles distant from the county seat, the time shall extend to fifteen days.

"SEC. 5. Quartz claims, recorded in accordance with the provisions of section four of this act, shall entitle the person so recording to hold the same to the use of himself, his heirs, and assigns: *Provided*, That within six months from and after the date of recording, he shall perform or cause to be performed thereon work amounting in value to the sum of two hundred dollars.

"SEC. 6. Any person or persons holding quartz claims in pursuance of this act, shall renew the notice required in section three at least once in twelve months, unless such claimant is occupying and working the same.

"SEC. 7. The conveyances of quartz claims heretofore made by bills of sale or other instruments of writing, with or without seals, shall be construed in accordance with the lawful local rules, regulations, and customs of miners in the several mining districts; and said bills of sale or instruments of writing concerning quartz claims, without seals, shall be *prima facie* evidence of sale, as if such conveyance had been made by deed under seal.

"SEC. 8. Conveyances of quartz claims shall hereafter require the same formalities, and shall be subject to the same rules of construction as the transfer and conveyance of real estate.

"SEC. 9. The location and pre-emption of quartz claims heretofore made shall be established and proved, when there is a contest before the courts, by the local rules, customs, and regulations of the miners in each mining district where such claim is located, when not in conflict with the laws of the United States or with the laws of this Territory.

"SEC. 10. This act to take effect and be in force from and after its approval by the Governor.

"Approved February 4, 1864."

Laws of Idaho Territory, First Session, 1864, p. 577.

With this law in force, the Territory of Montana was established by act of Congress of May 26, 1864. As already stated its western part, including Deer Lodge county, was carved out of Idaho; and the laws of Idaho remained in force there until repealed. Consequently, the act of Idaho was in force in the region afterwards formed into Deer Lodge county in July or August, 1864, when the claim of Humphrey and Allison was located; and it will be perceived that the location and record were in accordance with the provisions of that act. (See Record, pp. 9, 10, 11, 19, 20, 59, Testimony of G. O. Humphrey.)

The First Legislature of Montana did not meet until December 12, 1864. On the 26th day of December, 1864, at its first session, it passed "An act relating to the discovery of gold and silver quartz leads, lodes, or ledges, and of the manner of their location," which repealed the act of Idaho above mentioned, and re-enacted its provisions upon a broader basis. And it may be remarked, in passing, that just about the same time (on December 13, 1864) the Legislature of Idaho also repealed the previous law, and re-enacted its provisions substantially to the same effect as the subsequent statute of Montana.

All the sections of the statute of Montana, except one, have reference to claims thereafter to be located, and, therefore, have no bearing on the Humphrey and Allison claim. But the 10th section of that statute applies to previously located claims. It is as follows:

"Sec. 10. That if, at any time previous to the passage of this act, claims have been taken up and recorded in the recorder's office of the proper county upon any actual or proper lead, lode, or ledge of quartz ore or mineral, the owners or proper claimant, or claimants, of said respective claims shall hold the same to the use of themselves, their heirs and assigns."

The first general enactment made by the Congress of the United States in reference to the location of mineral lands

seems to have been the act of July 26, 1866, (14 Statutes, p. 251.) But even prior to this, by the act of February 27, 1865, (Chap. 64, Sec. 9, 13 Statutes, p. 441,) Congress had recognized the validity of territorial legislation on the subject of mineral lands, and of possessory rights acquired under such legislation. The section last mentioned, which has been retained in the Revised Statutes of the United States, as section 910, reads as follows:

"No possessory action between persons in any court of the United States for any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession."

The act of July 26, 1866, was superseded by the act of May 10, 1872, (17 Statutes, p. 91,) which has been included in the Revised Statutes, sections 2318 to 2352. The sections which are deemed to bear upon the controversy in the present case are the following:

"SEC. 2322. The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, 1872, so long as they comply with the laws of the United States and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." * * *

* * * * * *

"SEC. 2324. The miners of each mining district may make regulations not in conflict with the laws of the United

States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, 1872, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, 1874, and each year thereafter, for each one hundred feet in length along the vein, until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and, upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location." * * *

The time limited by the act of May 10, 1872, for the performance of labor on previously located claims was enlarged by an act passed March 1, 1873, (17 Statutes, p. 483,) and still further by an act of June 6, 1874, (18 Statutes, p. 61.) This last provided, that "the time for the first annual expenditure on claims located prior to the passage of said act (that of May 10, 1872,) be extended to the 1st day of January, 1875."

By necessary implication, this made all the subsequent annual periods for the performance of work co-terminous with the calendar year. And a subsequent act, approved January 22, 1880, made the calendar year, beginning with

the first of January following any location, the legal period for the performance of the required work.

Under this condition of the law in reference to mining claims, it is clear that the location by Humphrey and Allison in 1864 was duly made and recorded in pursuance of the laws then existing in that part of the Territory of Montana; that their claim, the title to which in the mean time had become vested in Thornton, was kept alive and prevented from forfeiture by the work performed thereon in 1875 by the latter; that Murphy, the assignee of Thornton, had the whole of the year 1876 during which to perform the work for that year; and that no forfeiture of his title could have accrued before the first day of January, 1877. It necessarily follows, that the ground was not open to relocation by any one else before the last mentioned day, and that any such attempted relocation was a nullity.

See Simmons *vs.* Wagner, 101 U. S., 260.

2.

But it is objected, on behalf of the plaintiff, that the Murphy title was only an equitable one; that it was barred by the Statute of Limitations of Montana; and that it could not have been made available against the plaintiff's relocation at the time such relocation was made; and that consequently it cannot be available to the defendants for any purpose in the present suit.

It may be as well to state here, what has already been stated in the record, that the defendants claim no connection whatever with the Murphy title; but that, on the contrary, their own title is, to some extent, based upon its forfeiture on the 1st of January, 1877. They interpose it, not in aid of their own claim, but to defeat that of the plaintiff. Their position is, that it was a valid subsisting title on the 19th day of December, 1876; and that, therefore, the plaintiff's attempted relocation on that day was unauthorized by

law; but that this Murphy title became actually forfeited on the 1st day of January, 1877; and that their own relocation, being the first and only one thereafter, gave them a legal valid possessory right to the property.

It does not appear very clearly what the plaintiff means by designating the Murphy title as a merely equitable one, and therefore unavailing against the title acquired by himself. The Murphy title was precisely of the same character as the one which he attempted to acquire. If the former was equitable, the latter could be no more. If the former would be insufficient in a suit in ejectment, because it was not the full legal title, that consideration alone would be sufficient to defeat the plaintiff's present action.

Undoubtedly, these mining titles become *grants* under the act of Congress, and confer a *legal* easement in the soil. But it makes very little difference, in fact, whether they are to be regarded as legal or equitable rights. This Court has said of them in the case of Forbes *vs.* Gracey, (94 U. S., 767:)

"They are property in the fullest sense of the word, and their ownership, transfer, and use are governed by a well-defined code or codes of law, and are recognized by the States and the Federal Government. These claims may be sold, transferred, mortgaged, and inherited, without infringing the title of the United States."

And the statute law of Montana places them precisely on a level with complete legal titles in reference to the formalities of transfer, conveyance, and legal proceedings. The "Codified Statutes" of that Territory, section 34 of Title "Conveyances of Realty" (Acts of Seventh Session, p. 402,) provide as follows:

"The term '*real estate*,' as used in this act, shall be construed as co-extensive in meaning with lands, tenements, hereditaments, and *possessory title to public lands in this Territory*."

But this point is fully disposed of by section 910 of the Revised Statutes, already cited, which distinctly authorizes suits in ejectment to be maintained upon these mining claims.

Stress, however, is laid upon a statute of limitations of Montana, passed January 11, 1872, and which was in force until the 16th of February, 1877, covering the period of the alleged entry and possession of the plaintiff in error. This was a general statute of limitations; and its second section was as follows:

"No action to recover any mining claim, whether placer or quartz, or any quartz lead or lode, or any interests therein or possession thereof, unless the same be held under patent from the Government of the United States, shall be commenced or maintained unless that it is proved that the plaintiff, or his assigns, or predecessor in interest were in the actual session or possession of such mining claim, quartz lead or lode, within one year next before the commencement of such action." * * *

Laws of Montana, 1872, p. 591.

And it is maintained, on behalf of the plaintiff, that the Thornton-Murphy title was ineffectual to the defendants as a defense, for the reason that Murphy was not in possession of the disputed property at any time within one year before the 19th of December, 1876, the date of the plaintiff's entry, and could not have maintained a suit in ejectment against the plaintiff.

In answer to this, it will be perceived that the plaintiff has persistently mistaken the character of the defense contained in the interposition of the Thornton-Murphy title. The defendants claim no connection whatever with that title. Indeed, they rather claim in opposition to it. They interpose that title as a fact existing on the 19th of December, 1876, which made the entry of the plaintiff an utter nullity, just as the claim of any plaintiff in ejectment might be defeated by proof of any fact or circumstance, however

disconnected with the defendant or his title, which would show the absence of title in the plaintiff.

Even if it were conceded that, on or after the 19th of December, 1876, Murphy could not have maintained a suit in ejectment against Belk under this statute of limitations, it does not follow at all that the Murphy title was extinguished. The statute, at most, only barred the remedy. The title remained as a valid title under the laws of the United States, *to prevent the inception of any other title.*

Then, again, if this statute were construed to affect the right of Murphy, and not his remedy alone, it would be plainly in derogation of the act of Congress of May 10, 1872, (Revised Statutes, Secs. 2318–2352,) already referred to, and must be held to have been repealed *pro tanto* by that act. That act, as we have seen, gave the Thornton-Murphy party a right of property in the premises until the first of January, 1877; and no act of the Territorial Legislature, prior or subsequent thereto, could be effectual to impair that right.

But, in fact, the territorial statute of limitations, upon which the plaintiff relies, was not in force at the time this suit was brought, and has no bearing whatever upon the subject.

On the 9th day of February, 1865, the Legislature of Montana passed a general act of limitation, of which the second section had reference to mining claims, and was as follows:

"No action for the recovery of mining claims, (lode claims excepted,) or for the recovery of possession thereof, shall be maintained, unless it appear that the plaintiff or his assigns were seized or possessed of such mining claims within one year before the commencement of such action."

Laws of Montana, Act of February 9, 1865, Sec. 2.

This act was repealed and modified by the act of January 11, 1872, section 2, before cited. The repeal, as will be

perceived, was mainly of the exception of lode claims contained in the act of 1865. But the act of 1865 was restored in its integrity, and the act of January 11, 1872, was repealed by the act of the 16th of February, 1877, section 40, (Laws of Montana, 1877, Sec. 40 of act of Feb. 16, p. 48,) which re-enacted *totidem verbis* the act of 1865, as above given.

The act of 1872 was not in force, therefore, when the plaintiff brought his suit, and he could have acquired no rights under it. The act of limitations, which was then in force, specially excepted lode claims, the class which included the claim in controversy in this suit. The territorial law of limitations in existence at the time of the trial did not bar a suit in ejectment by Murphy against Belk.

3.

But it is objected that incompetent testimony was admitted to substantiate the Thornton-Murphy title; and it is said,

1st. That there was error in the admission of certain copies of the original records of Summit Valley District, in which the mine in question is located. (Record, pp. 27, 28, 29.)

2d. That there was error in the admission in evidence of certain records of deeds, which were links in the chain of title from Humphreys and Allison to Thornton and Murphy. (Record, pp. 12, 13, 14, 16.)

3d. That there was error in the admission of testimony as to the amount of work done by the defendants under their relocation, and as to the staking of the lode and the contents of the notice posted thereon by the defendants. (Record, pp. 22, 23.)

4th. And it is further objected, that certain testimony offered by the plaintiff, that of the surveyor, McFarland, as to the boundaries of the ground owned by a company known as the National Mining and Exploring Company, was improperly excluded by the court. (Record, p. 39.)

1st. As to the first of these objections, it is plain that it is untenable. The papers containing the original records of the District are shown to have been lost. The copies offered in evidence are shown to have been made by the recorder's clerk. They are the very best secondary evidence attainable—better than the recollection of the recorder; and, of course, any secondary evidence is admissible under the circumstances.

Greenleaf on Evidence, vol. 1, Sec. 84, and note.
Butler *vs.* Maples, 9 Wall, 778.

2d. The objection to the admission of the record of the deeds, by which the title was transferred from Humphreys and Allison to Thornton, is based upon the alleged want of witnesses to the deeds, and upon alleged defective acknowledgments.

The reasoning of the Supreme Court of the Territory in its opinion filed in the case, (Printed Record, pp. 62, 63,) and its review therein of the teritorial statutes upon the subject supply the answer to this objection.

It will be proper to cite at length the sections of the Territorial statute on the subject of conveyancing which have reference to this point. They are found in the Act of the Legislature of Montana of January 12, 1872, revising and codifying the general laws of the Teritory. (Revised and Codified Statutes, acts of 1871, and 1872, p. 396,) and are as follows:

"SEC. 1. * * * * *

"SEC. 2. * * * * *

"SEC. 3. Every conveyance in writing, whereby any real estate is conveyed, or may be affected, shall be acknowledged, or proved, and certified in the manner hereinafter provided.

"SEC. 4. (Is in regard to the officers who may take acknowledgments, among whom are enumerated clerks of courts, and justices of the peace; but the official character of the latter has to be certified when the acknowledgment is taken out of the teritory, or out of the county where land lies.)

"SEC. 5. * * * * *

"SEC. 6. * * * * *

"SEC. 7. The certificate of acknowledgment shall state the fact of acknowledgment, and that the person making the same was personally known to the officer granting the certificate to be the person whose name is subscribed to the conveyance as a party thereto, or was proved to be such by the oath or affidavit of a credible witness whose name shall be inserted in the certificate.

"SEC. 8. Such certificate shall be substantially in the following form, to wit:

Territory of Montana, }
County of ——— } *ss:*

On this day of A. D., 18 , personally appeared before me, a notary public, (judge, or other officer, as the case may be) in and for said county, A. B., personally known to me to be the person described in, and who executed the foregoing instrument, and who acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

"SEC. 9. (Gives form where the identity of the grantor has been proved by witnesses.)

"SEC. 10. The proof of the execution of any conveyance whereby any real estate is conveyed or effected, shall be, first, by the testimony of a subscribing witness; or, second, when all the subscribing witnesses are dead or cannot be had, by evidence of the handwriting of the party, and at least one subscribing witness.

Sections 11 to 17. * * * *

"SEC. 18. A certificate of the acknowledgment of any conveyance, or the proof of the execution thereof, as provided in this act, signed by the officer taking the same, and under the seal of the office, shall entitle such conveyance with the certificate or certificates as aforesaid, to be recorded in the office of the recorder of any county in this teritory.

"SEC. 19–20–21–22. (Refer to married women.)

"SEC. 23. Every conveyance of real estate, and every instrument of writing setting forth an agreement to convey any real estate, (which) may be effected, proved, acknowledged, and certified in the manner prescribed in this act, to operate as a notice to third persons shall be recorded in the office of the recorder of the county in which such real estate is situated, but shall be valid and binding between the parties thereto without such record.

"SEC. 24. Every conveyance and instrument in writing, acknowledged or proved, and certified and recorded in the manner prescribed in this act, from the time of filing the same with the recorder for record, shall impart notice to all persons of the contents thereof; and subsequent purchasers and mortgagees shall be deemed to purchase and take with notice.

"SEC. 25–26–27. * * * * *

"SEC. 28. Every conveyance or other instrument conveying, or affecting real estate, which shall be acknowledged or proved, and certified, as hereinafter (*hereinbefore*) prescribed, may, together with the certificate of acknowledgment or proof, be read in evidence without further proof.

"SEC. 29. When any such conveyance or instrument is acknowledged or proved, certified, and recorded in the manner hereinafter (*hereinbefore*) prescribed, and it shall be shown to the court that such conveyance or instrument is lost, or not within the power of the party wishing to use the same, the record thereof, or the transcript of such record certified by the recorder under the seal of his office, may be read in evidence without further proof.

"SECS. 30, 31, 32, 33. * * *

"SEC. 34. The term real estate, as used in this act, shall be construed as coextensive in meaning with lands, tenements, hereditaments, and possessory titles to public lands in this Territory.

"SEC. 35. &c., &c., &c."

From a perusal of this act it will be seen; *first*, that the record of a conveyance is admissible in evidence, whenever the original conveyance is shown to have been lost or not to be in the power of the party who wishes to prove it; and *secondly*, that to entitle a conveyance to be recorded, there must be either one of two things, an acknowledgment of the conveyance by the party making it, with a certificate of acknowledgment in due form; or proof of the execution of the instrument before subscribing witnesses, with a certificate of such proof in due form. Both circumstances are not required to be concurrent in any case.

The Supreme Court of Montana seems to take it for granted that two of the deeds offered in evidence here, one from Allison and wife to Binns, (Record, pp. 12, 30,) and the other from Binns to Thornton, (Record, pp. 14, 33,) were defectively acknowledged—for what reason does not appear, unless it be that the certificate of acknowledgment does not contain the words "freely and voluntarily," which appear in the form prescribed by Sec. 8 of the act just cited. It is respectfully submitted that these acknowledgments are not defective, and that the omission of these words from the certificates do not vitiate the certificates.

Dundas *vs.* Hitchcock, 12 Howard, 256.
Carpenter *vs.* Dexter, 8 Wallace, 513.
Henderson *vs.* Grewell, 8 California, 581.

But, however this may be, there can be no reasonable doubt, as the territorial court justly holds, that the deed from the two Humphreys, two of the original locators, to Thornton, (Record, pp. 16, 17, 18–36, 37,) was duly executed and acknowledged according to law. No objection is made to

the acknowledgment of it, and the only objection advanced by the plaintiff seems to be that it has no subscribing witnesses. But, as already stated, that objection is plainly untenable. The act is in the alternative, that every deed must either be acknowledged or proved, so as to entitle it to record, and both circumstances need not concur in any case.

Now, if the deed from the two Humphreys to Thornton, conveying a one-fourth undivided interest in the property in question was good and valid, and the record thereof was properly admitted in evidence, Thornton was under this deed a tenant in common of the property in 1875—to say the least of his title—when he performed the work required under the act of Congress to prevent a forfeiture. His act, as that of a tenant in common, inured to the benefit of his co-tenants; his possession was the possession of all of them; and, of course, there could be no valid relocation of the land, as long as he complied with the law.

Washburn on Real Estate, vol. 1, p. 417.
Mining Co. *vs.* Taylor, 100 U. S., pp. 40, 42.

3d. As to the objection of the plaintiff, that testimony was admitted on the part of the defendants to show the amount of work done by the latter—it does not seem necessary to occupy the time of the Court with it. The testimony was, perhaps, unnecessary and superfluous and of no service to the cause of the defendants. But, at the same time, it did not injure the plaintiff and could not by any possibility have affected the result.

4th. The testimony of one McFarland, a surveyor, produced on behalf of the plaintiff, to show the boundaries of the ground in dispute, and that the pit upon which work to represent the ground had been done, was upon ground owned by the National Mining and Exploring Company, and not upon ground owned by defendants, or J. C. C. Thornton at the time it was represented, was refused by the Court, and this is alleged as error. (Record, p. 39.)

But this testimony evidently was inadmissible, inasmuch as it was merely hearsay. McFarland was asked if any one had shown him the boundary line *on the day of trial;* who had shown it to him, and where the line *then* was. He was not asked to testify from his own knowledge, but from what some one had told him. He was not asked to testify where the line *was in* 1875, when the work was done; but where it was in 1877, at the time of trial. This was irrelevant.

In the testimony actually given by this witness, he says, (p. 25, Record,) that he has no knowledge where this boundary line was in 1875, and has no information in regard to it as of that time.

4.

It is respectfully submitted that there was no error in the rulings of the court below in regard to the admission or exclusion of testimony; and that, upon the evidence before it, it very properly decided that the ground in dispute was not open to location or relocation on the 19th day of December, A. D. 1876, when the plaintiff attempted to enter. And so only one question remains, whether, conceding the relocation to have been a nullity, the plaintiff's subsequent occupation of the ground on the 15th of February, 1877, when the Thornton-Murphy title had actually become forfeited, could be construed to have reference back to the relocation of the 19th of December, 1876, and so far to validate that unauthorized relocation as to give the plaintiff good title against any subsequent relocator.

It is difficult to see how that which is void in itself, can be valid, or rendered valid, for any purpose whatever. But it is easy to see, that to allow any one to come in upon the grant of another, *in anticipation of possible forfeiture*, and to have his illegal entry made good by subsequent occupation,

would give rise to infinite confusion, and would involve danger of repeated breaches of the peace.

The mining law (act of Congress of May 10, 1872,) operates as a grant of an easement on the public domain, upon one condition, a condition precedent, namely, the formality of a location. Without this no title can pass from the United States. The performance of work is merely a condition subsequent, necessary to be performed to retain the title already acquired. The location, being the notice of the appropriation of the land by the locator, is made by law the foundation of the title, and nothing else will suffice in place of it.

Wilson *vs.* Mason, 1 Cranch, pp. 45, 99.
Atherton *vs.* Fowler, 96 U. S., 516.
Hosmer *vs.* Wallace, 97 U. S., 575.
Simmons *vs.* Wagner, 101 U. S., 260.

5.

One further point is suggested by the instructions asked by the plaintiff in this case. It is, that unless the location of Humphrey and Allison in 1864 is shown to have been authorized by some pre-existing law, it is for the defendants to show that it was made in accordance with the customs, rules, and regulations of the miners in the mining district in which it was made. (Record, p. 44.)

On the contrary, the rule of law is, that when a party is shown to have been in possession under a claim of original location, that location is presumed to be lawful and in accordance with local usage and regulation until the contrary is shown.

In a case in the Supreme Court of Montana, (Robertson *vs.* Smith, 1 Montana, 410–414), it was said:

" We hold that this section of that act (act of Congress of July 26, 1866, Sec. 1, 14 Stat., 253) grants to the proper person an easement upon such of the mineral lands belong-

ing to the public domain of the United States as he may appropriate, in accordance with the local rules and customs of miners in the mining districts, in which the same may be situated, there being at present (1871) no regulations prescribed by law to vary or limit these. There is no point presented in this case that would imply that plaintiffs did not hold their mining claims in accordance with the rules and customs of the miners in the district in which the same are situated. They being in possession of them, it will be presumed that they hold them in accordance with such rules and customs, upon the same principle that the possessor of any real estate is presumed to be the owner thereof, until the contrary is shown."

6.

Uudoubtedly the territorial courts ruled rightly on all the points of law raised before them in this case; and all was left to the discretion of the jury which could well have been so left. No reason appears for disturbing its verdict or the judgment of the court.

R. T. Merrick,
M. F. Morris,
For Defendants in Error.

17-291

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 849.

EZEKIEL GILES, PLAINTIFF IN ERROR,

vs.

SAMUEL W. LITTLE AND DAVID MAY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED JUNE 1, 1881.

SUPREME COURT OF THE UNITED STATES.

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a Pleas in the circuit court of the United States for the eighth judicial circuit and district of Nebraska, before the honorable George W. McCrary, judge of said circuit court, at the term of January, 1881.

Be it remembered that on the 23rd day of August, A. D. 1880, Ezekiel Giles, plaintiff, filed in the clerk's office of said circuit court his petition against Samuel W. Little et al., defendants, which said petition is in words and figures following, to wit:

1 In the United States circuit court, district of Nebraska.

EZEKIEL GILES
vs.
SAMUEL W. LITTLE AND DAVID MAY.

Ezekiel Giles, plaintiff, complains of Samuel W. Little and David May, and says:

1. The plaintiff is a resident in and a citizen of the State of Iowa, and the said defendants are residents in and citizens of the State of Nebraska.

2. On the 10th of June, 1869, and thence to his death, Jacob Dawson was seized and possessed of divers real and personal estates of great value, and had a wife named Edith J., and six children who were on said day minors, and some very young, and all without any property whatever, his said wife being seized and possessed in her own right of real and personal estates of the value of $10,000 and over.

3. On said day the said Jacob made his last will and testament, which contained the following sole bequest:

After all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give, bequeath, and dispose of as follows, to wit: To my beloved wife, Edith J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seized, the same to remain and be hers with full power, right, and authority to dispose of the same as to her shall seem meet and proper so long as she shall remain my widow, upon the express condition, however, that *that* if she should marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, may go to my
2 surviving children, share and share alike, and in case any of my children should have deceased leaving issue, then the issue so left to receive the share to which said child would be entitled. I likewise make, constitute, and appoint my said wife, Edith J., to be executrix of this my last will and testament.

4. On the 22nd day of June, 1869, the said Jacob died in Lancaster County, in this district, leaving him surviving his said wife and six children. The said will was duly ap'roved and admitted to probate in the proper court of said county, and letters testamentary thereon were issued out of said court to the said Edith J., who took upon herself the excution of the said trust. The personal property whereof the said Jacob died possessed was duly inventoried and appraised at $958, and among the real estates whereof at his death the said Jacob was seized was that certain piece or parcel of land known and described as follows: Lot number six (6), block fifty-four (54), in the city of Lincoln, in said Lancaster County, excepting six (6) inches off the entire east line of said lot, which supports the east party wall of said lot, which parcel of land is of the value of $5,000 and over.

5. On the 27th day of April, 1870, the said Edith J., by her certain deed of conveyance dated on said day, and duly executed and acknowledged, conveyed the premises to one Cody by warranty deed, which contained no reference to nor recited the power in said will, and a copy of said deed is hereto annexed, marked "A," and made a part of this petition, and by divers mesne conveyances from said Cody the said defendant Little claims and pretends that he is seized in fee of said premises, and he is now in possession thereof by the defendant May as his tenant.

3 6. On or about the 15th day of November, 1879, the said Edith J. intermarried with one Pickering, who in her girlhood was a suitor for her hand in marriage and had thence to that day maintained intimate relations of friendship with her.

7. One of the said children of the said Jacob has died intestate without issue, and the survivors being in indigent circumstances have joined in a conveyance of the said premises bearing date on the 15th day of September, 1879, and duly executed and acknowledged, whereby they conveyed the same in fee to one Burr and one Wheeler, who by their deed, dated April 27, 1880, have conveyed the same to said plaintiff. And by reason of the premises the said plaintiff has become and is entitled to the immediate possession thereof, and the defendant, under the alleged title derived to him as aforesaid, unlawfully keeps the said plaintiff out of the possession thereof.

8. The said defendant has been in possession of said premises since the day last aforesaid, by reason whereof the said plaintiff has sustained damages to the amount of $1,000.

Wherefore the said plaintiff prays judgment against the said defendants for the recovery of the possession of the said premises and $1,000, his damages so as aforesaid sustained, and costs of this action.

H. H. WHEELER,
L. C. BURR,
Pl'ff's Att'ys.

J. M. WOOLWORTH,
Of Counsel for Pl'ff.

DISTRICT OF NEBRASKA, *ss:*

I, Lionel C. Burr, being duly sworn, say that I am one of the attorneys for the plaintiff in the above-entitled cause; that I have
4 read the foregoing petition and know the contents thereof and the facts therein stated are true; and that the plaintiff in said cause is a non-resident.

LIONEL C. BURR.

Subscribed in my presence and sworn to before me this 21st day of August, 1880.

W. R. KELLEY,
Notary Public.

EXHIBIT A.

Know all men by these presents that I, Editha J. Dawson, of the county of Lancaster and State of Nebraska, in consideration of the sum of ten thousand dollars in hand paid by Aldus Cody, at the county of Lancaster, State of Nebraska, do hereby sell and convey unto the said Aldus Cody the following-described real estate, to wit, the west one-half (½) of lot No. three (3) and all of lots No. four, five, and six (4, 5, &

6), all in block No. fifty-four (54), in the town of Lincoln, county of Lancaster, and State of Nebraska, according to the original survey *survey* of said town, subject, however, to a certain mortgage upon said lots four and five and west one-half of lot three (3), bearing date the 28th day of August, A. D. 1869, and executed by said Dawson to Nelson C. Brock to secure the payment of the sum of twenty-six hundred thirty-one and $\frac{58}{100}$ dollars in one year from the date thereof, and recorded in book "A," pages 418 & 419, of the records of mortgages in said county; and which said mortgages the said Cody assumes to pay and satisfy in full, and save the said Dawson harmless therefrom as a part of said consideration. To have and to hold said premises unto the said Aldus Cody, his heirs and assigns forever, in fee-simple; and I do hereby covenant with the said Aldus Cody, his heirs and assigns, that I am
5 lawfully seized of said premises; that they are free from encumbrances; that I have good right and lawful authority to sell and convey the same; and that I will forever warrant and defend the same against the lawful claims of all persons whomsoever.

Signed this 27th day of April, A. D. 1870.

EDITHA J. DAWSON. [SEAL.]

Witness—
D. G. HULL.

[$10.00. U. S. rev.]

THE STATE OF NEBRASKA,
Lancaster County, ss:

On the 27th day of April, A. D. 1870, before me, the subscriber, a notary public, duly commissioned and qualified for and residing in said county, personally came Editha J. Dawson, personally to me known to be the identical person whose name is affixed to the foregoing conveyance as grantor, and she acknowledged the same to be her voluntary act and deed.

In witness whereof I have hereunto subscribed my name and affixed my official seal at Lincoln, Nebraska, on the date last above written.

[SEAL.] D. G. HULL,
Notary Public.

STATE OF NEBRASKA,
Lancaster County, ss:

I, L. E. Cropsey, county clerk of said county, hereby certify that the above and foregoing is a true and correct copy of the original now of record in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said county this 25 day of February, A. D. 1881.

[SEAL.] L. E. CROPSEY,
County Clerk,
6 By O. C. BELL,
Deputy Co. Clerk.

Said petition is endorsed as follows: No. 91 F. Ezekiel Giles vs. Samuel W. Little, David May. Petition. Filed Aug. 23, 1880. Watson B. Smith, clerk by E. D. Frank, deputy. L. C. Burr, H. H. Wheeler, att'y for pl'ff. J. M. Woolworth, of counsel for pl'ff.

Thereupon, on said 23rd day of August, 1880, a summons was issued in said case and returned on the 27th day of August, 1881, duly served on said defendants personally, by copy.

7 Thereupon afterwards, to wit, on the 27th day of September, 1880, a demurrer was filed in said case, which said demurrer is in words and figures following, to wit:

In the circuit court of the United States, in and for the district of Nebraska.

EZEKIEL GILES
vs.
SAMUEL W. LITTLE AND DAVID MAY.

The demurrer of Samuel W. Little and David May, defendants to the bill of complaint of Ezekiel Giles, plaintiff.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill to be true in such manner and form as the same are therein set forth or alleged, do demur thereto, and for cause of demurrer show that the said plaintiff has not in and by his said bill made or stated such a case as doth or ought to entitle him to any such discovery or relief as is thereby sought or prayed for from or against these defendants, demand the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

T. M. MARQUETT,
Solicitor for Defendant.

8 STATE OF NEBRASKA,
Lancaster County, ss:

Samuel W. Little, being sworn, says he is one of the defendants above named, and that the foregoing demurrer to complaint of the plaintiff is interposed in good faith, and not for delay.

S. W. LITTLE.

Sworn to before me and subscribed in my presence by Samuel W. Little this September 27th, 1880.

[SEAL.] F. M. HALL,
Notary Public.

I hereby certify that in my opinion this demurrer is well founded in point of law.

J. W. DEWEESE,
Of Counsel.

Said demurrer is endorsed as follows: No. 91, Doc. F. U. S. circuit court, district of Nebraska. Ezekiel Giles vs. Samuel W. Little and David May. Demurrer. Filed Sept. 27, 1880. Watson B. Smith, clerk, by E. D. Frank, dep.

Thereupon afterwards, at the November term of said court, on the 10th day of November, 1880, the following proceedings were had in said case, as appears of record on folio 522, journal F, of said court.

EZEKIEL GILES
vs.
SAMUEL W. LITTLE ET AL.

This case being submitted to the court on demurrer to the petition, the court takes same under advisement.

Thereupon afterwards, to wit, on the 24th day of February, 1881, an opinion was filed in said case, which said opinion is in words and figures following, to wit:

9 Circuit court of the United States, district of Nebraska, January term, 1881.

EZEKIEL GILES
vs.
SAMUEL W. LITTLE. } On demurrer to petition.

Action of ejectment to recover two lots in the city of Lincoln.

Jacob Dawson, who was, at the time of making his will and at the time of his death, the owner in fee of the lots, disposed of them by will as follows:

"After all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give, bequeath, and dispose of as follows, to wit: To my beloved wife, Edith J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seized, the same to remain and be hers, with full power, right, and authority to dispose of the same as to her shall seem meet and proper, so long as she shall remain my widow, upon the express condition that if she shall marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, should go to my surviving children, share and share alike; and in case any of my children should have deceased, leaving issue, then the issue so left to receive the share to which said child would be entitled. I likewise make, constitute, and appoint my said wife, Edith J., to be executrix of this my last will and testament."

On the 22nd of June, 1869, the said Jacob died in Nebraska, leaving surviving him the said Edith J., his widow, and six children. On the 27th day of April, 1870, the said Edith J. Dawson conveyed the premises in controversy to one Cody, under whom, through certain mesne conveyances, the defendant claims. On or about the 15th
10 of November, 1879, the said Edith intermarried. On the 15th of September, 1879, the surviving heirs conveyed the premises in controversy to one Burr and one Wheeler, under whom the plaintiff claims.

J. M. Woolworth for plaintiff.
Marquett, Deweese and Hall for defendant.

MCCRARY, circuit judge:

Was Edith J. Dawson empowered by the will of Jacob Dawson to convey the fee of the premises? The answer to this question depends upon the construction of the will.

In the determination of this question very little assistance can be derived from the consideration of adjudicated cases, since testamentary conveyances, unlike most others, present an endless variety of form

and expression, and each must be construed very largely by a consideration of its own language and circumstances. We have found great difficulty in arriving at a satisfactory conclusion as to the construction of the will now under consideration, but, upon the best consideration we are able to give it, we hold that the widow was authorized to convey the fee, and that the judgment must therefore be for the defendant. We base this conclusion upon the following considerations:

1st. This construction is, we think, the only one by which we can give effect to the very comprehensive terms in which the bequest is expressed, to wit: "To my beloved wife, Edith J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seized, the same to remain and be hers, with full power, right, and authority to dispose of the same as to her shall seem meet and proper, so long as she shall remain my widow."

11 The whole property was to be hers. The power of disposal was given by words well chosen to express the most unlimited control. The whole instrument must be construed together, and the words just quoted must have their ordinary meaning except in so far as they are controlled by the other terms employed.

The concluding words in the above quotation, "so long as she shall remain my widow," do not restrain or limit the power of disposal, but only the time of its exercise. The divisee had unlimited power to dispose of any or all the property bequeathed, provided she exercised it during her widowhood.

2nd. The condition can have full effect by giving the whole instrument the meaning above stated. The words are, "Upon the express condition that if she shall marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, should go to my surviving children, share and share alike." If the language here employed had been such as to convey the idea that the estate bequeathed was to remain for the children, it would have greatly strengthened the position of plaintiff. But, on the contrary, the language used clearly shows that the testator contemplated the possibility at least that the widow might, under the unlimited power of disposal during her widowhood, sell and convey a part or all of the property; and hence in case of her marriage the children were to receive the estate bequeathed, "or whatever shall remain." It is only by conceeding the power of disposal as to part that we can conceive of a remainder; and if she had power to dispose of a part, she had power to dispose of all. Her control was precisely the same over every part of the estate.

3rd. The construction we have adopted is the only one that will
12 give effect to every clause of the will. As we have seen, no other construction is consistent with the terms of the first clause of the will, which declare the property hers with power to dispose of it as to her shall seem meet and proper. To hold that she took only an estate for years, with power to dispose of no more, would be to nullify so much of the instrument as gave her the property with power, right, and authority to dispose of the same as to her shall seem meet and proper. The construction contended for by plaintiff is also inconsistent with some of the language used in the condition, while that we have adopted will give effect to all the clauses. Unless we hold that the power of disposal was conferred upon the widow by the will, we can give no meaning or effect to that clause in the condition which gives to the children, in case of the marriage of the widow, the estate bequeathed, "or whatever may remain." As already suggested, this implies that a part may be disposed of, and proceeds upon the theory

that there was a power of disposal given by the will. It is insisted that the words "or whatever may remain" apply only to the personal estate, but an examination of the terms of the instrument will show that there is no room for this construction. It is "the estate herein bequeathed," whether real or personal or both, "or whatever may remain," that is, whatever may remain of the estate, that is to go to the children. By recognizing the power of disposal we can give meaning to this clause, and in no other way can it have any meaning or effect.

4th. The construction we adopt seems to us to be the most reasonable. The power to sell the widow's interest during her widowhood would have been so uncertain as to the extent of the interest to be conveyed as to be almost valueless. A title which could be ended the day after it was given by the marriage of the grantor would be too uncer-
13 tain to be of any value. It is scarcely conceivable that the testator would have been so careful to employ the well-chosen words found in the will, giving the widow unlimited discretion as to the disposal of the estate, if he had intended only to empower her to convey an interest that might be at any moment defeated by her marriage.

5th. The statute of Nebraska, according to which the will must be construed, provides as follows (General Statutes, page 300, sec. 124): "Every devise of land in any will hereafter made shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate." This statute clearly requires that construction of the will which favors the theory that the whole estate was transferred thereby.

The demurrer to the petition is sustained, and if plaintiff stands upon his petition there will be judgment for defendant.

Said opinion is endorsed as follows: No. 91 F. Ezekiel Giles vs. Samuel W. Little. Opinion. Filed Feb'y 24, 1881. Watson B. Smith, clerk. McCrary, circuit judge.

Thereupon afterwards, to wit, at the January adjourned term of said court, on the 26th of day February, 1881, the following proceedings were had in said case, as appears of record on folio 795, journal F of said court.

14 EZEKIEL GILES
vs.
SAMUEL W. LITTLE ET AL.

This cause came on to be heard upon the demurrer of the defendants to the petition as amended filed in this cause, and was argued by counsel, and the court finds that the said demurrer is well taken, and that the said petition does not state facts sufficient to constitute a cause of action in favor of said plaintiff against said defendants, it is therefore ordered and considered that the said demurrer be, and the same is hereby, sustained, and that the said petition be, and the same is hereby, dismissed, and that the defendants have and recover of the said plaintiffs their costs, taxed at $41.45; and the plaintiff then and there excepted to the above finding, order, and judgment.

Thereupon afterwards, to wit, on the 1st day of March, 1881, a bond was filed in said case, which said bond is in words and figures following, to wit:

Know all men by these presents that we, Ezekiel Giles, as principal,

and Frank L. Sheldon and C. C. Burr, as sureties, are held and firmly bound unto Samuel W. Little and David May in the full and just sum of five hundred dollars, to be paid to the said Samuel W. Little and David May, their certain attorney, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 1st day of March, in the year of our Lord one thousand eight hundred and eighty-one.

Whereas lately at a circuit court of the United States for the district of Nebraska, in a suit depending in said court between Ezekiel
15 Giles, plaintiff, and Samuel W. Little and David May, defendants, a judgment was rendered against the said Giles, and the said Giles having obtained a writ and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Samuel W. Little and David May, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Giles shall prosecute his said writ to effect, and answer all damages and costs if he fail to make his said plea good, then the above obligation to be void, else to remain in full force and virtue.

FRANK L. SHELDON.
C. C. BURR.

Approved by—

ELMER S. DUNDY, *Judge.*

Said bond is endorsed as follows: No. 91 F. United States circuit court, district of Nebraska. Ezekiel Giles, pl'ff in error, vs. Samuel W. Little et al. Bond. Filed March 1st, 1880. Watson B. Smith, clerk.

Thereupon afterwards, to wit, on the 1st day of March, 1881, a writ of error was allowed and citation issued in said case, of which the following are the originals:

16 UNITED STATES OF AMERICA,
District of Nebraska, ss:

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court, before you, between Ezekiel Giles, plaintiff, and Samuel W. Little & David May, defendants, a manifest error hath happened, to the great damage of the said plaintiff in the said cause, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause fur-

ther to be done therein to correct that error what of right and according to the laws and custom of the United States shall be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, at Omaha, in said district, this first day of March, 1881.

WATSON B. SMITH, *Clerk.*

Allowed by—

ELMER S. DUNDY, *Judge.*

(Endorsed:) No. 91 F. United States circuit court, district of Nebraska. Ezekiel Giles vs. Samuel W. Little et al. Writ of error. Filed March 1, 1881. Watson B. Smith, clerk.

17 THE UNITED STATES OF AMERICA,
District of Nebraska, ss:

To Samuel W. Little & David May, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein Ezekiel Giles is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Omaha, this first day of March, 1881.

ELMER S. DUNDY, *Judge.*

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 5th day of March, 1881, I received this citation, and on the 7th day of March, 1881, I served the same upon the within-named defendants, Samuel W. Little and David May, in Lancaster County, State and district of Nebraska, by leaving a certified copy thereof, with all the endorsements thereon, at the usual place of abode of each of the said defendants, with an adult person and resident in the family of each of said defendants.

E. L. BIERBORDER,
United States Marshal for the District of Nebraska.
By A. G. HASTINGS,
Deputy United States Marshal.

Marshal's costs, $4.12.

(Indorsed:) No. 91 F. United States circuit court, district of Nebraska. Ezekiel Giles, pl'ff in error, vs. Samuel W. Little et al. Citation. Filed March 7, 1881. Watson B. Smith, clerk.

18 UNITED STATES OF AMERICA,
District of Nebraska, ss:

By virtue of the foregoing writ of error, and in obedience thereto, I, Watson B. Smith, clerk of the circuit court of the United States for the district of Nebraska, in the eighth circuit, do hereby certify that the foregoing folios from one to 18 contain true and faithful transcripts of

the pleadings and proceedings of record and on file in my office as said clerk, and the whole thereof, and the endorsements thereon, in the case of Ezekiel Giles vs. Samuel W. Little and David May; and that a copy of the writ of error and citation has been lodged and the same remain in my said office.

Witness my hand and the seal of said court, at Omaha, this 28th day of May, 1881.

[SEAL.] WATSON B. SMITH, *Clerk.*

(Indorsement on cover:) No. 849. Ezekiel Giles, plaintiff in error, vs. Samuel W. Little and David May. Nebraska C. C. U. S. Filed 1st June, 1881.

OFFICE SUPREME COURT U.S.
FILED
OCT 19 1881
JAMES H. MCKENNEY, CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1881.

EZEKIEL GILES, Plaintiff in Error.

vs.

SAMUEL W. LITTLE, ET AL.

BRIEF FOR THE PLAINTIFF IN ERROR.

J. M. WOOLWORTH,
Of Counsel for Plaintiff in Error.

JOHN D. MORTIMER, PRINTER, OMAHA.

Condition. See 11 Gray 36
argument of counsel

In the Supreme Court of the United States.

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BRIEF FOR THE PLAINTIFF IN ERROR.

This is a writ of error to the Circuit Court of the United States for the District of Nebraska.

It was an action of ejectment for the recovery of lot 6 in block 54, in the city of Lincoln, in the State of Nebraska.

The material allegations of the petition are as follows :—

"On the 10th of June, 1869, and thence to his death, Jacob Dawson was seized and possessed of divers real and personal estates of great value, and had a wife named Edith J., and six children, who were, on said day, minors; and some very young, and all without any property whatever—his said wife being seized and possessed in her own right, of real and personal estates of the value of $10,000 and over.

"On said day, the said Jacob made his last will and testament, which contained the following sole bequest: After all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give, bequeath and dispose of as follows, to-wit: To my beloved wife, Edith J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seized, the same to remain and be hers, with full power, right and authority to dispose of the same, as to her shall seem meet and proper, so long as she shall remain my widow; upon the express condition, that, if she shall marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, should go to my surviving children, share and share alike; and in case any of my children should have deceased, leaving issue, then the issue so left to receive the share to which said child would be entitled. I likewise make, constitute and appoint my said wife, Edith J., to be executrix of this my last will and testament.

"On the 22d day of June, 1869, the said Jacob died at Lancaster county in this district, leaving him surviving, his said wife and six children. The said will was duly proved and admitted to probate in the

proper court of said county, and letters-testamentary thereon were issued out of said court to the said Edith J., who took upon her the execution of said trust.

"The personal property, whereof the said Jacob died possessed, was duly inventoried and appraised at $958; and among the real estates whereof, at his death, the said Jacob was seized, was that certain piece or parcel of land, known and described as follows: Lot number 6, in block 54, in the city of Lincoln, in said Lancaster County, except six inches off the entire east line of said lot, which supports the east party wall of said lot; which lot is of the value of $5,000 and over.

"On the 27th day of April, 1870, the said Edith J., by her certain deed of conveyance, dated on said day, and duly executed and acknowledged, conveyed, the said premises to one Cody, by warranty deed, which contained no reference to nor recited the power in said will, and a copy of said deed is hereto annexed, marked "A," and made a part of this petition, and by divers mesne conveyances from said Cody, the said defendant, Little, claims and pretends that he is seized in fee of said premises; and he is now in possession thereof by the defendant, May, as his tenant.

"On or about the 15th day of November, 1879,

the said Edith intermarried with one Pickering, who, in her girlhood, was a suitor for her hand in marriage, and had thence to that day maintained intimate relations of friendship with her.

"One of the said children of the said Jacob has died, intestate, without issue; and the survivors, being in indigent circumstances, have joined in a conveyance of the said premises, bearing date the 15th of September, 1869, and duly executed and acknowledged, whereby they conveyed the same in fee to one Burr and one Wheeler, who by their deed dated, have duly conveyed the same to said plaintiff. And by reason of the premises, the said plaintiff has become and is seized in fee of the said premises above described, and is entitled to the immediate possession thereof; the defendant under the alleged title derived to him as aforesaid, unlawfully keeps the said plaintiff out of possession thereof.

The prayer is the usual one in ejectment.

To this petition there was a general demurrer. The Circuit Court ~~overruled~~ sustained the demurrer and gave judgment for the defendants.

ASSIGNMENT OF ERROR.

The Court erred in overruling the demurrer and rendering judgment for the defendants.

The questions arising upon this record are,

1. Whether, by the devise to her, Mrs. Dawson took the fee or only an estate for ~~years~~ life during her widowhood.

2. Whether, if she took an estate for ~~years~~ life, she took an absolute power of disposal of the real estate, in fee, or only a power to convey an estate limited to her widowhood.

3. Whether, if she took only an estate for ~~years~~ life and a power to dispose of the fee, she exercised such power in the deed which she made.

The following analysis may be made of the clause of the will upon which the first and second of these questions is to be determined:

1. There are the general terms of the bequest: "After all my lawful debts are paid and discharged the residue of my estates, real and personal, I give, bequeath and dispose of, as follows:

2 There is the provision for the widow: "To my beloved wife, Edith J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seized, the same to remain and be hers."

3. There is the power over this estate: "With full power, right, and authority to dispose of the same, as to her shall seem meet and proper."

4 There is the limitation: "So long as she shall remain my widow."

5 There is the condition: "Upon the express condition, that if she should marry again, then it is my will that all of the estate here bequeathed, or whatever may remain, should go to my children share and share alike."

FIRST POINT.

This analysis of the sentence presents to our consideration the relations of these five several clauses. My first observation in reference to their relations is that the words of bequest in the introductory clause, "the residue of my estate, real and personal, I give, bequeath and dispose of as follows," show that the testator had in his mind a single disposition of his estate, and all the objects of his providence. The words are comprehensive: "I give and bequeath all my property *as follows*;" then comes one sentence, in which a complete disposition of all his property is made in behalf of his wife and children.

Nor is this effect of the introductory clause qualified by the repetition of the same words, with special reference to the wife; "to my beloved wife I give and

bequeath all my estates, real and personal." Had we not the introductory clause these words of bequest to her might imply that she was chiefly in his mind and that the children were secondary objects of his care.

But being a repetition of the general terms of bequest and following them, the natural import of the general terms remains. The whole sentence then should be read thus: "I give and bequeath all my property to my wife, in the first place, and thereafter to my children."

The next observation upon the relation of the several clauses of this sentence is, that the circumstance that the last is in the form of a condition is immaterial; it is to be read without regard to the form of the expression.

The first rule in the construction of wills is to seek the intention of the testator; that is the pole star by which the court must steer (4 Kent, 537*).

This intention is to be deduced from the whole will; and the rules for its construction are to be applied with less strictness than in the case of other instruments. Redfield says: "There is no better principle in regard to rules of construction wherever applied, than to use them as helps and assistants toward reaching the intent

of the testator, and to abandon them whenever they lead one side of that object; thus making them our servants rather than our masters." (1 Wills 420.) Accordingly, the words, their collocation and the modes of their connection, will be less regarded than their general import: indeed, they will be disregarded in order to bring out their import.

The clause preceding the condition firstly bequeaths an estate, and secondly confers a power of disposal; one or other, or both of which is limited to the widowhood of the wife. To which the limitations relates, will be the subject of inquiry hereafter, and is not material in this connection. If the limitation be upon the estate, then the reading is, I give my wife all my estates to be hers, as long as she shall remain my widow; and the words of the clause of conditions obviously only direct the destination of the estates thereafter,

Consequently the matter of the clause is not strictly proper for a condition; because it does not restrain the estate previously given, which is the nature of a condition.

If, on the other hand, the limitation "so long as she shall remain my widow," refers to the power of disposal, the result is not different.

The reading then is "I give all my estate to my wife, to be, and remain hers; and she shall have power to dispose thereof as long as she remains my widow." The succeeding words which are in the form of a condition, define the destination of the estates undisposed of, and do not restrain the power, which has been previously done. It thus appears that however we regard the operation of the clause of limitation, whether upon the estate or the power, the form of the last clause, which is that of a condition, is immaterial. It is not a correct form of expression in either case; because, in each the limitation is imposed by the previous clause. It is to be regarded rather as an amplification of the testator's previous words, and as used more distinctly to express his meaning.

SECOND POINT.

From these remarks, which are preliminary merely, we proceed to notice that the will gives to the wife an estate and to confer upon her a power. As to each, the question is, what is its extent. Does the wife take an estate in fee or an estate during her widowhood; that, is for life? Does she take a power of disposal of the fee or of the estate for life? I propose first to

ascertain what was the estate which the widow took. I insist that she took an estate for life only.

1 This is clear,if the clause "so long as she remains my widow," limits the gift to her; and I submit that that is the correct reading. The words conferring the power of disposal are interposed between the gift and the limitation by way of parenthesis.

The clauses may be transposed in order to ascertain the intent of the testator. This was early laid down in *Cole v. Rawlinson, 5 Ld. Rag. 831 Boon v. Cornforth, 2 Ves. Sr., 277, 279,* and has been reasserted in many cases; the more recent being *Pond v. Bery, 10 Paige 140. 152; Chryslie v. Phyfe, 19 N. Y., 344, 348.*

If, by an application of this rule, the clauses of the sentence may be transposed, the proper reading is "I give and bequeath all my estate, real and personal, to my wife, but if she marry again, all my said estates shall go to my children; and I give her full power, right and authority to dispose of the same as to her shall seem meet."

This transposition brings out the clear and manifest meaning that the widow was to take an estate for life. And this was the intention of the testator as

appears from two or three obvious considerations, which I propose now to briefly submit.

If the limitation "so long as she remain my widow" limits the power and not the estate, which she takes under the will, a very singular situation is presented: An estate in fee is given, with the power, which is implied in the gift and is unlimited, of disposing of it at her pleasure. The gift of the fee itself contains the power of disposition. To add to this gift a power of disposition which is not as extensive as the gift is in its very nature a contradiction.

It is a familiar rule in the construction of all instruments that due force and effect must be given to each clause and word. It is only by attributing the limitation "so long as she shall remain my widow" to the estate given her, that the clause containing the power of disposal can have operation.

2 But whether the clause "so long as she remains my widow" is to be read in connection with the gift of estate or the grant of the power, the limitation is to be annexed to the estate.

In *Smith v. Bell, 6 Peters, 68,* the bequest was as follows:

"First, I desire to be decently buried in the place where I shall happen to die; also, I give and bequeath to my son Jessie Goodwin, my young sorrel gelding and one feather-bed, to be delivered to him by my executrix after my decease; also, I give to my wife, Elizabeth Goodwin, all my personal estate whatsoever, wheresoever, and of what nature, kind and quality soever, after payment of my debts, legacies and funeral expenses; which personal estate I give and bequeath unto my said wife, Elizabeth Goodwin, to and for her own use and benefit and disposal absolutely; the remainder of said estate, after her decease, to be for the use of the said Jessie Goodwin; and I do hereby constitute and appoint my said wife, Elizabeth Goodwin, sole executrix of this my last will and testament."

The question being what estate the wife took under this bequest, Chief Justice Marshall said:

"In the will under consideration, but two persons are mentioned—a wife and son. The testator attempts in express words, to make a provision for both out of the same property. The provision for the wife is immediate; that for the son is to take effect after her death. The words of the will make both provisions, but it is doubted whether both can have effect. In the first

member of the sentence he says: 'I give to my wife, Elizabeth Goodwin, all my personal estate whatsoever and wheresoever, and of what nature, kind and quality soever, after payment of my debts, legacies and funeral expenses; which personal estate I give and bequeath to my said wife, Elizabeth Goodwin, to and for her own use and benefit and disposal absolutely.'

"It must be admitted that words could not have been employed, which would be better fitted to give the whole personal estate absolutely to the wife; or which would be more clearly express that intention. But the testator proceeds: 'The remainder of said estate, after her decease to be for the use of the said Jesse Goodwin.' Jesse Goodwin was his son.

"These words give the remainder of the estate, after his wife's decease, to the son, with as much clearness as the preceeding words give the whole estate to his wife. They manifest the intention of the testator to make a future provision for his son, as clearly as the first part of the bequest manifests his intention to make an immediate provision for his wife. If the first bequest is to take effect according to the obvious import of the words taken alone, the last is expunged from the will.

"The operation of the whole clause will be precisely

the same as if the last member of the sentence were stricken out; yet both clauses are equally the words of the testator, and equally binding, and equally claim the attention of those who may construe the will. We are no more at liberty to disregard the last member of the sentence than the first. No rule is better settled, than that the whole will is to be taken together, and is to be so constructed as to give effect, if it be possible, to the whole. Either the last member of the sentence must be totally rejected, or it must influence the construction of the first, so as to restrain the natural meaning of its words; either the bequest to the son must be stricken out, or it must limit the bequest of the wife, and confine it to her life. The limitation in remainder shows that, in the opinion of the testator, the previous words had given only an estate for life. This was the sense in which he used them.

"It is impossible to read the will without perceiving a clear intention to give the personal estate to the son after the death of his mother. 'The remainder of said estate, after her decease, to be for the use of the said Jesse Goodwin.' Had the testator been asked whether he intended to give anything by this bequest to his son, the words of the clause would have answered

the question in as plain terms as our language affords.

* * * * * * * *

"It is stated, in many cases, that where there are two intents inconsistent with each other, that which is primary will control that which is secondary; but the intent to provide for the wife, during life, is not inconsistent with the intent to provide for the son, by giving him the same property after her decease. The two interests stand very well together, and are consistent, as well with the probable intent, as with the words of the testator. The intent to give the personal estate absolutely to the wife, is, it is true, inconsistent with the intention to give it, after her decease, to the son: but which of them is the primary interest? which ought to control the other? If we are governed by the words, if we endeavor to give full effect to them all, or if we are influenced by the relation of the parties, and the motives which probably governed in making the will, no such inconsistent intentions exist: but if they do exist, we perceive no motive for ascribing any superior strength to that which would provide for those who might claim the estate of the wife, after her decedence, to that which provide, after her decease, for the only child of the testator.

"To create these inconsistent intentions—this intention to do, in limiting this remainder, what the policy of the law forbids, the bequest to the wife must be constructed to give her the power to sell or consume the entire personal and real estate, during her life; which is wholly incompatible, with a gift of what remains at her death. The remainder, after such a bequest, is said to be void for uncertainty. As this construction destroys, totally, the legacy obviously intended for the son, by his father, it will not be made unless it be indespensible. No effort to explain the words in a different sense can do so much violence to this clause, as the total rejection of the whole bequest, given in express terms to an only son.

"The first part of the clause which gives the personal estate to the wife would undoubtedly, if standing alone, give it to her absolutely. But all the cases admit that a remainder limited on such a bequest would be valid, and that the wife would take only for life. The difficulty is produced by the subsequent words. They are 'which personal estates I give and bequeath unto my said wife, Elizabeth Goodwin, to and for her own use and benefit and disposal absolutely.' The operation of these words, when standing alone, cannot

be questioned. But suppose the testator had added the words 'during her life.' These words would have restrained those which preceded them, and have limited the use and benefit and the absolute disposal, given by the prior words, to the use and benefit, and to a disposal for the life of the wife. *13 Ves. 444.*

"The words, then, are susceptible of such limitation. It may be imposed on them by other words. Even the words 'disposal absolutely,' may have their absolute character qualified by restraining words, connected with, and explaining them to mean, such absolute disposal as a tenant for life may make.

"If this would be true, provided the restraining words, 'for her life,' had been added, why may not other equivalent words, others which equally manifest the intent to restrain the estate of the wife to her life, be allowed the same operation? The words 'the remainder of said estate, after her decease, to be for the use of the said Jesse Goodwin,' are, we think, equivalent. They manifest, with equal clearness, the intent to limit the estate given to her, to her life, and ought to have the same effect. They are totally inconsistent with an estate in the wife, which is to endure beyond her life."

The case cited, and the case at bar are in the particular now under consideration precisely the same. In each there was a gift to the wife, and remainder to the children. In Smith *v.* Bell the bequest was as follows: "I give to my wife all my estates to and for her own use and disposal absolutely; the remainder, after her death, I give to my son." In the case at the bar it was as follows: "I give to my wife all my estates, to be and remain hers; when she marries again I give them to my children."

In both, the words importing an absolute gift to the wife are limited by the subsequent clause providing for the children. What is said by the Chief Justice in one case is equally applicable to the other.

3 This construction is supported by several considerations; one of which is that, regard being had to the circumstances, we are bound to suppose that the testator did not intend to leave his children unprovided for. In Smith *v.* Bell it is distinctly held, that we may refer to the circumstances in construing the will.

"In the construction of ambiguous expressions, the situation of the parties may very properly be taken into view.

"The ties which connect the testator with his lega-

tees, the affection subsisting between them, the motives which may reasonably be supposed to operate with him, and to influence him in the disposition of his property, are all entitled to consideration, in expounding doubtful words, and ascertaining the meaning in which the testator used them.

* * * * * * * *

"If we look to the situation of the parties, to the motives which might naturally operate on the testator, to the whole circumstances, so far as they appear, on the case; we find every reason for supporting the intention, which the words, giving effect to all, of themselves import.

"The only two objects of the testator's bounty were his wife and his son. Both must have been dear to him.

"The will furnishes no indication of his possessing any land. His personal estate was probably small, too small to be divided. It seems to have consisted of a negro woman and four others, probably her children. Their relative ages, which are stated in the plaintiff's declaration, would indicate that the woman was the mother of the other four. A sixth is sued for, but he was not born at the death of the testator. The value of

the other articles, which constituted his personal estate, is not mentioned, but it was probably inconsiderable. Farmers and planters, having no real estate, and only five slaves—a woman and four children—have rarely much personal estate in addition to their slaves. The testator was not in a condition to make any present provision for an only child, without lessening that he wished to make for his wife. He therefore gives to his son only a horse and a feather bed. The residue is given to his wife.

"What feelings, what wishes might be supposed to actuate a husband and a father, having so little to bestow on a wife and child, he was about to leave behind him?

"His affections would prompt him to give something to both.

"He could not be insensible to the claims of either. But if his property would not, in his opinion, bear immediate division, the only practicable mode of accomplishing his object would be to give a present interest to one, and a future interest to the other. All of his feelings would prompt him to make, as far as was in his power, a comfortable provision for his wife, during her life, and for his child, after her decease. This he has attempted to do. No principle in our nature could

prompt him to give his property to the future husband of his wife, to the exclusion of his only child. Every consideration, then, suggested by the relation of the parties and the circumstances of the case, comes in aid of that construction, which would give effect to the last as well as the first clause in the will; which would support the bequest of the remainder to the son, as well as the bequest to the wife. It is not possible to doubt that this was the intention of the testator."

In *Clark v. Boorman's Executors, 18 Wallace, 493*, Mr. Justice Miller, after adverting to the insufficiency of rules and decisions to solve the difficulties of construing wills, in the comprehensive language, for which he is eminently distinguished, says:

"Under this state of the science of the law, as applicable to the construction of wills, it may be doubted if any other source of enlightenment in the construction of a will is of much assistance, than the application of natural reason to the language of the instrument, under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution, and connecting the parties and the property devised, with the testator and with the instrument itself."

And in *Blake v. Hawkins, 98 U. S. 315, 324,* Mr. Justice Strong, speaking for the whole court, says:

"It is a common remark, that, when interpreting a will, the attending circumstances of the testator, such as the condition of his family and the amount and character of his property, may and ought to be taken into consideration. The interpreter may place himself in the position occupied by the testator, when he made the will, and from that standpoint discover what was intended."

The circumstances of this case are much like those of Smith v. Bell. The testator had a wife and several children, for whom, it is to be presumed, he intended to provide; all were equally entitled to his providence and care; unless, perhaps, the claims of the children were the stronger, because they were young and entirely dependent, while she already had estates of the value of $10,000 in her own right. The language of the bequest shows that all were in his view; he recognized his duty to all and intended to perform it. While willing to entrust her with the management of his property, confident that she would be true to her children so long as she remained his widow, he foresaw that she might marry the man who, in her youth, had been her suitor;

and he intended to prevent his labors and accumulations passing to a stranger's control. Under such circumstances it is to be presumed that he did not intend to leave his children unprovided for.

4 And in this connection the settled rule for the construction of wills is applicable, that the heir is not to be disinherited unless the intent to do so is clearly expressed. *Allen's Executors v. Allen, 18 How. 319.*

The construction contended for by the defendant implies that the testator was heedless of the natural duty of a father to his children, and, at a solemn moment, was most inconsiderate of their circumstances and condition. Surely the court will be satisfied with only unequivocal language of such import.

And in this particular case there are special circumstances which render more than usually proper the application of this rule. It appears from the petition that before her marriage with the testator, Mrs. Dawson was sought in marriage by Pickering and that, through the long period of her married life, she maintained with him the friendly feelings of her youth. The testator, anticipating that after his death Pickering might renew his suit for her hand, sought to prevent his property from falling under his control and to se-

cure the same to his children. And this was not an unjust disposition of the property; for she was possessed of estates worth $10,000, while the children would be penniless unless the bequest was in such terms as protected them.

Under these circumstances, a just regard for the natural sentiments which must be supposed to have animated the testator, leads to the conviction that he intended to give her an estate limited to her widowhood.

THIRD POINT.

I proceed now to inquire what was the extent of the power of disposal of these estates; did it authorize the widow to convey an absolute estate in fee, or only the estate which she herself took under the will.

In *Brant v. Virginia Coal and Iron Company, 93 U. S. 326*, the words were "I give and bequeath to my beloved wife, Nancy Sinclair, all my estate both real and personal; that is to say, all my lands, cattle, horses, sheep, farming utensils, household and kitchen furniture, with everything that I possess, to have and to hold during her life, and to do with as she sees proper before her death." The widow made a deed conveying the

fee and died. The plaintiff holding under the testator's son and heir-at-law, claimed the estate against the party holding under the deed of the widow. Mr. Justice Field speaking for the whole court said: "The complainant contends that the widow took a life-estate in the property, with only such a power as a life-tenant can have, and that her conveyance, therefore carried no greater interest to the Union Potomac Company. The defendant corporation on the other hand, insists, that with the life-estate, the widow took full power to dispose of the property absolutely, and that her conveyance accordingly passed the fee.

"We are of the opinion that the position taken by complainant is the correct one. The interest conveyed by the devise to the widow, was only a life-estate. The language used admits of no other conclusion; and the accompanying words, "to do with as she sees proper before her death," only conferred power to deal with the property in such manner as she might choose, consistently with that estate, and perhaps without liability for waste committed. The words used in connection with a conveyance of a lease-hold estate, would never be understood as conferring a power to sell the property so as to pass a greater estate. Whatever power of dis-

posal the words confer, is limited by the estate with which they are connected.

"In the case of *Bradley v. Westcott*, reported in the *13th Vesey*, the testator gave all his personal estate to his wife for her sole use for life, to be at her full, free and absolute disposal and disposition during life; and the court held, that as the testator had given in express terms an interest for life, the ambiguous words afterwards thrown in could not extend that interest to the absolute property. 'I must construe,' said the Master of the Rolls, 'the subsequent words with reference to the express interest for life previously given, that she is to have as full, free and absolute disposition as a tenant for life can have.'

"In *Smith v. Bell*, reported in the *6th of Peters*, the testator gave all his personal estate, after certain payments, to his wife, 'to and for her own use and disposal absolutely,' with a provision that the remainder, after her decease, should go to his son. The court held, that the latter clause qualified the former, and showed that the wife only took a life-estate. In construing the language of the devise, Chief Justice Marshall, after observing that the operation of the words 'to and for her own use and benefit and disposal absolutely,' an-

nexed to the bequest and standing alone, conld not be questioned, said: 'But suppose the testator had added the words "during her natural life," these words would have restrained those which preceded them, and have limited the use and benefit, and the absolute disposal given by the prior words, to the use and benefit and to a disposal for the life of the wife, the words then are susceptible of such limitation. It may be imposed on them by other words: even the words "disposal absolutely" may have their character qualified by restraining words connected with and explaining them, to mean such absolute disposal as a tenant for life may make.'

"The Chief Justice then proceeded to show that other equivalent words might be used, equally manifesting the intent of the testator to restrain the estate of the wife to her life, and that the words, devising a remainder to the son, were thus equivalent.

"In *Boyd v. Strahan, 36 Ill. 355*, there was a bequest to the wife, of all the personal property of the testator not otherwise disposed of, 'to be at her own disposal, and for her own proper use and benefit during her natural life;' and the court held that the words 'during her natural life' so qualified the power of dis-

posal, as to make it mean such disposal as a tenant for life could make.

"Numerous other cases to the same purport might be cited; they all show, that, where a power of disposal accompanies a bequest or devise of a life-estate, the power is limited to such disposition as a tenant for life can make, unless there are other words clearly indicatting that a larger power is intended."

The similarity of these two bequests appears upon a moment's comparison. In the case cited they are: 'I give my wife all my estates, to have and to hold during her life, and to do with as she sees proper before her death."

In the case at the bar the import of the words is, "I give my wife all my estate, the same to be and remain hers so long as she remains my widow, and I give her full power to dispose of them as she shall think proper."

This case is decisive: others might be cited to the same effect; notably, *Frazier v. Hussey, 43 Ind. 310.* But it would answer no good purpose here to support a judgment of this Court. Some cases in the State reports may, perhaps, be found to the contrary. The

law in this court is well settled, by the maturely considered judgments already cited.

And upon this point the special circumstances of the case have an important bearing. As has been said, the testator anticipated the renewal of his suit by Pickering, and in the event of the widow's second marriage, felt that special provision should be made for his own children. It was a very ineffectual provision for them, to limit to her widowhood her power to dispose of the fee of the estates, for the day before her second marriage she might convey all of them beyond the reach of the children. She was remarried on the 15th of November, 1879. On the 14th of that month she had, according to the contention of the defendants, "full power, right and authority to dispose of the same as to her seemed meet and proper," to the extent, not only of her own estate, but of the fee also. She might convey them to her intended husband, and when on the next day they were married, the children would be unprovided for, and the entire purpose of the testator's provision for them would be entirely defeated.

The only way by which he could, in the event which he clearly had in his mind, effectually assure this property to the children, was to give her a power

over the estates limited to her interest therein. The terms of the will show on their face that they were the subject of serious consideration on the testator's part, and it is certain that he would not deliberately have contrived a plan for the easy defeat of his provision for his children.

FOURTH POINT.

But it is contended, in support of this demurrer, that there are words in the last clause which imply an absolute power of disposition, and give to the children only what may remain in the wife's hands at the termination of her estate. The clause is, "if she should marry again, then it is my will that all the estates herein bequeathed, or whatever may remain, should go to my surviving children, share and share alike."

The contention rests upon these words, "*or whatever may remain*," and is that they imply that part of the estate may be absolutely disposed of by the wife, during her widowhood.

If I have been right in what I have heretofore said, I submit that these words cannot have the effect to change the proper construction of this will. That is certainly

true, unless they can have no operation, without this extensive effect being attributed to them. If they can be satisfied by a more limited meaning, that construction is the proper one. That they can, is apparent upon a brief consideration. The testator at the time of making his will was seized of real estates, and possessed of personal property. Both were covered by the terms of the devise; of both, she was to have the use during her widowhood.

The personalty would necessarily be consumed in its use. This the testator well understood. Hence, only whatever of that species of property remained, was to go to the children; and for what was destroyed in the using by her, during her widowhood, she was not to be answerable.

In *Siegwalt v. Siegwalt, 37 Ill. 430*, the words were "I give and bequeath to my beloved wife, Antonia, all my real and personal estate wheresoever situated, in fee simple absolute forever; that is to say, my said wife shall have all the benefits thereof, until the expiration of her life, at which time my son, Anton, shall be the only heir of real or personal estate, what may be left."

And the court says: "But the personal property

being perishable in its nature, and generally of that character that must be used or consumed to be enjoyed, he only provided that the son should take such portion as remained at her death; hence the language employed in the will. We think that this is the most reasonable construction that can be applied to the whole clause when considered together. It is true that he gives to his son, after the death of his wife, what may be left of the real and personal property; but he, no doubt, knew that the personal property would not remain until the period arrived when the limitation over should take effect."

In *Smith v. Bell*, the language is nearly the same: This suit is brought for slaves—"a species of property not consumed by use, and in which a remainder may be limited after a life-estate. They composed a part, and probably the most important part, of the estate given to the wife, 'to and for her own use and benefit and disposal absolutely.' But in this personal estate, according to the usual condition of persons in the situation of the testator, there were trifling and perishable articles, such as the stock on a farm, household furniture, and the crop of the year, which would be consumed in the use; and over which the exercise of absolute ownership was necessary to a full enjoyment.

These may have been in the mind of the testator when he employed the strong words of the bequest to her."

The case of *Green v. Hewitt*, in the Supreme Court of Illinois, decided on the 26th of November, 1880, reported in the 12 Central Law Journal 58, No. 3 for January 21, 1881, is directly in point, The will in that case provided,

"Second :—After the payment of such debts and funeral expenses, I give and bequeath to my beloved wife, E. T., the farm on which we now reside, situate, etc.; also, all my personal property of every description, so long as she remains my widow; at the expiration of that time the whole, or whatsoever remains, to descend to my daughter, M. T."

After holding that by this devise the widow did not take the fee, and commenting upon the words "or whatever remains," Mr. Justice Mulkey says: "The misapprehension as to the legal effect of the devise doubtless grows out of the use of the expression, 'whatever remains,' by the testator, in limiting the remainder to his daughter. The use of that expression is of no vital significance, and cannot be permitted to

override the clearly expressed intention that the widow should take a life-estate only. As part of the estate devised personalty, it is but reasonable to suppose that some of it would be of that species of property, whose value and use consist solely in its consumption, such as provisions, etc.; and it was doubtless the intention and expectation of the testator that property of this character should and would be consumed by his widow, and of course not in existence when her estate terminated. It was also reasonable to suppose that if she lived long as his widow, some of the articles of personalty would be worn out, lost or destroyed; hence in making the limitation over, it was but natural and proper to use the expression, 'whatever remains.' It had reference to the anticipated condition of the personal estate when it would, under the limitation, pass into his daughter's hands. And this is all the significance the expression has."

2. So, too, in respect to the realty; the widow until her second marriage, had the unqualified right to use it; she might, in such use, commit waste. The testator intended to protect her against being questioned by the remaindermen in respect thereof, as was held in *Brant v. The Virginia Coal and Iron Co., supra.* It

appears, then, that these words "or whatever may remain" may be satisfied without attributing to them the extensive effect of enlarging the widow's power of disposition, or the estates bequeathed to the children.

FIFTH POINT.

The statute of Nebraska is invoked in the support of the judgment. By Section 124 of Chapter 17, entitled Decedents, at page 300 of the General Statutes, it is provided that—

> "Every devise of land in any will hereafter made shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall appear by the will that the devisor intended to convey a less estate."

But this statute has no possible application here. This devise as construed by the plaintiff gives all the estate of the devisor—just as much as if construed according to the views of the defendant. The difference between the parties is not whether a whole or part only of the estate of the testator is devised, but to whom it is devised. We insist that an estate for life with a power of disposal limited thereto, was devised to the

wife, and an estate in remainder was devised to the children—the two estates together being the fee simple; that is, of course, all the testator's estate. The other side insist that the devise is of the fee, or of a power to dispose of the fee. But in either view the whole estate is devised—in that of the plaintiff in error as well as in that of the defendant.

SIXTH POINT.

I pass now to the consideration of the case in its other aspect; namely, the execution of the power of disposition. I assume that it has been established that the widow took an estate for life; and, for the purposes of the argument I concede that she took a power to dispose of the fee. I submit that her deed to Cody conveyed only her own interest; namely, an estate during her widowhood.

It is to be remembered that there were vested in her at once, an interest and a power. Her deed did not refer to the power. The rule in such case is that it will be referred to her interest, and not to that of others, which she has the power to convey.

Kent says *4 Comm. 334**:

"The general rule of construction, both as to deeds and wills, is that, if there be an interest and a power existing together in the same person over the same subject, and an act be done without a particular reference to the power, it will be applied to the interest, and not to the power. If there be any legal interest on which the deed can attach, it will not execute the power."

In *Blake v. Hawkins, 98 U. S. 312, 326.* Mr. Justice Strong, says, that indications of an intention to execute a power, "As expressed in repeated decisions, were: *First*, some reference to the power in the will or other instrument; *second*, some reference to the power or subject over which the power extends; and *third*, where the provisions of the will, or other instruments executed by the donee of the power, would be ineffectual or a mere nullity, or would have no operation, if not an execution of the power."

Applying these tests, it is clear that Mrs. Dawson's deed was not an execution of the power.

1. There was in the deed no reference to the power. 2. There was no reference in the deed to the power or the subject over which it extends. 3. The deed was effectual to pass her life-estate without regard to the remainder.

In the following cases this doctrine has been applied:—

Dunning v. Van Dusen, 47 Ind. 422.
Jones v. Wood, 16 Pa. St. 25.
Owen v. Switzyzer, 57 Mo. 322.
Fowles v. Fisher, 77 N. C. 437.

I have selected these from a multitude of cases, because they are in their circumstances almost precisely like the one at bar, and illustrate the other questions which I have presented to the consideration of the court.

I submit that the demurrer should be overruled and judgment entered for the plaintiff in error.

J. M. WOOLWORTH,
Of Counsel for Plaintiff
in Error.

ates.

R.

is in Error.

FILED
OCT 25 1881

In the Supreme Court of the United States.

OCTOBER TERM, 1881.

EZEKIEL GILES, Plaintiff in Error,

vs.

SAMUEL W. LITTLE ET AL.

BRIEF FOR THE DEFENDANTS IN ERROR.

T. M. MARQUETT,
Of Counsel for Defendants in Error.

STATE JOURNAL CO., PRINTERS AND STATIONERS, LINCOLN, NEB.

U. S. SUPREME COURT.

District of Nebraska.

EZEKIEL GILES
vs.
S. W. LITTLE ET AL.

BRIEF OF DEFENDANTS.

This cause stands for hearing on petition in error. The case brings up the construction of the will of Jacob Dawson, which is in words and figures as follows:

"After all my lawful debts are paid and discharged, the resi-
"due of my estate, real and personal, I give, bequeath, and dis-
"pose of as follows, to-wit: To my beloved wife, Edith J. Daw-
"son, I give and bequeath all my estate, real and personal, of
"which I may die seized, the same to be and remain hers with
"full power, right, and authority to dispose of the same as to her
"shall seem meet and proper, so long as she shall remain my
"widow, upon the *express condition*, however, that if she should
"marry again, then it is my will that all the estate herein be-

"queathed, or *whatever may remain*, should go to my surviving "children, share and share alike, and in case any of my children "should have deceased leaving issue, then the issue so left to re-"ceive the share to which said child would be entitled. I like-"wise make, constitute, and appoint my said wife, Edith J., to "be executrix of this my last will and testament, hereby revok-"ing all former wills made by me."

PLAINTIFF'S ANALYSIS.

[SEE PAGE 5 OF HIS BRIEF.]

"1. The general terms of bequest: After all my lawful debts "are paid and discharged, the residue of my estates, real and "personal, I give, bequeath, and dispose of as follows:

"2. The provisions for the widow: To my beloved wife, "Edith J. Dawson, I give and bequeath all my estate, real and "personal, of which I may die seized, the same to remain and be "hers.

"3. The power over this estate: With full power, right, and "authority to dispose of the same, as to her shall seem meet and "proper.

"4. The limitation: So long as she shall remain my widow.

"5. The condition: Upon the express condition that if she "should marry again, then it is my will that all of the estate "here bequeathed, or whatever may remain, should go to my "children, share and share alike."

FIRST POINT.

Take the words of the will, and it is clear that the intention of the testator was to give to the wife a fee simple title to the real

estate, as well as to the personalty; and in the three first clauses of the will, as analyzed by plaintiff, there can be no doubt that the fee simple is given. This much is admitted; but it is contended by plaintiff that the fee, conferred in the first three clauses, by the fourth is limited to a life estate, and that the condition in the fifth clause does not change or alter the apparent life estate given.

In order to arrive at this conclusion, his argument is that the fourth clause, or limitation, limits to a life estate, and that the condition in the fifth clause only directs the destination of the estate thereafter. After making this statement on the eighth page of his brief, the plaintiff says that "the fifth clause is not strictly a condition," and then assumes that "the condition does not restrain the estate previously given which is the nature of a condition." The fallacy of his argument is in trying to do away with the fifth clause as a condition, and to give the fourth clause a meaning other than that which, read in the light of the fifth clause, clearly shows was the intention of the testator.

The argument of plaintiff amounts to this, that the will ends at the end of the fourth clause, and that the said clause is in no way restrained or modified by the fifth clause. In other words, the fifth clause is *meaningless*. On the other hand, the defendant contends that the words, "Upon the express condition, however, "that if she should marry again, then it is my will that all the "estate herein bequeathed, or *whatever may remain*, shall go to "my children, share and share alike," have the effect to make the fee given by the first and second clauses a conditional bequest—conditional upon her getting married. Such a condition is one that can be made, and it was clearly the intention here to make it. Says Redfield: "Conditions annexed to devises, both "of real and personal estate, to a widow, that they shall become

"inoperative in the event of the marriage of the devisee, have "been generally recognized as valid, both in England and "America. * * * There seems no impropriety, how-"ever, in allowing the operations of conditions in restraint of "the marriage of widows, in favor of such persons as may have "a reasonable interest, either pecuniary or moral, in the ques-"tion of their marriage." (2 Redfield on Wills, 294.)

According to the interpretation of plaintiff there would be no necessity for the fifth clause, for the direction which the estate is to take is the same as the law directs. Hence you are to give the fifth clause the meaning that the words import or make it meaningless, as Plaintiff attempts to do.

Then the case stands thus:

1st. There is no doubt that the words in the first and second clauses, and even the third, give to the wife an absolute title in fee simple.

2d. The fourth clause, with nothing to follow or explain it, would limit the fee to a life estate. If the testator had stopped here it might have been claimed that there was only a life estate given to the wife.

3d. Put in the fifth clause and leave out the fourth and we would have a bequest of the fee made in first and second clauses, a *conditional one.*

4th. We then arrive at the conclusion that the fourth and fifth clauses of the will, as the fourth is interpreted by plaintiff, are repugnant to each other. The one *limits* the estate given in prior clauses, the other only makes it *conditional*—puts in a condition that may never happen. The plaintiff claims that the

former clause is to control and make meaningless the latter; and, as against this construction of the plaintiff, we lay down the following fundamental rule:

A later clause in a will when repugnant to a former one, must be considered as intended to modify or abrogate the former, or, in the language of the Supreme Court of the State of Illinois, as expressed in the cases of *Murfitt vs. Jessup*, 94th Ill., 158, and *Brownfield vs. Wilson*, 78 Ill., 470: "We must presume that, having reconsidered the fourth clause, the testator was not satisfied with it, and by the fifth clause intended more fully and accurately to express his intention." In the language of Redfield: "The more probable and just exposition of the matter is, that having reviewed what he had written, and finding his intent obscure, he may have added what appears to be his final determination, as a last expression of what he most desired." (1 *Redfield on Wilson*, 450–451, 422.)

It is the intention of the testator we are seeking to discover. He gives his wife a fee with the absolute power to dispose of the same "so long as she remains my widow." But he then conceives that the words "so long as she remains my widow" do not clearly express his meaning, and so, in the fifth clause, he says just what his *will* or *intention* was. And that is, it is *only* upon the *condition* that his widow may again marry, that this absolute fee and disposal shall be *taken from her*.

This construction gives full effect to the words in fifth clause "or whatever may remain," clearly indicating that the wife held the fee and might dispose of the same.

The surrounding circumstances make this plain.

First—According to the petition, the wife had an old suitor by

the name of Pickering, of whom the testator was still afraid. This was the skeleton that hung in his closet. In his will, he says to his wife: "I give you all my property both real and personal, to "dispose of as to you seems best and proper. And I also "entrust you with the settlement of my estate and the payment "of my debts. I put everything in *your* hands; but," (thinking still of the old *suitor*) "if you do not marry him everything is "yours; if you do, then I take everything from you *and give it to* "*my children.*"

Plaintiff objects to this view, not that it is not the *expressed intention* of the testator, but that it would give his wife the right to rob his children, by selling the property and then marrying her old suitor. But this supposes the mother to be an unnatural one; it presumes that the mother would wrong the child. The law places everything in the hands of the husband and believes that he will be true to his children, after as well as before *his wife dies*, no matter whether he marries again or not. It is time that we had the same faith in the *mother*. Plaintiff should not ask a decision from this court on the ground that a mother will be untrue to her children.

Second—The fact that he makes her his sole executrix and says, *dispose of the property as may seem fit to you*, and pay all my *debts*, is another indication as to what his intentions were, and is conclusive in *law*.

The exhibit attached to the petition shows that this real estate in question was sold to pay a *debt*, which we know to be a debt of the estate.

As to the position we take, that although the limitation in the fourth clause might in itself limit the estate given in the prior clauses to a life estate, yet the fifth clause so modifies the fourth

that the fee simple is given, the case of *Bankart vs. Jacoby*, 36 Iowa, 273, is applicable. In this case the will had three clauses; and the court decides that while the two first clauses standing together would only give a life estate, the third clause so modified the second as to make it a fee. This case is one in point.

SECOND POINT.

Plaintiff lays down the following proposition in his second point: "and in this connection the settled rule for the construc-"tion of wills is applicable, that the heir is not to be disinher-"ited unless the intent to do so is clearly expressed." And quotes *Allen's Executors vs. Allen*, 18 Howard, 391. But in that same case the Supreme Court of the United States uses this language:

"The testator's language must be construed with reference to "the laws and policy of the country of his domicile. It is our "duty to ascertain what the laws and policy of Penn. are, so far "as they may have a controlling influence in the construction of "this will. Penn. has only so far altered the English common "law as to substitute *all the children* for the *sole* HEIR. This is "the will the law makes in case of intestacy and is the policy of "the state. Under the law the heirs must take, unless they are "disinherited by express words or necessary implication." I undertake to say that under the Nebraska statutes the converse of that proposition is true. Under our statutes, page 300, Section 124: "Every devise of land in any will hereafter made "shall be construed to convey all the estate of the devisor there-"in, which he could lawfully devise, unless it shall clearly ap-"pear by the will that the devisor intended to convey a less es-"tate." This would make the converse of the law laid

down in the 18th Howard true; by the law of Nebraska the wife would take a fee simple, unless by express words the will gave her only a life estate. Conjecture or uncertainty shall never take the fee simple from her. But in this case uncertainty and conjecture are the sole grounds on which it is attempted to say that in the first instance the wife did not take the fee simple. And the entire fallacy of the argument of the plaintiff rests upon the fact that he adopts the English common law rule for the construction of wills instead of the law of Nebraska, having never discovered the fact that our legislature has passed a statute, and lays down the rule which would govern the construction of wills made in our state.

Under a similar statutory provision in a late case in Michigan, to-wit.: *Weir vs. Michigan Stove Co.*, decided October 27th, 1881, it was there construed by the court as follows: "And the court "putting the construction upon the following bequest, to-wit: "I give and bequeath all my property of whatsoever nature to "my wife, Euphemia, she paying all my just and lawful debts. "The one-half of the residue, after her decease, to be paid to "my two sisters in Scotland, share and share alike." In this case the court holds that it did away with the common law rule. "That the heir was not to be disinherited unless the intent to so "is clearly expressed, and established this rule:—That when in "the first instance a fee is given to the wife, if the words that "follow leave it doubtful whether the testator intended to give "her a less estate or not, then they must give way to the clear-"ly expressed words which give the fee." In the case of *Cleveland vs. Spilman*, (25 Ind.), the court, in commenting on a similar statute, says that the statute changes the common law rule.

But it is claimed by the plaintiff in error that this statute is of no possible application here. According to his view, the con-

struction of the will must be made the same as though this statute had never existed. We now inquire, therefore, what is the object of this statute? This statute is passed, as we conceive, to to do away with the common law doctrine that, unless it is affirmed that a greater than an estate for life was intended, only the latter would pass. We contend that the intention of the statute is to do away with the restrictions as to alienation—to prevent the fostering of monopoly in land, or anything that would tend to perpetuity. This view is supported by the decisions of every supreme court that has passed upon a statute of this kind. Indiana enacted a statute of this kind in 1843, but repealed it in 1852. (See *Smith vs. Meiser*, Ind. Reports LI, page 422.) In the case of *Cleveland vs. Spilman, et al.* (XXV Ind., page 98) in referring to this law, the court says:

"The common law anciently imposed many restraints upon "the alienation of real estate, for reasons that were purely feudal; "and though the severities of that system have long since been "swept away, by the gradual progress of a civilization and refine-"ment with which it was inconsistent, yet as this change was the "work of ages, and was wrought by slow degrees, the theory on "which it was founded to this day constitutes the basis of the "English law of real property, and of the American as well, by "virtue of the adoption of the common law here. As these re-"straints were, from time to time, removed in that country, the "leaning of the courts in favor of the common law, and of the "theories in which the judges had been educated, actually pre-"served, until our own times, some rules which have long since "ceased to have the semblance of any reason for their support. "Thus it is too well settled to be now questioned by the courts, "where a statute has not interposed, that in a deed there must be "words of inheritance to pass a fee simple in lands. But in a

"grant of personal property this is not necessary. This distinc-
"tion never rested on the slightest reason iu this country. But
"less strictness was required in the disposition of real estate by
"will, for the reason that when this mode of alienation was intro-
"duced, the rigor of feudal times was greatly worn out, and hence
"more liberality prevailed. We believe it has never been held
"that the word 'heirs,' or any other legal word of inheritance,
"was necessary in a will to transmit an estate in fee simple. Upon
"the ground that a testator may often be without that pro-
"fessional assistance of which a party to the deed can always have
"time to avail himself, it was long ago held that the intention of
"the testator, as it could be collected from the whole will, more
"than from the exact legal import of the words employed, should
"be regarded. Cowp., 352. But still it was uniformly held that
"unless it thus affirmatively appeared that a greater than an estate
"for life was intended, only the latter would pass, and in this
"shape the law has come down to us, modified only by a manifest
"tendency of the courts to be more easily satisfied that an estate
"of inheritance was intended by the testator. Many of our states
"have interposed by legislation to establish the better rule that
"both in deeds and devises the estate passed shall be held to be
"a fee simple, unless the instrument contains words of limitation.
"This state did so in 1843. R. S. 1843, p. 485. But singularly
"enough, the provision was omitted in the revision of 1852, as
"to wills, though continued as to deeds."

In both the XXV and LI Ind. the court refers to this same statute that we now invoke, and clearly says that its provisions would change the common law doctrine—in a case like this—that where the testator gave a devise to his wife, that devise would carry with it the fee simple in the land, unless it clearly appears that the devisor intended to convey a less estate.

The state of Michigan has a similar statute, and, if I am not wrong, our statute was taken from that. The court, in the case of *Weir v. The Michigan Stove Company* (reported in the Northwestern Reporter, vol. 8, page 78), says:

"The construction of the will of Hugh A. Young, of which "the following is a copy, is the question presented in this case.

"In the name of God, amen.

"I, Hugh Andrew Young, of the city of Detroit, county of "Wayne, and state of Michigan, of the age of 55 years, and be-"ing of sound mind and memory, do make, publish, and declare "this my last will and testament, in the manner following, that "is to say, I give and bequeath all my property, of whatsoever "nature, to my wife Euphemia, she paying all my just and law-"ful debts. The half of the residue after her decease to be paid "to my two sisters in Scotland, share and share alike; if either "should die before my wife's death, then the other to have the "full half; if both should be dead, then let it be divided between "their nearest heirs; the other half to be disposed of as my wife "directs, as I hereby appoint her my sole executrix of this my "last will and testament.

"In witness whereof I have hereunto set my hand and seal "this fifteenth day of March, in the year of our Lord one thou-"sand eight hundred and fifty-eight.

(Signed) "H. A. YOUNG," (L. S.)

"What estate did his wife take under this will? Taking the en-"tire instrument and ascertaining the intention from the language "used, I have no doubt but that Mrs. Young took the entire es-"tate, and that the Stove Company, under her deed of December "9, 1865, acquired all the title the testator had immediately pre-"ceding his death.

"We have a statute which declares that every devise of land "in any will shall be construed to convey all the estate of the "devisor therein, which he could lawfully devise, unless it clear-"ly appears by the will that the devisor intended to convey a less "estate. 2 Comp. Laws, 4323.

"The language of the testator in the bequest to his wife is "clear and unqualified, and unless restricted by what follows "would not be open to question. Does it clearly appear by what "follows thereafter that the devisor intended to convey less than "his entire estate to his wife?

"If there are doubts, then under the statute they must give "way to the otherwise clearly expressed intention. It seems to "me that the testator contemplated the fact that his wife might "sell and dispose of his estate, but might not use during her life "time the entire proceeds thereof, and in case she did not, one-"half of the residue of such proceeds should be paid, after the "decease of his wife, to his two sisters, and the other half as his "wife should have directed. The language used cannot, I think, "be held to clearly indicate a division of real estate and nothing "else after the death of his wife.

"In my opinion this is the proper construction, and the judg-"ment below should be affirmed with costs."

In this case the words of the will would seem to determine the estate at the death of his wife, yet it is construed that the words "I give and bequeath all my property, of whatsoever na-"ture, to my wife, Euphemia," are words that give a fee. How much stronger are the words "I give and bequeath all my estate, "real and personal, of which I may die seized, the same to re-"main and be hers, with full power, right, and authority to

"dispose of the same as to her shall seem meet and proper?" These are much stronger words than the words in *Weir vs. Michigan Stove Company*. They speak in that case of the residue—what remains at the death; and that is similar language to the words in this will, which speaks of "whatsoever remains" at the date of her marriage.

THIRD POINT.

The wife is made the sole executrix, and in all such cases it is the settled rule, that where a devisee, whose estate is undefined, is directed to pay debts, the devisee takes an estate in fee. [*King vs. Ackerman*, 2 Black, U. S. Supreme Court Reports, page 415. 2 Washburn on Real Property, page 751, sec. 25.]

In the case of *King vs. Ackerman* the court says: "It is a long "settled rule also, that where a devisee, whose estate is undefined, "is directed to pay the testator's debts or legacies, or a specific "sum in gross, he takes an estate in fee. The reason on which "this rule is founded is, that if the devisee took a less estate he "might be damnified by the determination of his interest before "reimbursement of his expenditure. This rule, though founded "on inference or implication, is nevertheless as technical and "rigid in its application as that to which it is an exception; for "the court will not inquire into the relative value of the charge; "or, if the charge be contingent, will not weigh probabilities as "to whether the devisee will ever be called on to pay it."

This is in accordance with American institutions which favor alienation, which legislate against monopoly, and attempt to prevent perpetuities. The cases also the plaintiff cites are none of them cases where the wife was sole executrix, and where, in any instance, it might become necessary for her to sell real estate.

FOURTH POINT.

When personal property is given in the same clause with realty, it is evidence that a fee was intended. Especially is that the case when by the same words the realty is given that gives the personality. 1 Redfield on Wills, 427. *Leiter vs. Sheppard*, 85 Ill, 247.

FIFTH POINT.

REPLY TO PLAINTIFF'S AUTHORITIES.

The authorities cited by plaintiff, which are claimed to be in point, to wit: *Smith vs. Bell* and *Brant vs. Virginia Lead & Iron Company*, 93 U. S., 326, differ from the case at bar in these respects:

First. They were taken to the supreme court from states that had still the common law in force. The court rightfully held that under the laws of Pennsylvania and Virginia the heir is not to be disinherited unless the intent is clearly expressed. This is the converse of the rule of Nebraska.

Second. There was no condition as to marriage, but the limitation to a life estate was unrestrained and in nowise modified by what followed.

Third. In neither of these cases was the wife made sole executrix, and placed in a situation where it might become necessary for her to sell real as well as personal property.

Plaintiff quotes the 37th Illinois, but that case is not in point, for this reason: By express words, there the estate given to the wife was limited to the benefits thereof. And these are the

words: "That is to say my said wife shall have all of the bene-
"fits thereof until the expiration of her life, at which time my
"son Anton shall be the only heir of my real and personal estate,
"or what may be left." In that case "what may be left" would only refer to that portion of the estate that she had power to dispose of. And as she only had the benefits of the estate, instead of the fee, why of course she could only dispose of the income, or the benefits derived from it. And "what may be left" could only refer to personal property in that case.

The 36th Ill. for the same reason is inapplicable.

The case of *Green vs. Hewitt*, in the supreme court of Illinois, referred to the Plaintiff's argument on page 33, is not a case in point for three reasons: First, the widow in that case was to have the property only so long as she remained the testator's widow, and there was no condition explaining and modifying the words, "so long as she shall remain my widow." Second, there was no absolute power of disposal, and, in fact, there was no absolute giving of the fee simple—no words that conveyed the same. And third, the wife was not the executrix of the will, and she had no absolute power given either to dispose of property or to pay debts, as the widow has here. Hence the court holds, in that case, that the words, "so long as she remains my widow," under the circumstances, would not indicate the right to dispose of the realty, inasmuch as no right had been given. But the same supreme court of Illinois, in the case of *Markillie vs. Ragland* (77 Ill. Rep., page 98), in putting a construction upon a will which ran thus—"It is my will that, "at the decease of my wife, *whatever may remain* of my estate, "real and personal, shall descend to my heirs," says:

"Had he not intended that his wife should have power to sell

"his real estate, why speak of what should remain of it at his "wife's death? He had provided no other mode of selling it, "except by his wife after his death; and, as his debts were in-"considerable, he could not have supposed it would, in any "event, be necessary to have real estate sold under a decree of "court for their payment. He, we think, clearly intended that "his wife should have the unlimited discretionary power to sell "any or all of his property, whether personal or real."

In this case, a life estate was only given in words, yet the wife was to pay the debts. In that respect it is unlike the case referred to by the plaintiff, and like the case at bar; and hence the difference in meaning that the court, in its construction, puts upon the words "whatever may remain." In the one case the court holds that these words import the right to dispose of the real estate, and in the other not. In both these Illinois cases the court finds the intention of the testator, and gives in each an apparently different meaning to the words, "whatever may remain." And why? In the case of *Markillie vs. Ragland*, the bequest gives an absolute right of disposal of both personalty and realty, though it limits to a life estate. In that case, where the right of disposal is conferred, it is said by the court that the words, "whatever remains" show that the devisee had a right to dispose of the real estate as well as the personal. In the case of *Green vs. Hewitt*, there is no right to dispose of either real or personal property. Hence, to get at the intention of the testator, which must govern the words "what-"ever remains," the same court puts a different construction on the same words, saying in the case of *Green vs. Hewitt*, there being no power given to sell, but an implied power always to consume personal property, such as provisions, &c., why it could only apply to personal property. In applying these two authori-

ties to the case at bar, we find that, in this respect, it is like *Markillie vs. Ragland.* In the first instance both real and personal property is bequeathed to the wife, with full power and right to dispose of the same as to her shall seem meet and proper. The power to dispose of the realty is just as absolute as of the personal property; and it follows from this that if the same construction is put on the case at bar which the supreme court put on the case of *Markillie vs. Ragland*, then the words "what-"ever remains" must be applied to the realty as well as the personalty, inasmuch as the words in this case cover both.

The able argument of plaintiff's counsel cannot do away *with an express condition.* He cannot do away with the fact that the only place where the testator refers to his children—the only bequest he gives them—is upon the *condition* that his wife marry again. Then when that happens, the bequest to his wife becomes inoperative and goes to his children; but only so much as *may then remain* undisposed of.

T. M. MARQUETT,
Of Counsel for Defendant in Error.

OFFICE SUPREME COURT U. S.
FILED
OCT 19 1881
JAMES H. McKENNEY, CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1881.

EZEKIEL GILES,
Plaintiff in Error.
vs.
SAMUEL W. LITTLE, *et al.*

POINTS IN REPLY.

FIRST POINT.

In our brief in chief we endeavored to show that the fifth clause of the will is not in its nature a condition, although such is the form of the expression: our argument being that the fourth clause–"so long as she shall remain my widow":—limited the words of the prior clauses so that Mrs. Dawson took only a life estate; and that the fifth clause did not defeat her life estate, but only defined the destination of the remainder.

To put the matter in the simplest form: If A. conveys to B. an estate for B's life and adds to the terms of the grant the words "on condition that if B. dies the property shall go to C" the life estate of B. is not subject to a condition; it is not defeated by the happening of his death. He takes the whole estate granted to

him; and the subsequent clause only disposes of the remainder.

So here, our contention is that upon the first four clauses, Mrs. Dawson took a life estate. The words in effect are, "I devise all my property to my wife to have and to hold during her widowhood." Then comes the fifth clause which in effect is "when she remarries or dies the same to go to my children."

We insist that the form of the expression shall be disregarded and the real purpose of the clause be effected.

On the other hand, the learned counsel for the defendant, insisting upon the form of the expression, without attempting to meet our contention says that there is a repugnance between the fourth and fifth clauses, and therefore the last shall have effect and the former be disregarded.

We submit that there is no repugnance whatever between the first four clauses and the last clause, nor between the fourth and fifth clauses. Certainly there is none if the form of expression be disregarded. Let the whole sentence be read with the words omitted which give to the last clause the form of a condition. It is as follows:

> "After all my lawful debts are paid and discharged, the residue of my estate real and personal I give, bequeath and dispose of as follows,

> to-wit: To my beloved wife Edith J. Dawson, I give and bequeath all my estate real and personal of which I may die seized, the same to be and remain hers, with full power right and authority to dispose of the same as to her shall seem meet and proper, so long as she shall remain my widow"; when "she shall marry again then it is my will that all the estate herein bequeathed or whatever may remain should go to my surviving children, share and share alike."

Thus read, that is the words which give the form of a condition to the clause being omitted, there is no repugnance whatever. Are we justified in making this change in the form of the expression?

We confidently submit that we are for these reasons:

1. It is the nature of a condition to defeat the estate granted. If this devise were thus: I give and bequeth to my wife all my real estates the same to be and remain hers forever, but if she marry again they shall go to my chilbren." The happening of the contingency would defeat the estate devised. There is a condition.

But the words are: "I give and bequeath all my estates to my wife to be and remain hers so long as she shall remain my widow." All she takes is a life estate. That life-estate is not defeated by a clause disposing of the remainder; therefore the clause is not in its nature a condition.

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2. We are justified in changing the form of the expression for the further reason that by so doing we give effect to the fourth clause—"so long as she shall remain my widow." The learned counselor for the defendant insists that those words shall be stricken out, in the face of the most familiar rule of construction.

3. And there is the further rule which is applicable to wills even more than to any other instrument, that words and forms of words are to be disregarded in order to reach the intention of the testator. We have in this will, one single sentence in which the whole property of the testator is disposed of. There are not several separate distinct sentences, by one of which provision is made for one person or class of persons, and another by which provision is made for another person or class of persons. All the persons who were the proper objects of the testator's providence are, by the fact of the use of one sentence, shown to have been at once and all together present to his mind. He intended to provide for them all; the wife during widowhood, the children afterwards. Against this manifest intention the form of words and the form of words alone is urged.

Let the true nature of a condition be regarded and the subject-matter of the fifth clause be considered, and it is plain that the testator intended thereby only to define the destination of the estate.

4. The rule is that a will shall not be construed to disinherit the children unless the intention to do so be clearly expressed. To which it is answered that the court will not presume that a mother will be untrue to her children. That is an unfortunate statement of counsel. If Mrs. Dawson's deed under which the defendant claims was intended by her to pass the fee, she has exposed herself to the imputation.

With an estate of $10,000 in her own right she has squandered the patrimony of these children and left them penniless. Either she understood that she was disposing of her life-estate only, which defeats the claim of the defendant, or she was an unnatural mother, and justifies us in the imputation.

5. But there is another reason which is fatal to the contention of the defendant. He insists that Mrs. Dawson took the fee upon the condition that she should not remarry. The condition is in restraint of marriage. It therefore is against public policy and illegal and void. He thus urges and insists upon this void clause as against the fourth, which limits her estate to her widowhood.

His contention then is that the illegal clause by reason of its repugnance avoids the limitation; which is absurd.

If the fifth clause be stricken from the will, as it must be if illegal, the fourth remains, and Mrs. Daw-

son took only a life-estate and the children took the remainder under the statute of descents. The argument for the defendant proves, therefore, too much,—it indubitably gives the estate, to recover which this action is brought, to the plaintiff in error.

We submit that the form of expression in the fifth clause should be disregarded and the effect should be attributed to it of simply directing the destination of the remainder, after the determination of the life-estate devised to the widow.

It is secondly insisted by the learned counsel for the defendant in error under his first point that Mrs. Dawson took the fee because she was sole executrix of the will.

But the question here is upon a bequest after all the debts have been paid. The language of the will is "after all my lawful debts are paid and discharged the residue of my estates real and personal I give, bequeath and dispose of as follows:"

Under the will she had two capacities; one as executrix—the other as legatee. Before her rights as legatee attached her power as executrix was exhausted. Her bequest did not become effectual until her power to sell the estate for debts was determined. We can not attribute her power as executrix to sell the estates for the payment of debts to her rights as legatee, which took effect not until after the debts were paid and was of

the property which remained thereafter.

Under his third point the learned counsel returns to this subject and cites in support of his proposition *King v. Ackerman*, 2 Black 415. That case is clearly distinguishable from this in the particular mentioned above. The will contained bequests to Benjaman L. Benson of two estates without the words required at the common law for the devise of the fee. It then charged the legatee with the payment of $1,500 to other parties. The question was whether the legatee took the fee, the necessary technical words for the purpose not being used, but he being charged with the payment to to others of a sum of money. The argument of counsel even more clearly than the opinion of the court shows that the circumstance of the legatee taking the estate subject to the charge was controlling. In this case Mrs. Dawson did not take the estate subject to the payment of debts as we have seen; she only took after their payment..

A correction must here be made of an error into which the learned counsel has inadvertently fallen. He says that the exhibit attached to the petition,—that is, the deed made by Mrs. Dawson under which the defendant claims;—"shows that this real estate in question was sold to pay a debt which we know to be a debt of the estate." Quite the reverse is shown by the deed to be the fact. The testator died June 22, 1869. The

deed set out in the exhibit conveyed the property subject to a mortgage, and shows that this mortgage was made, not by the testator but by Mrs. Dawson, on the 28th of August, 1869, two months after the testator's death. The exhibit therefore shows that the estate in question was sold to Cody to pay a debt not of the estate, but of Mrs. Dawson.

SECOND POINT.

In order to meet the doctrine of Allen's executors v. Allen, 18 How. 319, that the heir is not to be disinherited unless the intent to do so be clearly expressed, the learned counsel brings forward the statute of Nebraska which in our brief in chief we considered under our fifth point.

Without paying what we there said the compliment of his attention, our learned adversary cites as decisive in favor of his view of the effect of the statute, therecent case of *Mier v. the Michigan Stove Compauy*, 7 North Western Reporter 78.

If that were the decision of the supreme court of Nebraska this court might feel constrained to follow it. But it is not authority here. It may be referred to for information, in order to enlighten the court by the views of a tribunal entitled to great respect, but it has no greater force. As the state court in Nebraska

has not spoken on this subject, this court will follow its own previous adjudications; and if the Michigan court has held another doctrine its opinions will not be adopted.

Aside from the statute in question, which has been enacted in both these states, the case of *Mier v. The Michigan Stove Company* does not materially differ from *Smith v. Bell*, 6 Peters 68.

In the Michigan case the material words of the devise are:

> "I give and bequeath all my property to my "wife: * * The half of the residue after her "decease to be paid to my two sisters * * "The other half to be disposed of as my wife "may direct."

In *Smith v. Bell* the material words are:

> "I give to my wife all my personal estate what-"soever; * * The remainder of said estate "after her decease to be paid for the use of the "said Jesse Goodwin."

The language of the Michigan will is as to one half of the property the same as that of the will which was under consideration in *Smith v. Bell.* Unless then the statute changes the rule which this court laid down the doctrine of *Smith v. Bell* will be applied here.

The report of the Michigan case is most unsatisfactory. It does not inform us what was in question—

whether real or personal property—whether the half of the property given to the sisters or the half ultimately given to the wife. For aught that appears the widow as executrix may have disposed of the property in question to pay debts, or, it being personalty, have consumed the same in its use. Unless we are informed on these points we can give to the case very little consideration.

The statute is barely mentioned. In what way it operated to support the construction placed on the will is not shown. All that is said is that there are doubts as to the meaning of the testator. But here with the assistance of the deliberate judgment of this court expressed in *Smith v. Bell* there is no doubt. Whatever doubt there might have been if the law had not received exposition from this court, there can be none now. The whole subject has been clarified by that judgment.

It is said the testator's language must be construed with reference to the laws and policy of Nebraska. That is perfectly true. But we have not been pointed to any law nor to any policy, which inhibits a devise or a grant to one person for life and to another in remainder, which is the disposition which this will makes of this estate. On the other hand section 52, of chap. 73, page 394, general statute, ed. of 1881, provides "estates may be created to commence at a future date."

And section 59 of the same chapter on the same page

provides that "Any person or persons having an interest in remainders or reversion of real estate shall be entitled to all the rights and benefits of this act."

In these statutory provisions there is distinct recognition of the estate which the children took under this will, and so far from the laws or policy of Nebraska being against, it is clearly in favor of our construction of this will.

But besides all this there is a broad distinction between the Michigan case and the one at bar. In that the devise to the wife was without words of limitation, except as the same were found in the subsequent gifts to the sisters: here the words of limitation are express: they are "so long as she continues my widow."

THIRD POINT

We pass now to the distinctions which, under his fifth point the counsel for the defendant takes between the case at bar and those cited by us in our brief in chief.

The first is, that *Smith v. Bell* and *Brant v. The Virginia Company* came from States which had not a statute like that of Nebraska relating to the construction of wills. We think that provision has been shown to have no relation to the subject.

The second is, that there was in those cases no condition as to marriage, but the limitation to a life estate

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The second is, that there was in those cases no condition as to marriage, but the limitation to a life estate

was unrestrained, and in no wise modified by what followed. We are unable to see any distinction for the purposes of this discussion between an estate for life determinable by the death or the marriage of the tenant for life,—nor to our apprehension has the counsel pointed out any. And so far as the limitations which make the devise to Mrs. Dawson that of a life estate are concerned, they are if possible more clear and decisive here than in the cases cited.

Third, the circumstance that Mrs. Dawson was executrix of this will is immaterial because she took as legatee not until after the debts were paid.

In his discussion of the case of *Siegwald v. Siegwald*, 37 Ill. 289, 430 of Denslow's edition, the counsel does not state quite fairly the terms of the devise: They are: "I give and beqeath to my beloved wife Antonia all my real and personal estates wheresoever situated in fee simple for ever; that is to say, my said wife shall have all the benefits thereof until the expiration of her life, at which time my son Anton shall be the only heir of said real or personal estate what may be left."

There was language in which the fee simple as well as the benefits of the property are mentioned. The court does not place its opinion upon the use of the words "My said wife shall have all the benefits thereof."

And in the case of *Boyd v. Strahan*, 36 Ill. 355,

neither those words nor words equivalent thereto are used. At any rate the distinction which my learned friend takes, escaped the attention of Mr. Justice Field when delivering the judgment of this court in *Brant v. The Virginia Company,* in which he cites that case with approval.

I confess an inability to see any difference in the language of the devise under consideration in *Green v. Hewett* and that used here, except that there express words giving the power of disposal are not found, and the disposition of the remainder is not expressed in the form of a condition.

After what has been said above the points taken against this case do not warrant comment.

The language of the bequest in *Markillie v. Ragland,* 77 Ill. 98, cited to meet and offset *Green v. Hewett* is so peculiar and so very different from that of the devise here under consideration, that it needs no further comment than simply to say, that what the court says about the power of the wife to sell is not based upon the clause to which the counsel applies it, namely, "whatever may remain of my estate, real and personal, shall descend to my heirs."

If the whole case be read it strongly supports our contention.

FOURTH POINT.

The learned counsel for the defendant in error did not find room in his thorough and exhaustive argument to notice the sixth point of our brief in chief. If this will did not pass the fee to Mrs. Dawson, the deed cannot be considered as an exercise of the power, because it did not refer thereto. It must be taken only as a conveyance of her life estate. The research and ingenuity of counsel was unequal to meeting this decisive point.

J. M. WOOLWORTH,

Of Counsel for Plaintiff in Error.

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Of Counsel for Plaintiff in Error.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~1~~ 3—ORIGINAL.

EX PARTE IN THE MATTER OF WILLIAM W. WOOLLEN AND WILLIS S. WEBB, PETITIONERS.

PETITION FOR MANDAMUS.

FILED MAY 10, 1880.

SUPREME COURT OF THE UNITED STATES.

No. 4—Original.

EX PARTE IN THE MATTER OF WILLIAM W. WOOLLEN AND WILLIS S. WEBB, PETITIONERS.

PETITION FOR MANDAMUS.

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1 *Petition for mandamus and restraining order.*

In the Supreme Court of the United States.

EX PARTE WILLIAM W. WOOLLEN AND WILLIS S. Webb, in re William McEwen and Sons, in bankruptcy.

To the honorable Morrison R. Waite, Chief Justice, and the honorable Nathan Clifford, Noah H. Swayne, Samuel F. Miller, Stephen J. Field, William Strong, Joseph P. Bradley, Ward Hunt, and John M. Harlan, associate justices of the Supreme Court of the United States:

The petition of William W. Woollen and Willis S. Webb would most respectfully show unto the court that your petitioners now are, and for more than eight years past have been citizens and residents of the district and State of Indiana; that William McEwen, Gideon B. Mc-
2 Ewen, and Archibald McEwen, partners as McEwen and Sons, of said State and district, were adjudged bankrupts by the district court of the United States for the district of Indiana, on the day of , 1872; and thereafter Joseph I. Irwin, Archibald F. Thompson, John H. Long, and Jesse R. Newsom were appointed and duly qualified as assignees of the estate of said bankrupts; that petitioners filed their proof of debt against the individual estate of William McEwen, bankrupt, on the 17th day of June, 1872, the amount proved and allowed being the sum of $5,591.69, which was duly allowed by the register, and no exception or objection whatever was filed thereto until the 21st day of April, 1875, at which date said assignees filed exceptions to the allowance of said claim as to $591.69 of said claim; and afterwards, on
3 the 5th day of November, 1879, said assignees amended said exception by adding thereto an exception to the whole of said claim, on the ground that the claim was against the estate of McEwen & Sons, and not against William McEwen, individually; that on the 17th day of December, 1879, said district court, having heard the evidence, disallowed and rejected said claim; that afterwards, to wit, on said 17th day of December, 1879, petitioners prayed an appeal from said decision of said district court to the circuit court of the United States for the district of Indiana, and on the same day gave notice, as required by law, to the clerk of said district court and to the said assignees of the claim of said appeal; and afterwards, to wit, on the 17th day of December, 1879, petitioners perfected their said appeal by filing bond, as required by law, which bond was duly approved, all of which proceedings
4 will more fully and at large appear by reference to the record in said cause, a certified copy of which is to this petition attached, and to which for greater certainty petitioners beg leave to refer with like effect as if the same were here set out at length.

Petitioners would further most respectfully show that petitioners took, and claimed and perfected said appeal in good faith, fully intending to enter the same at the term of the circuit court of the United States which should be held within the said district next after the expiration of ten days from the time of claiming the same, to wit, at the May term, 1880, of said court; that before the beginning of the said May term, 1880, of said court, to wit, on the 29th day of March, 1880, and within the said term at which said decision was made and said appeal claimed, said assignees, without authority of law, filed in said
5 circuit court a motion to dismiss the said appeal, a copy of which

motion is embraced in the certified copy of proceedings hereto attached and heretofore referred to; that thereafter, to wit, on the 30th day of March, 1880, said motion was by the said circuit court sustained, and said appeal dismissed, to which ruling of the court these petitioners at the time excepted, and twenty days' time was given in which to prepare and file their bill of exceptions; that petitioners duly prepared their said bill of exceptions, and the same was signed by the judge of said court and filed and made part of the record in said cause on the 12th day of April, 1880; that on the 17th day of April, 1880, these petitioners sued out their writ of error to said circuit court to bring the said proceedings before this court, and upon the same day tend-
6 ered their bond with sufficient surety and demanded their citation in said cause, said bond being approved by counsel for assignees, &c.; that on the 19th day of April said bond was duly approved, and citation signed by Hon. Thomas Drummond, judge of said circuit court for said district of Indiana; that on the 20th day of April, 1880, said bond and citation were duly filed in the clerk's office of said United States circuit court for said district of Indiana, and upon said last-named day said citation was duly served upon said assignees, all of which proceedings fully and at large appear by reference to the record in said cause, a certified transcript of which is hereto attached, and to which petitioners beg leave to refer with like effect as if the same were here set out at length.

7 Petitioners would further show that Hon. Thomas Drummond, circuit judge, was only present in the district of Indiana during the November term of said court from about March 18, 1880, to March 30, 1880, during which time his attention was mainly given to chancery causes and settlements of railroad receivers. Before Judge Drummond's arrival the district judge announced that the jury would be discharged for the term at the close of the trial then about to be commenced. Judge Drummond heard no jury trial; the district judge discharged the jury at the close of the trial in progress when Judge Drummond arrived.

8 Petitioners would further show that on August 26, 1873, and long after petitioners' claim had been regularly proved and allowed by the register, against the individual estate of William McEwen, the assignees filed a petition against the individual creditors of William McEwen to marshal assets and praying that firm creditors might be permitted to share pari passu with individual creditors in the assets of the estate of said William McEwen; that said assignees made petitioners defendants to said petition as creditors of the individual estate of William McEwen, and filed as part of said petition a certain schedule showing petitioners to be holders of a claim proved and allowed against the individual estate of said William McEwen. That said petition led to protracted and expensive litigation, terminating finally in the defeat
9 of said assignees and the preservation of the individual assets of said William McEwen, for the benefit of his individual creditors. That during this entire litigation, continuing for more than four years, said petitioners were recognized by said assignees as creditors of the individual estate of William McEwen, upon said claim proved and allowed by the register on June 17, 1872, as aforesaid; and petitioners, by their counsel, took an active part in the litigation and defense against said assignees' petition. That during said litigation between the assignees and firm creditors upon the one side, and the individual creditors of William McEwen upon the other side, all of the proved claims were repeatedly examined and classified, and no objection or exception

was ever filed against petitioners' claim, on the ground that it was not a claim against the individual estate of William McEwen until long after the termination of said litigation, to wit, Nov. 5, 1879—the
10 objection filed on April 21, 1875, being only to $591.69 of petitioners' claim on the ground that that amount allowed for interest and attorney's fees was erroneous. That no individual creditor of the estate of William McEwen has filed any exception to petitioners' proof of claim, or offered any objections to or protest against petitioners' sharing in said assets of the individual estate of William McEwen, in accordance with their claim as proved and allowed by the register, but said assignees, after suffering petitioners' claim to stand proved and allowed against the individual estate of William McEwen from June 17, 1872, until November 5, 1879, without exception or objection, except as to interest and attorney's fees as aforesaid, and after having impleaded and litigated against petitioners as individual creditors of said William McEwen's estate for years, did, upon their own mo-
11 tion, and, as petitioners believe, without right, after such lapse of time, and such proceedings as hereinbefore stated, on the 5th day of November, 1879, file their said second exception to petitioners' proof of claim, upon which exception said proceedings were had as disclosed by said transcript attached hereto and hereinbefore referred to, and as in this petition before set forth.

Petitioners further show that the amount in controversy in said cause exceeds the sum of five thousand dollars exclusive of costs. That on the 12th day of April, 1880, notwithstanding your petitioners were diligently perfecting their bill of exceptions, and filed the same on said 12th day of April, 1880, and were diligently prosecuting their proceedings to bring said matter before this court, the said district court ordered a third and final meeting of the creditors of said bankrupt to be held on the 28th day of April, 1880, and directed said assignees to give notice for the final settlement of said estate, of which order and meet-
12 ing petitioners had no knowledge or notice until the 17th day of April, 1880: That said meeting has been appointed for April 28th, 1880, and notice of the same duly published: That if said estate is finally settled there will remain no assets available to pay petitioners' claim, if the same should be finally allowed.

By reason of all the facts in this petition set forth, petitioners pray the court to issue a writ of mandate commanding the judges of the circuit court of the United States for the district of Indiana to set aside, annul, and vacate said order dismissing said appeal and to reinstate said appeal, and to allow petitioners to enter the same together with their complaint as required by law; and to issue a writ of mandate to the judge of the district court of the United States for the district
13 of Indiana, commanding him to set aside, annul, and vacate said order requiring the final settlement of said estate on April 28th, 1880; and to issue a writ of mandate or a restraining order to said assignees aforesaid, commanding them to make no final settlement of said estate until the final determination of the matters in dispute between your petitioners and them. And inasmuch as it is impossible to give due and legal notice for regular hearing of this motion for writ of mandamus prior to April 28th, 1880, the time now fixed by the district court for the final distribution of the assets of the individual estate of said William McEwen, bankrupt, and inasmuch as irreparable injury may be done petitioners if all the assets out of which alone payment of their claim can be made if finally established are distributed and paid

21 In the district court of the United States, district of Indiana, in bankruptcy.

IN THE MATTER OF WILLIAM MCEWEN, Archibald McEwen, & Gideon B. McEwen, bankrupts. } No. 1322.

At Indianapolis, in said district, before the honorable Walter Q. Gresham, judge of said court, sitting as a court of bankruptcy, the proceeding following was had this 19th day of March, A. D. 1878:

Come now on this 15th day of January, 1878, said Jesse R. Newsom, Archibald F. Thompson, John H. Long, Joseph I. Irwin, assignees in bankruptcy of McEwen and Sons, plaintiffs, in the original proceedings filed herein to marshal assets, and Joshua D. McQueen, David F. Long, Albert Jones, Moses Sweeney, John Carr, and other defendants to said original proceedings and plaintiffs in the petition filed herein in behalf of the firm creditors of said bankrupts, McEwen and Sons, by Harrison, Hines and Miller, and Herod and Winters, their solicitors, and the said Nathan Powell, Willis S. Webb, Ralph Hill, George W. Richardson, and other individual creditors of said William McEwen, defendant, to said original proceedings and petition, come also by Harrington, Hill, McDonald, and Butler, their solicitors. Come also W. P. Fishback, master, to whom the matter upon the said original proceedings and petition and answer thereto of said individual creditors, and replication thereto of said assignees and firm creditors, had heretofore been, by order of this court, referred, and here now files his report, which reads in the words and figures following, to wit:

22 And afterwards, to wit, on the 19th day of January, 1878, said plaintiff in said original proceedings and petition, the assignees of said bankrupts and firm creditors of said McEwen and Sons, come by their said solicitors, and file their exceptions to said report of said master, which said exceptions read in the words and figures following, to wit:

And afterwards, to wit, on the 18th day of March, 1878, come again said assignees and said firm creditors, plaintiffs as aforesaid, and said individual creditors come also in open court before the Hon. Walter Q. Gresham, judge of the district court of the United States for the district of Indiana, and the matter of said exceptions to said report of said master is now set down for hearing and final determination and decision by the court.

And the court now orders and directs that the said master do file with and append to his said report a statement showing in detail each and every item of the costs and disbursements made by said assignees in the matter of said bankruptcy, and referred to in said report, specifying as to each item, on what account, and for what services said expenditure was incurred, and on account and for the benefit of what particular firm and estate the same was made; and now comes said master, and files and appends to his said report said statement, which is in
23 the words and figures following, to wit:

And the court having heard the argument and having examined said report and exceptions thereto, and being fully advised in the premises, does now overrule the said exceptions to said report of said master, and does in all things confirm said report. It is therefore ordered, adjudged and decreed by the court that all costs and disbursements of the whole bankruptcy proceedings, properly charged and allowed, shall be first

paid out of the whole and gross amount of money coming into the hands of said assignees from the entire bankruptcy proceeding by appo tioning the same upon the joint and separate estates of said McEwen and Sons; and said William McEwen, Archibald McEwen, and Gideon B. McEwen, partners composing said firm of McEwen and Sons, according to the relative amount realized by said assignees from said several estates pro rata. And that after payment of costs and disbursements so made, the remainder of the amount realized by said assignees from said firm, assets of McEwen and Sons, be by said assignees distributed and paid to said firm creditors, and the remainder of the amount realized from said several separate estates be paid to the individual creditors of said individual partners composing said firm, and
24 if any surplus remains after full payment of the individual creditors of any or either of said individual estates, such surplus be added to said firm assets, and paid and distributed to said firm creditors.

And it is ordered, adjudged, and decreed by the court, that said firm creditors do not share pari passu with the individual creditors of the estate of William McEwen in the assets of said William McEwen's individual estate. And the assignees are ordered and directed by the court to proceed to make distribution and payment of the money in their hands, in accordance with this decree. To which order, judgment, and decree of said court, said assignees and said firm creditors, plaintiffs as aforesaid, by their said solicitors, then and there and at the proper time excepted. And said assignees and firm creditors now pray an appeal from said order overruling their said exceptions, and from said judgment and decree, to the circuit court of the United States for the district of Indiana, and the court now grants said appeal upon said assignees and firm creditors executing a bond in the penalty of $1,000.00 with sureties, to which order granting such appeal said indi-
25 vidual creditors object and except, upon the ground that there is no appeal from such decision allowed by law, but that the same should be only and solely a revision of said decision of said district court by the circuit court of the United States, under and by virtue of the supervisory power conferred upon said circuit court by the bankrupt law; and it is ordered that upon the execution of said bonds within the time allowed by law and the giving of notice as required by law of such appeal, that all proceedings upon the order and decree of the court herein be stayed. And now come the said assignees and firm creditors, and file their said bond, which is approved by the court, and which reads as follows, to wit:

26 UNITED STATES OF AMERICA,
District of Indiana, ss:

I, Noble C. Butler, clerk of the district court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full and true copy of an order in the matter of William McEwen et al. in bankruptcy, made and entered in said court on the 19th day of March, A. D. 1878, as fully as the same appears of record in my office.

Witness my hand and the seal of said court, at Indianapolis, in said district, this 23d day of April, A. D. 1880.

NOBLE C. BUTLER, *Clerk.*

27 In the circuit court of the United States for the district of Indiana. November term, 1877.

Before the honorable Thomas Drummond, judge.

JOSEPH R. NEWSOM, ARCHIBALD F. THOMPSON, John H. Long, Joseph I. Irwin, assignees of McEwen and Sons; Joshua D. McQueen, David F. Long, Albert Jones, Moses Sweeney, and John Carr, *v.* NATHAN POWELL, WILLIS S. WEBB, RALPH Hill, George W. Richardson et al., individual creditors of William McEwen, bankrupt.	5879. Chancery.

MARCH 20TH, 1878.

And afterwards, to wit, on the twentieth day of March, 1878, come the assignees in said bankruptcy, and certain firm creditors of said firm of McEwen and Sons, by Harrison, Hines and Miller, and Herod and Winter, their solicitors, and the individual creditors of William McEwen, by Harrington, Hill, and McDonald and Butler, their solicitors, and the matter of the appeal from the order and decision of the district court for said district of Indiana upon exceptions to the master's report upon the proceedings of the assignees on certain firm creditors for marshaling assets is now set down for final hearing and decision before hon-
28 orable Thomas Drummond, judge of the circuit court of the United States for the district and State of Indiana.

And the argument of counsel having been heard and the court being fully advised in the premises, affirms the decision of the district court, and overrules the exceptions to said master's report, and in all things confirms the said master's report. It is therefore ordered and decreed that the said decision of the district court, made and rendered herein, be, and the same is hereby, affirmed, and the said exceptions to the master's report are hereby overruled, and said report is in all things confirmed, and said assignees are hereby ordered and directed to make payment of costs and disbursements and distribution of the moneys in their hands, as such assignees, in accordance with the said order, decision, and judgment of the district court of the United States for said district and State of Indiana; to which order, judgment, and decree said appellants, plaintiffs herein, now here, and at the proper time object and except, and they now pray an appeal herein to the Supreme Court of the United States, which said appeal is now here by the court refused and disallowed.

29 UNITED STATES OF AMERICA,
District of Indiana, ss:

I, Noble C. Butler, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full and true copy of the decree in the cause of Joseph R. Newsom, assignees, &c., et al., v. Nathan Powell et al., made and entered in said court on the 20th day of March, A. D. 1878, as fully as the same appears of record in my office.

Witness my hand and the seal of said court, at Indianapolis, in said district, this 23d day of April, A. D. 1880.

NOBLE C. BUTLER, *Clerk.*

29½ (Indorsed:) In U. S. Supreme Court. Ex parte William W. Woolen, Willis S. Webb, in re McEwen and Sons. In bankruptcy. Petition for mandamus and restraining order. J. E. McDonald, John M. Butler, solicitors for petitioners.

30 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house, in the city of Indianapolis, in said district, on the first Tuesday in November, in the year of our Lord one thousand eight hundred and seventy-nine, before the honorable Thomas Drummond, judge of said court, and Walter Q. Gresham, judge of the district court of the United States for said district, and ex officio judge of said circuit court.

WILLIAM W. WOOLLEN AND WILLIS S. WEBB *v.* JESSE R. NEWSOM, ARCHIBALD F. THOMPSON, Joseph I. Irwin, and John H. Long, assignees in bankruptcy of the individual estate of Wm. McEwen.	6883.	Civil action.

Be it remembered that heretofore, to wit, on the 29th day of March, A. D. 1880, at the November term of said court, before the honorable Thomas Drummond and Walter Q. Gresham, judges as aforesaid, the following proceedings in the above-entitled cause were had, to wit:

Now comes the said assignees, by Herod and Winter, their attorneys, and file their motion to dismiss the appeal of said plaintiffs from the order of the district court, disallowing their claim against the
31 estate of William McEwen, bankrupt, in the words and figures following, to wit:

To the hon. judges of said court:

Jesse R. Newsom, Archibald F. Thompson, Joseph I. Irwin, and John H. Long, assignees in bankruptcy of William McEwen, respectfully show that said William W. Woollen and Willis S. Webb, heretofore, to wit, on the day of , 187 , filed with Jno. W. Ray, register in bankruptcy, their certain proof of debt against the estate of said bankrupt, which was allowed by said register, to the amount of $5,591.69.

That thereafter, to wit, on the 21st day of April, 1875, said assignees of said bankrupt filed with said register their exceptions in writing to the allowance of said claim, and moved that said debt be expunged and disallowed; that thereafter, to wit, on the 5th day of November, 1879, by agreement between said claimant and said assignees, said exceptions were certified by said register to the district court of the United States for the district of Indiana, for trial and determination.

That thereafter, to wit, on the 27th day of November, 1879, said exceptions were duly tried in said district court, and said court sustained said exceptions and disallowed said claim, and ordered that the same be expunged; that thereafter, on the 17th day of December, 1879, said claimants filed in said court their petition, showing that said order disallowing said claim had been entered without notice to them, and that in consequence thereof, the time allowed for appeal had elapsed without an appeal being taken, although they had intended to appeal
32 from an adverse decision; and thereupon they asked that the decision of the court in said matter be reviewed for the purpose of allowing them an appeal; that said court thereupon reviewed its decision in said cause, and said cause was reheard upon the same evidence,

and said court again sustained said exceptions, and ordered that said claim be disallowed and expunged; that said claimants thereupon prayed an appeal to the circuit court, and on said day, to wit, the 17th day of December, 1879, served notice of their said appeal upon said assignees and upon the clerk of said court, and also filed their appeal bond to the approval of said court; all of which will more fully appear by a certified transcript of the record of said cause, which is filed herewith and made a part hereof.

And said assignees respectfully show to the court that the order of said district court rehearing said cause for the purpose of permitting said appeal was within authority of law and void; and further, that said appeal was taken during the present term of this court, and that it became and was the duty of said appellants to enter their said appeal and file a statement of their claim in the nature of a declaration, as in an action at law, in this court within ten days after said appeal was taken, but said assignees say that said appellants have hereto wholly failed and refused and now fail and refuse to perfect their said appeal by entering the same and filing said declaration in this court, and declare that they will not enter said appeal until the May term, 1880, of this court.

Wherefore said assignees ask that the appeal of said claimants be dismissed.

33 HEROD AND WINTER,
Att'ys for said Assignees.

And said plaintiffs come also, by Mess. McDonald and Butler, their attorneys, and said motion is now submitted to the court, and the premises being seen, it is ordered by the court that said motion be sustained, and that the appeal aforesaid of said plaintiffs be, and the same is hereby, dismissed, and that said defendants recover of said plaintiffs their costs herein, taxed at dollars and cents, to which order and judgment said plaintiffs except, and twenty days' time is given said claimants in which to prepare and file their bill of exceptions to the ruling of the court herein.

And afterwards, to wit, on the 12th day of April, A. D. 1880, at the November term of said court, before the honorable Walter Q. Gresham, judge, as aforesaid, the following further proceedings in the above entitled cause were had, to wit:

Come now the claimants, by McDonald and Butler, their attorneys, and file their bill of exceptions herein in the words following, to wit:

Be it remembered that heretofore, to wit, on the 29th day of March, 1880, being the 126th judicial day of the November term, 1879, of said court, the defendants in the above entitled cause filed in said court a certified transcript of the record of said cause in the district court of the United States for the district of Indiana, together with their written motion to dismiss the appeal taken from the decision and judgment of said district court by the plaintiffs herein, which transcript of
34 record and motion to dismiss appeal read in the words and figures following, to wit:

35 Pleas of the district court of the United States for the district of Indiana, begun and holden at the United States courthouse in the city of Indianapolis, in said district, before the honorable

Walter Q. Gresham, judge of said court, sitting as a court of bankruptcy.

IN THE MATTER OF WILLIAM MCEWEN, GIDEON B. MCEWEN, and ARCHIBALD MCEWEN, bankrupts.	1322.	In bankruptcy.

In the matter of the claim of Woollen, Webb & Co. against the individual estate of William McEwen.

Be it remembered that heretofore, to wit, on the day of , before the honorable Walter Q. Gresham, judge as aforesaid, the following proceedings in the above-entitled cause were had, to wit:

Comes now John W. Ray, register herein, and files his memorandum of the proof of debt made by Woollen, Webb and Company against the estate of said William McEwen, which said proof of debt is in the words and figures following, to wit:

36 STATE OF INDIANA,
County of Bartholomew, ss:

Be it remembered that heretofore, to wit, at a term of the court of common pleas of the county of Bartholomew, in the State of Indiana, begun, holden, and continued at the court-house in the city of Columbus, on the first day of December, 1871, the same being the fifth judicial day of the November term, A. D. 1871, of the said court of common pleas before the honorable Frank Emmerson, sole judge of the seventh district of the court of common pleas, in which is the county of Bartholomew, in the State of Indiana, the following proceedings were had in the cause of—

WILLIAM W. WOOLLEN & WILLIS S. WEBB, doing business under the name and style of Woollen, Webb & Co., *vs.* WILLIAM MCEWEN, ARCHIBALD MCEWEN, Gideon B. McEwen, partners under the name of McEwen & Sons.	No. 107.	On notes.

Come the parties by their attorneys, and the plaintiffs file answer to the interrogatories on file herein; also answer to the defendant Long's cross-complaint and reply to defendant Long's answer, as follows, to wit (here ins't):

37 And by agreement this cause is now submitted to the court for trial and finding, and the other defendants, except Long, failing and refusing to answer the complaint on file herein, the same is taken for confessed and true as to them; and said defendants William McEwen, Archibald McEwen, and Gideon B. McEwen, failing and refusing to answer the complaint of suretyship of defendant Long, the same is taken for confessed, and the evidence being fully heard, and the premises seen, the court finds for the plaintiffs, and assesses their damages against all said defendants at the sum of ten thousand six hundred and seventy-three dollars and fifty-three cents ($10,673.53), without relief from valuation or appraisement laws.

It is therefore considered and adjudged by the court that the plaintiffs recover of the said defendants the sum of ten thousand six hundred and

seventy-three dollars and *and* fifty-three cents ($10,673.53), without relief from valuation or appraisement laws, together with their costs in this behalf expended, taxed at ten dollars and cents.

And it is further considered and adjudged by the court that the said Ara E. S. Long having been found to be surety only on said debt, the sheriff is hereby directed to levy any execution that may issue
38 on said judgment, first, upon and exhaust the property of said principals, William McEwen, Archibald McEwen, and Gideon B. McEwen, before a levy shall be made upon the property of said Ara E. S. Long, surety herein, and the clerk shall endorse a memorandum of this order on the execution.

STATE OF INDIANA,
County of Bartholomew, ss :

I, S. Webber Smith, clerk of the court of common pleas of the county of Bartholomew, in the State of Indiana, do hereby certify that the foregoing is a true and complete copy of the findings and judgment of said court in the above-entitled cause, on the day and year first aforesaid, as appears of record in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of the said court of common pleas, at my office in the city of Columbus, this 18th day of June, A. D. 1872.

[SEAL.] S. WEBBER SMITH,
Clerk C. C. P., Bartholomew Co., Ind.

39 In the district court of the United States for the district of Indiana. In bankruptcy.

IN THE MATTER OF WILLIAM MCEWEN, BANKRUPT. }

DISTRICT OF INDIANA, *ss :*

On this seventeenth day of June, A. D. 1872, before me, John W. Ray, a register of said district, personally appeared William W. Woollen, of Indianapolis, in the county of Marion and State of Indiana, and who, after being duly sworn and examined at the time and place aforesaid, upon his oath says that William McEwen, the person against whom a petition for adjudication of bankruptcy is filed, was and still is justly and truly indebted to William W. Woollen and Willis S. Webb, partners, doing business under the firm name of Woollen, Webb & Co., in the sum of five thousand dollars and interest, & attorneys' fees, for which said sum of five thousand dollars and interest and attorneys' fees, or any part thereof, this deponent has not, nor has any person by their order, or to this deponent's knowledge or belief, for their use, received any security or satisfaction whatsoever save and except that hereinafter mentioned. That the claim was not procured for the purpose of influencing the proceedings under the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867; that no bargain or agreement, expressed
40 or implied, has been made or entered into by or on behalf of this deponent to sell, transfer, or dispose of said claim, or any part thereof, against said bankrupt, or to take or receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote of said firm for assignee, or any action on the part of this depo-

nent or any other person in the proceedings under said act has been, is, or shall be in any way affected, influenced, or controlled. And affiant says that said indebtedness is for a balance due for money loaned to said William McEwen; that said William McEwen borrowed of said Woollen, Webb & Co., for his individual use, the sum of ten thousand dollars, on the 7 day of July, A. D. 1871; that after said McEwen had made the arrangement to borrow said money he brought to said Woollen, Webb & Co. two notes of $5,000 each, signed by McEwen & Sons, and A. E. S. Long as surety; that said notes were both sued on and judgment obtained thereon against William McEwen, Gideon B. McEwen, and Archie McEwen, and said A. E. S. Long, in Bartholomew County. And affiant says that said Long has paid and secured $5,000 upon said indebtedness, and that the balance and interest remain due and unpaid. And affiant says that the balance due is the individual debt of said William McEwen, as he verily believes. Said debt is evidenced by a transcript of a judgment filed herewith.

W. W. WOOLLEN, *Deponent.*

41 Subscribed and sworn to at Indianapolis on the 17th day of June, A. D. 1872, before me,

JNO. W. RAY, *Register.*

42 And afterwards, to wit, on the 21st day of April, 1875, the assignees herein, by Herod and Winter and S. Stansifer, their solicitors, filed their exceptions to the allowance of said claim of Woollen, Webb and Company in these words, to wit:

In the district court of the United States for the district of Indiana.

IN THE MATTER OF McEWEN & SONS, IN BANKruptcy.)

The assignees of said bankrupt say that they except to $591.69 of the allowance of claim of Woollen, Webb & Co. against William McEwen & Co., because—

First. The note on which judgment was rendered bore date July 7, 1871, and called for $5,000.00 at 90 days. The proceeding in bankruptcy was instituted against said William McEwen on the 14th day of Sept., 1871, and the suit on said note was instituted thereafter. Wherefore the assignees say that the allowance should not exceed the face of the note, to wit, $5,000.00.

S. STANSIFER.

Second. And they further except and object to the allowance of the whole of said claim, because the said debt upon which said claim is founded is a debt of the partnership estate of McEwen & Sons and not provable against the individual estate of William McEwen.

S. STANSIFER,
HEROD & WINTER,
For Assignees.

43 And afterwards, to wit, on the 5th day of November, 1879, Henry Jordan, register of bankruptcy herein, filed his certificate in my office, in the words following, to wit:

IN THE MATTER OF McEWEN & SONS, BANKRUPTS. } No. 1322.

NOV. 5, 1879.

MEMORANDUM.—Come now the parties, by their att'ys, and file agreement that the matter of the exceptions to the claim of Woollen, Webb & Co., and Willis S. Webb, pending before me, shall be certified to the court for trial & finding.

It is therefore ordered that said matters be, and they are now hereby, certified to court for trial & finding.

HENRY JORDAN,
Register.

The agreement between the parties referred to by the register is in the following words, to wit:

44 In the matter of the bankruptcy of McEwen & Sons.

In the district court of the United States for the district of Indiana.

WOOLLEN, WEBB & CO. *vs.* WILLIAM McEWEN. } Claim.

WILLIS S. WEBB *vs.* WILLIAM McEWEN. } Claim.

It is agreed that the register in bankruptcy may certify the above claims and exceptions filed to the same to the district court, and that the judge thereof may hear and determine the same upon the proofs submitted to him, with the right of either party to take proper proceedings to have the same revised by the judge of the circuit court or in the circuit court.

McDONALD & BUTLER,
Att'ys for Claimants.
HEROD & WINTER,
Att'ys for Assignee.

45 And afterward, to wit, on the 29th day of November, A. D. 1879, the following further proceedings were had in the above entitled cause:

Now come said assignees, by Herod & Winter, their attorneys, and said claimants, by McDonald & Butler, the attorneys, come also, and the matter of the exceptions herein is now submitted to the court for trial and finding, and the evidence being heard and premises seen, the court sustained said exceptions, to which said claimants now except.

It is therefore ordered by the court that the proof of debt heretofore filed by said Woollen, Webb & Co. against the individual estate of William McEwen for the sum of $5,591, and allowed by the register, be disallowed as a debt against said indivdual estate, and that said claim be expunged, to which said claimants except.

It is further ordered, that the clerk certify this order to the register.

46 And afterwards, to wit, on the 17th day of December, 1879, the following further proceedings were had in the above entitled cause:

Come now Woollen, Webb & Co., by McDonald & Butler, their attorneys, and file their petition for a rehearing in the following words, to wit:

The petition of William W. Woollen and Willis S. Webb, partners under the firm name of Woollen, Webb & Co., would respectfully show unto the court:

That heretofore, to wit, on the 29th day of November, 1879, this honorable court sustained the exceptions of the assignees of said bankrupt filed to your petitioners' said claim and disallowed said claim entirely.

That your petitioners were not notified in any way of said decision and had no knowledge whatever that said exceptions had been passed upon by the court until the 15th day of December, 1879, when a member of the firm of McDonald & Butler, your petitioners' solicitors, learned incidentally of said decision.

That your petitioners' said solicitors, McDonald & Butler, were no way notified or informed of the said ruling until the 15th day of
47 December, 1879, when they learned of the same as aforesaid.

That said firm of McDonald & Butler understood from the language used by the court, when asked regarding said claims some days prior to said decision, that no decision would be rendered on said claims before the close of the trials of criminal causes in which said court was then engaged.

That at the time of said decision, Messrs. Herod & Winter, solicitors for the assignees of said bankrupt, were notified of the same and a member of said firm was present at the time of said decision.

That by reason of more then ten days having elapsed since said decision no appeal can now be taken therefrom.

That it was the design and intention of your petitioners to appeal from the decision of this honorable court if their said claim should be disallowed, and that they fully believe that said claim should be allowed, and are desirous of taking an appeal in said matter to the United States circuit court for the district of Indiana.

By reason of all the matters in this petition set forth, your petitioners pray the court to grant a rehearing of the said claims, and
48 to set aside the order sustaining said exceptions and disallowing said claims, and to order that said claim stand allowed as a valid claim against said bankrupt's estate, or at all events to set aside said order and grant a rehearing, as that, in event the present ruling of the court should be adhered to, your petitioners may be allowed to appeal therefrom, inasmuch as your petitioners fully believe said ruling and decision to be contrary to law, and contrary to the evidence in this case, and is not sustained by sufficient evidence.

McDONALD & BUTLER,
Solicitors for Petitioners.

And afterward, to wit, on the same day, the court entered the following order in the above entitled cause:

Come now William W. Woollen and Willis S. Webb, partners as Wollen, Webb & Co., and file their petition for a rehearing of their said claim, and the court being sufficiently advised grants said petition and sets aside the order heretofore, to wit, on the 29th day of November, 1879, entered, disallowing said claim, to which ruling said assignees

except, and said claim is now set down for hearing before the
49 court upon the evidence heretofore introduced, and the court having considered the evidence and the argument of counsel now sustains the exceptions of the assignees to said claim, and rejects said claim, and orders that the same be disallowed, to which ruling of the court said claimants now except and pray an appeal to the circuit court of the United States for the district of Indiana, and now in open court notify said assignees and the clerk of this court of their said appeal, and said appeal is granted and bond fixed at five hundred dollars, with William H. Webb as surety.

And afterwards, to wit, later on the same day, Woollen, Webb & Co. by McDonald & Butler, their attorneys, file their claim and notice of appeal in the following words, to wit:

William W. Woollen and Willis S. Webb, partners under the firm name of Woollen, Webb & Co., hereby claim an appeal from the order of court entered in the above-entitled cause and matter on the 17th day of December, 1879, sustaining the exceptions of the assignees of said bankrupt to your petitioners' said claim, and disallowing and re-
50 jecting said claim entirely, and hereby notify said assignees and the clerk of said court of said appeal, and herewith tender bond for said appeal, in the sum of five hundred dollars, with William H. Webb as surety thereon, and require this notice to be entered with the record of the proceedings in said matter this 17th day of December, 1879.

McDONALD & BUTLER,
Solicitors for Claimants.

We acknowledge service of above notice. Dec. 17, 1879.
HEROD & WINTER,
Att'ys for Assignees.

And afterward, to wit, later on the same day, come Woollen, Webb & Co., and file their appeal bond in the penalty and with surety as fixed by the court, in the following words, to wit:

Circuit court of the United States.

WILLIAM W. WOOLLEN AND WILLIS S. WEBB *vs.* THE ESTATE OF WILLIAM MCEWEN, BANKRUPT, Joseph I. Irwin, Jesse R. Newsom, Archibald F. Thompson, John H. Long, assignees of said bankrupt.	}

51 Know all men by these presents that we, William W. Woollen, and Willis S. Webb, as principals, and William H. Webb, as surety, are held and firmly bound unto the above named Joseph I. Irwin, Jesse R. Newsom, Archibald F. Thompson, and John H. Long, assignees of the estate of William McEwen, bankrupt, in the sum of five hundred dollars, to be paid to the said Irwin, Newsom, Thompson, and Long, as such assignees as aforesaid, to which payment well and truly to be made we bind ourselves jointly and severally, and our and each of our heirs, executors, and administrators jointly by these presents. Sealed with our seals and dated this 17th day of December, 1879.

Whereas the above named William W. Woollen and Willis S. Webb have prosecuted an appeal to the circuit court of the United States to reverse the decree and decision rendered in the above entitled suit, by the district court of the United States for the district of Indiana:

Now therefore the condition of this obligation is that if the above named William W. Woollen and Willis S. Webb shall prosecute their said appeal to effect and answer all costs and damages that may be adjudged or awarded against them if they shall fail to make good their plea, then this obligation to be void, otherwise in full force.

W. W. WOOLLEN. [SEAL.]
W. S. WEBB. [SEAL.]
WM. H. WEBB. [SEAL.]

Sealed and delivered in presence of—

Taken and approved by me this 17th day of December. 1879.

NOBLE C. BUTLER, *Clerk.*

52 DISTRICT OF INDIANA:

I, Noble C. Butler, clerk of the district court of the United States, for the district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete transcript of the proceedings had under and by virtue of the claim filed against the individual estate of William McEwen, in bankruptcy, by Woollen, Webb & Co., as the same appear of record and on file in my office of the dates respectively as shown by said transcript.

Witness my hand and the seal of said court this 6th day of January, A. D. 1880.

NOBLE C. BUTLER, *Clerk.*

DISTRICT OF INDIANA:

I, Walter Q. Gresham, judge of the district court of the United States, for said district, do certify that at the date of the foregoing certificate, Noble C. Butler was, and now is, the clerk of the district court of the United States for said district, and that his attestation aforesaid is in due form of law.

Witness my hand this 6th day of January, 1880.

WALTER Q. GRESHAM.

52½ (Indorsed:) No. . U. S. circuit court. William W. Woollen, Willis S. Webb vs. Assignees of William McEwen's estate. McD. & B. for claimant.

Rec'd fee on transcript, $3.80.

N. C. BUTLER, *Clerk.*

53 And afterwards, to wit, on the 30th day of March, 1880, being the 127th judicial day of the November term, 1879, of said court, the court being sufficiently advised in the premises, sustained said motion, to which ruling of the court the plaintiff at the time excepted, and twenty days' time is given the plaintiffs to prepare and file their bill of exceptions.

And now on this 12th day of April, 1880, it being yet of the November term, 1879, of said court, and within the twenty days so limited as aforesaid, said plaintiffs now tender this their bill of exceptions and pray that the same be signed and sealed by the court and made part of

the record in this cause, which is accordingly done this 12th day of April, 1880.

THOMAS DRUMMOND,
Cir. Judge.

And afterwards, to wit, on the 19th day of April, A. D. 1880, at the November term of said court, before the honorable Thomas Drummond, judge as aforesaid, the following further proceedings in the above entitled cause were had, to wit:

Come now the parties by their respective attorneys, and thereupon appellants by McDonald and Butler, their attorneys, file their bond herein with Woollen, Webb and Co., W. W. Woollen and Wm. H. Webb, sureties thereon, which is approved by the court.

And said bond is in the words following, to wit:

Know all men by these presents, that we, William W. Woollen, Willis S. Webb, partners as Woollen, Webb and Co., and William H.
54 Webb are held and firmly bound unto the above named Jesse R. Newsom, Archibald F. Thompson, Joseph I. Irwin and John H. Long, assignees in bankruptcy of the estate of William McEwen, bankrupt, in the sum of one thousand dollars to be paid to said Jesse R. Newsom, Archibald F. Thompson, Joseph I. Irwin, and John H. Long, assignees as aforesaid, to which payment well and truly to be made, we bind ourselves jointly and severally and our and each of our heirs, executors and administrators, jointly by these presents. Sealed with our seals and dated this 17th day of April, 1880.

Whereas the above named William W. Woollen and Willis S. Webb have prosecuted their writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above entitled suit by the circuit court of the United States for the district of Indiana:

Now, therefore, the condition of this obligation is, that if the above-named William W. Woollen and Willis S. Webb shall prosecute their said writ of error to effect, and answer all costs and damages that may be adjudged or awarded against them if they shall fail to make good their plea, then this obligation to be void; otherwise in full force.

Sealed and delivered in presence of—

WOOLLEN, WEBB AND CO. [SEAL.]
W. W. WOOLLEN. [SEAL.]
WM. H. WEBB. [SEAL.]

Taken and approved by me this 19th day of April, 1880. But not admitting a writ of error is a writ of right herein.

THOMAS DRUMMOND.

55 UNITED STATES OF AMERICA,
District of Indiana, ss:

I, Noble C. Butler, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full, true and complete transcript of the record in the cause of William W. Woollen et al. v. Jesse R. Newsom et al., assignees, &c., No. 6883, as fully as the same remains upon the records now in my office.

Witness my hand and the seal of said court, at Indianapolis, in said district, this 22d day of April, A. D. 1880.

NOBLE C. BUTLER, *Clerk.*

Clerk's fee, $2.00.

56 United States of America, to Jesse R. Newsom, Archibald F. Thompson, Joseph I. Irwin, and John H. Long, assignees in bankruptcy of estate of William McEwen, bankrupt, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of Indiana, wherein William W. Woolen and Willis S. Webb are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Thomas Drummond, this 19th day of April, in the year of our Lord one thousand eight hundred and eighty, but not admitting that a writ of error herein is a writ of right.

THOMAS DRUMMOND.

56½ (Indorsed:) 1879, October term. No. 4. Original. In United States Supreme Court. Ex parte William W. Woolen, Willis S. Webb, petitioners. In re McEwen and Sons. In bankruptcy. Petition for mandamus and restraining order. Filed 10 May, 1880. J. E. McDonald, John M. Butler, solicitors for petitioner.

57 We hereby acknowledge service of this writ and the receipt of a certified copy this 20th day of April, 1880.

HEROD & WINTER,
Att'ys for the Assignees William McEwen.

58 In the district court of the United States, district of Indiana. In bankruptcy.

IN THE MATTER OF WILLIAM MCEWEN, ARCHIBALD McEwen, Gideon McEwen, partners as McEwen & Sons.

To the honorable Walter Q. Gresham, judge of said court, in chancery sitting:

Your orators, Joseph I. Irwin, Archibald F. Thompson, Jesse R. Newsom, and John H. Long, assignees of said estate, respectfully represent to said court that the assets of said firm will not more than pay the costs and expenses of the settlement of said estate; that the liabilities of the firm when said proceeding in involuntary bankruptcy was instituted amounted to not less than $220,000, and the individual indebtedness of said William McEwen was about $155,000, whilst the individual estate and property or said William McEwen, which consisted mainly of a large landed estate in Bartholomew County, Indiana, of the value of about $212,000. The individual effects and property of said Archibald and Gideon McEwen will not more than satisfy their individual liabilities.

Before and to about the first of March, 1870, said William McEwen and one Benjamin F. Jones were partners as McEwen & Jones in the private banking business in the city of Columbus, in said county of Bartholomew, when said Jones, who resides in said county, and who was and is insolvent, retired from said firm, and said William McEwen associated with him his sons, the said Archibald and Gideon McEwen, in said business, and continued the same in the firm name of McEwen & Sons.

When said Jones retired from said firm it was indebted largely in excess of its assets, and a portion of the depositors in said bank still hold the certificates of deposit of McEwen & Jones, and as to
59 the separate estate of said William McEwen claim the rights of individual creditors of said William McEwen.

As to the principal portion of the indebtedness of McEwen & Jones, it being to depositors in said bank, the new firm took up their certificates of deposit and gave their own in lieu thereof to the depositors.

When said William McEwen associated with him his said sons as aforesaid they were insolvent, having but little or no property, and they did not then or afterwards put any capital into said bank, and said firms of McEwen & Jones and McEwen & Sons were all the time insolvent, dependent alone upon the separate estate of said William McEwen for credit.

After said William McEwen associated with himself said Archibald and Gideon McEwen as aforesaid, he charged himself in the books of said firm of McEwen & Sons with $312,974.25 of the indebtedness of said firm of McEwen & Jones, including the amount of certificates of deposit taken up as aforesaid, and including the sum of over $60,000 overdrawn by said William McEwen from said McEwen & Jones' bank, and said William McEwen, when said firm of McEwen & Sons suspended, was indebted to said firm in the sum of $4,751.23, the amount overdrawn by him from said new firm.

Your orators say that the firm creditors, that is, those who hold certificates of deposit given by McEwen & Sons, assert and declare to your orators that they, the said creditors, are not firm creditors within the meaning of the bankrupt law. They assert and declare that the Kentucky Stock Bank, which was organized at said Columbus many years since, under the general or free banking law of the State of Indiana, by said William McEwen, Benjamin F. Jones, and one William F. Pidgeon, was organized on fictitious capital; that no actual capital was ever paid in by them, or either of them; that said bank was merged into that of McEwen & Jones, said Pidgeon retiring therefrom, and said McEwen & Jones' Bank assumed the liabilities of the Kentucky Stock Bank, which was insolvent, and that said McEwen & Jones' Bank was merged into that of McEwen & Sons, as before shown to the court. Said creditors further assert and declare to your orators that said bank, from its organization as the Kentucky Stock Bank to the suspension of said McEwen & Sons' Bank, was one and the same institution, and all the time insolvent; that no actual capital was ever paid in, but the bank was always based upon credit, and not the credit of the bank or said firms, but upon the credit alone of the estate of said William McEwen; that the creditors of the bank and the creditors of said
60 William McEwen were creditors alike upon the faith of said separate estate of William McEwen. Said creditors further declare that said bank, particularly after said Kentucky Stock Bank was merged into that of McEwen & Jones, was not a bank of discount, but a bank of deposit merely, a receptacle for deposits on which high rates of interest were paid, and the deposits were used by said William McEwen in his private speculations and business transactions.

Said creditors, for the reasons so alleged to be true, declare that said firms, and particularly that of McEwen & Sons, were mere shams and frauds, and they demand of your orators that said separate estate of said William McEwen and said firm effects be treated as a common fund for the benefit alike of all the creditors, whether firm or individual creditors in name.

Your orators further represent that said firm creditors, in the event that said firm is not so held and treated, assert that said William McEwen is individually indebted to said firm of McEwen & Sons in the sum so as aforesaid charged to himself in the books of said firm and said amount overdrawn by himself, and they demand that the individual estate and effects of said William McEwen to that extent be transferred to the firm effects.

Said firm creditors further assert that said William McEwen is indebted to said firm in large sums paid by said bank, interest on said William McEwen's individual debts, and in large sums moneys of said bank used by said William McEwen in his private speculations and business transactions, including land purchases, and they demand an accounting and that proper charges be made against said separate estate of William McEwen.

Exhibit A, filed herewith, sets forth the names and resideces of all the creditors so far as known to your orators, whether of said firms or said William McEwen individually, properly classified.

Wherefore, inasmuch as the matters herein alleged to be true by your orators, and the matters asserted to be true by said firm creditors, and as to the truth or falsity of which your orators say not, present questions of law and of fact that your orators are advised should be referred to this court for determination and adjudication, your orators pray that the creditors of said firms and of said William McEwen be made parties hereto as well as Benjamin F. Jones, and that they be required to answer on oath asserting their respective rights and claims in the premises, not only to the matters herein set forth, but as to all matters touching the proper marshalling of the assets of said estate,
61 whether firm or individual assets, and upon the hearing hereof they ask that such decree may be rendered in the premises as the court may deem just and equitable.

S. STANSIFER, *Sol.*

Filed August 26, 1873.

J. D. HOWLAND, *Clk.*

EXHIBIT A.

Names and residence of claimants against the estate of McEwen & Sons.

Names.	Residence.
Alkinson, Lewis G	Madison, Indiana.
Arroine & Cully	Dallas, Texas, or Brown Co., Ind.
Abbett, Wm. C	Columbus, Indiana.
Arvine, J. S	Dallas, Texas.
Bledsoe, G. S	Indianapolis, Indiana.
Betts, Martin	Columbus, Indiana.
Burnett, Bond	Columbus, Indiana.
Blessing, May	Columbus, Indiana.
Burns, David	Burnsville, Indiana.
Barrett & Hauzer	Columbus, Indiana.
Brockman, Henry	Columbus, Indiana.
Barger, James	Clifford, Indiana.
Blessing, Alfred A	Columbus, Indiana.
Council, T. Z	Columbus, Indiana.
Cully, Eugene	Nashville, Indiana.
Cline, John W	Columbus, Indiana.

Conner, Elisha.....Columbus, Indiana.
Cline, Margaret B..... Columbus, Indiana.
Clouse, John.....Hope, Indiana.
Clouse, Thomas .....Hope, Indiana.
Cox, Wm. L .....Columbus, Indiana.
Carr, John .....Columbus, Indiana.
Cline, Mary.....Columbus, Indiana.
Dillon, Thomas.....Columbus, Indiana.
Daugherty, Elizabeth K.....Walesboro', Indiana.
Daum, Peter.....Columbus, Indiana.
Davis, Peter.....Columbus, Indiana.
Downs, Emma E .....Columbus, Indiana.
Davis, Wm. B .....Columbus, Indiana.
Daugherty, Wm..... Columbus, Indiana.
62 Dudley, James.....Columbus, Indiana.
Edwards, John T.....Columbus, Indiana.
Essex, Lewis.....Hope, Indiana.
Fisher, Caroline..... Columbus, Indiana.
Fensler, Frederick.....Jonesville, Indiana.
Fartner, Margaret.....Columbus, Indiana.
Finkle, Sebastian .....Columbus, Indiana.
Gilliland, Geo. W.....Columbus, Indiana.
Glick, Uriah T.....Columbus, Indiana.
Grove, John B.....Columbus, Indiana.
Hanzer, Zachariah H.....Columbus, Indiana.
Hart, Thomas.....Columbus, Indiana.
Hodges, Hezekiah.....Columbus, Indiana.
Harms, Henry.....Columbus, Indiana.
Hunt, Sarah .....Taylorsville, Indiana.
Holtz, John P.....Columbus, Indiana.
Jones, Albert..... Columbus, Indiana.
Kreinhazen, Henry.....Jonesville, Indiana.
Kinney, Margaret .....Columbus, Indiana.
Klein Brothers .....Columbus, Indiana.
Long, Mary A.....Columbus, Indiana.
Long, David F.....Columbus, Indiana.
Long, John H.....Columbus, Indiana.
Lorts, George.....Hope, Indiana.
Loucher, Albert.....Lowell Mills, Indiana.
Lanham, Wm. R.....Carlisle, Indiana.
McFall, Joseph, administrator.....Columbus, Indiana.
McFall, Johathan.....Columbus, Indiana.
Moyer, Geo. W.....Columbus, Indiana.
McQueen, Joshua D.....Columbus, Indiana.
Merritt, Wm.....Walesboro', Indiana.
Mellett, Michael S.....Columbus, Indiana.
McDelland, F. M.....New Cumberland, Ohio.
Newsom, Nathan.....Elizabethtown, Indiana.
Newsom, Jesse R..... Columbus, Indiana.
Nading, John.....St. Louis Crossing, Indiana.
National Branch Bank.....Madison, Indiana.
Powell, Nathan .....Madison, Indiana.
Prather, John.....Jonesville, Indiana.
Ruellem, Henry.....Taylorsville, Indiana.
Ralstun, Eleanor V.....Columbus, Indiana.
63 Rhoads, Philip .....Lowell Mills, Indiana.

Reap, John ..... Waynesville, Indiana.
Ryan, Thos. F ..... Indianapolis, Indiana.
Strawn, Chas. H ..... Columbus, Indiana.
Staly, Frederick ..... Columbus, Indiana.
Saters, Geo. W ..... Whitestown, Boone Co., Indiana.
Strawn, Thos. D ..... Columbus, Indiana.
Seger, Christopher ..... Columbus, Indiana.
Stone, Hannah ..... Columbus, Indiana.
Stair, John ..... Columbus, Indiana.
Sowns, Emanuel ..... Hope, Indiana.
Slack, Jacob ..... Taylorsville, Indiana.
Sweeney, Moses ..... Walesboro, Indiana.
Thompson, A. T., assigned from J. T. Walker ..... Waynesville, Indiana.
Trotter, L. R ..... Hope, Indiana.
Thompson, Archie F ..... Waynesville, Indiana.
Thompson, A. T ..... Waynesville, Indiana.
Taylor, James C ..... Columbus, Indiana.
Valhowe, Herman ..... Jonesville, Indiana.
Walker, Jane ..... Walesboro, Indiana.
Woollen, Webb & Co ..... Indianapolis, Indiana.
Webber, David ..... Hartsville, Indiana.
Williams, Richard ..... Hartsville, Indiana.
Watkins, Joseph ..... Jonesville, Indiana.
Winchester, Anderson ..... Columbus, Indiana.
Zwick, Adams ..... Mount Liberty, Indiana.

Creditors of McEwen & Jones.

Cynthia Collins ..... Franklin, Indiana.
Albert Jones ..... Columbus, Indiana.
Benoni B. Jones ..... Columbus, Indiana.
Charles Jones ..... Columbus, Indiana.
William C. Abbett ..... Columbus, Indiana.
George King ..... Columbus, Indiana.
Jonathan McFall ..... Columbus, Indiana.

Names and residences of claimants against the estate of William McEwen.

Brown, Paul ..... Columbus, Indiana.

64 Brown, Philip ..... Columbus, Indiana.
Collier, Cynthia A ..... Franklin, Indiana.
Clark, Hezekiah ..... Columbus, Indiana.
Denham, T. B ..... Columbus, Indiana.
Downer, Frederick ..... Columbus, Indiana.
Dillon & Emig ..... Columbus, Indiana.
Dillon, Thos ..... Columbus, Indiana.
Essex, Wells ..... Hope, Indiana.
Fitch, Jas. H ..... Madison, Indiana.
Griffith, Hez ..... Columbus, Indiana.
Gilzland, Geo. W ..... Columbus, Indiana.
Gilgour, Wm ..... Columbus, Indiana.
Hord, Francis T ..... Columbus, Indiana.
Hill & Richardson ..... Columbus, Indiana.
Harker, James ..... Hope, Indiana.

	Irwin, Jos. I	Columbus, Indiana.
	Johnston & Clements	Madison, Indiana.
	Jones, Charles	Columbus, Indiana.
	Jones, Smith	Columbus, Indiana.
	Jones, Benoni B	Columbus, Indiana.
	Jones, Albert	Columbus, Indiana.
	Keith, Isham	Columbus, Indiana.
	Keith, John	Columbus, Indiana.
	Keith, Isham	Columbus, Indiana.
	Long, Asa E. S	Columbus, Indiana.
	Linton, Samuel M	Columbus, Indiana.
	Lanham, Wm. R	New Carlisle, Indiana.
	May, Benjamin	Columbus, Indiana.
	McLelland, Norwood	Cincinnati, Ohio.
	McEwen, Joel H	Columbus, Indiana.
	McDonald, Butler & McDonald	Indianapolis, Indiana.
	Newsom, Jesse R	Columbus, Indiana.
	National Branch Bank	Madison, Indiana.
	Newsom, Nathan	Elizabethtown, Indiana.
	Newsom, John Q	Elizabethtown, Indiana.
	Newsom, Wm. T	Elizabethtown, Indiana.
	Pfeiffer & Bro	Columbus, Indiana.
	Patterson, Jos. D	Indianapolis, Indiana.
	Rowley, John C	Columbus, Indiana.
	Rush & Davis	Columbus, Indiana.
65	Shithy, Gid. S	Columbus, Indiana.
	Stebbins, A. B	Columbus, Indiana.
	Summers, Wm. D	Columbus, Indiana.
	Samuels, Vogel & Co	Columbus, Indiana.
	Volland & Rithwish	Columbus, Indiana.
	Williams, Amanda E	Columbus, Indiana.
	Webb, Willis S	Indianapolis, Indiana.
	Wright, John T	Columbus, Indiana.
	Webb, John G	Indianapolis, Indiana.
	Wolf, Michael	Columbus, Indiana.
	Wagner, Jacob	Columbus, Indiana.
	Woollen, Webb & Co	Indianapolis, Indiana.

For the dep't,

BENJAMIN F. JONES,
Columbus, Indiana.

Filed August 26, 1873.

In the district court of the United States for the district of Indiana.

IN THE MATTER OF WILLIAM MCEWEN, ARCHIBALD MCEWEN, and GIDEON MCEWEN, partners as MCEWEN & SONS, in bankruptcy.

The demurrer of Nathan Powell, National Branch Bank of Madison, Indiana; Wesley W. Woollen and Willis S. Webb, as partners under the firm name and style of Woollen, Webb & Co.; Willis S. Webb, Joseph D. Patterson, Lewis S. Bledsoe; Joseph E. McDonald, John M. Butler, and Ezekiel M. McDonald, as partners under the firm name and style of McDonald, Butler & McDonald; Ralph Hill and Richardson, as partners under the firm name of Hill & Richardson; Isham Keith, Thomas Essex, Joseph McFall, John F. Wright; Samuel Samuels, David

Samuels and Ferdinand Vogel, as partners under the firm name and style of Samuels, Vogel & Co., to the petition of complaint Joseph I. Irwin, Archibald F. Thompson, Jesse R. Newsom, and John H. Long, complainants and petitioners.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said petition of complaint to be true, in such manner and form as the same are therein and thereby set forth and alleged, demur thereto. And for cause of demurrer show: That the said complaining petitioners have not by their said bill made such a case as entitles them in equity to any relief from or against said defendants touching the matters contained
66 in said bill, or any of such matters, nor to entitle them to any discovery from or against these defendants, or either of them, or from or against any defendant named in said petition of complaint as to any of the matters therein contained. That it appears from the petitioners' own showing, by their said petition, that said complainants are not entitled in equity to ask for or have the separate individual property of said bankrupt, William McEwen, applied to the payment of the debts of the bankrupt firm of McEwen & Sons until the separate individual debts of said bankrupt, William McEwen, are first paid. Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, said defendants do demur to the said bill and to all the matters and things therein contained, and humbly pray judgment of this honorable court whether they shall be required to make any further or other answer to the said bill. And defendants pray to be hence dismissed with their reasonable costs in this behalf by them sustained.

We certify that in our opinion the foregoing demurrer of Nathan Powell and others, defendants to the bill of complaint of Joseph I. Irwin, Archibald F. Thompson, Jesse R. Newsom, and John H. Long, complainants, is well founded in law and proper to be filed in the above case.

HARRINGTON & KORBLY,
McDONALD & BUTLER,
HILL & RICHARDSON,
Attorneys for said Defendants.

Filed September 15, 1873.

J. D. HOWLAND.

In the district court of the United States for the district of Indiana.
In bankruptcy.

IN THE MATTER OF WILLIAM McEWEN, ARCHIbald McEwen, Gideon B. McEwen, late partners under the firm name of McEwen & Sons.

The answer of the individual creditors of William McEwen to petition filed by the assignees in bankruptcy of the said McEwen & Sons, and the supplemental petition of Joshua D. McQueen and others, partnership creditors of McEwen & Sons.

The National Branch Bank of Madison; Richard Johnson and John Clemenes, partners under the firm name of Johnson & Clemenes; Nathan Powell, Joseph E. McDonald, and John M. Butler, surviving
67 partners of McDonald, Butler & McDonald; Wesley W. Woollen and Willis S. Webb, partners under the firm name of Woollen, Webb & Co.; Willis S. Webb, Lewis D. Bledsoe, Asa E. L. Long,

Ralph Hill and George Richardson, partners under the firm name of Hill & Richardson; Joshua Keith, Isham Keith, Thomas Essex, Joseph McFall, Samuel Samuels, David Samuels and Ferdinand Vogle, partners under the firm name of Ferdinand Vogle & Co., individual creditors of William McEwen, reserving all manner of exceptions, etc., for answer to the said petition and supplemental, or to so much thereof as they are advised it is material for them to answer, say:

That as to this petition by the said assignees, Joseph I. Irwin, Archibald F. Thompson, Jesse R. Newsom, and John H. Long, these defendants deny that the firm assets of the said firm of Wm. McEwen & Sons will not more than pay the costs and expenses of the settlement of said estate, but on the contrary aver that the said firm assets, unless wasted by the said assignees or applied improvidently to the payment of claims and charges not properly chargeable to the same, are more than sufficient to pay all the just expenses of said bankruptcy properly chargeable upon the same, and leave a surplus for distribution among the partnership creditors of said firm.

These defendants have no knowledge of the amount of the liabilities of said firm, except as stated in said petition, and therefore neither admit nor deny the same; they admit that the individual indebtedness of said Wm. McEwen was about $155,000, and that the individual estate of said Wm. McEwen consisted mainly of lands in Bartholomew County, Indiana, but they are unable to state the value of said lands; these defendants have no knowledge, information, or belief as to the state and condition of the individual property and effects of Archibald McEwen and Gideon B. McEwen, nor of their individual liabilities, except as shown by the schedules in bankruptcy filed. These defendants further answering admit that at the time stated in said bill, that said Wm. McEwen and Benjamin F. Jones were partners in the private banking business at Columbus, Indiana, and that said Jones retired from said firm about the first of March, 1870, and that said Wm. McEwen associated with him his said sons, Archibald and Gideon McEwen, and continued said business under the firm name of McEwen & Sons, but these defendants have no knowledge, information, or belief as to whether said firm of McEwen & Jones was insolvent at the time said Jones retired therefrom, except as the same appears from the papers in the matter of the bankruptcy of McEwen & Sons.

These defendants admit that a portion of the depositors of Mc-
68 Ewen & Jones, and perhaps the principal ones, have surrendered their certificates of deposit and have taken in lieu thereof the certificates of deposit of said McEwen & Sons. But as to whether said firm of McEwen & Sons were insolvent at the time these defendants have no knowledge, and therefore do not admit the same; the defendants deny that the said William McEwen became indebted to the firm of McEwen & Sons for the certificates of deposit so taken up as aforesaid, or that he is in any manner indebted to said firm of McEwen & Sons on account of overdrafts or otherwise except as to the balance of $4,751.23. These defendants deny that parties holding certificates of deposit given by McEwen & Sons are not firm creditors within the meaning of the bankrupt law, but on the contrary thereof say that they are such creditors and entitled only to the rights secured to partnership creditors by said bankrupt law. These defendants say as to the origin, ownership, and proceedings of the Bank of Kentucky, or of any other banking institution preceeding the formation of said firm of McEwen & and Sons, alleged and charged in said petition, these defendants have no knowledge, information, or belief, but they deny that said firm of

McEwen & Sons is a mere sham and fraud, or that the said creditors of said firm have in any manner been defrauded thereby, and particularly and specially deny that the said firm creditors have any right or claim to participate with the individual creditors of said William McEwen in the avails and proceeds of his individual estate, and they especially deny that the said individual estate of William McEwen can be treated or held in any manner as firm assets. They also deny that said William McEwen is indebted to said firm on account of using money of said firm in his private business transactions.

These defendants admit that the exhibit marked A and filed with said petition contains the names and residence of the creditors, so far as known, of said firm of McEwen & Sons, and William McEwen individually, and they insist that the said assignees are required and bound to make distribution of the said several estates, partnership and individual, in the manner prescribed in the bankrupt law, securing to these defendants their rights of priority in the individual estate of said Wm. McEwen.

As to the said supplemental petition the said defendants admit that Joshua D. McQueen, and others therein mentioned, are creditors of the firm of McEwen & Sons, and that they have proved their several claims against said firm as in their said supplemental petition alleged. And they admit that said firm of McEwen & Sons was organized about the
69 1st of May, 1871, for the purpose of carrying on a general banking business, as in their supplemental petition alleged; they also admit that prior to that time and up to the 1st of March, 1870, a firm composed of said Wm. McEwen and one Benjamin F. Jones, of the same place, had been conducting a general banking business, but they deny that a dissolution of said firm took place except the withdrawal of said Jones; they admit that the firm of McEwen & Sons succeeded to the business of McEwen & Jones, but they deny that said firm of McEwen & Jones had but an insignificant amount of assets, or that their indebtedness exceeded the same in the sum of $313,000, as alleged in said supplemental petition, or in other sum. As to whether said firm of McEwen & Jones was insolvent at said time, or as to whether said Jones was individually insolvent, these defendants have no information or belief, and therefore do not admit the same. They admit that said Wm. McEwen was possessed of real and personal property to a large amount, but whether of the value stated in the petition they are unable to state; they have no knowledge of the amount of the individual indebtedness of said Wm. McEwen, except as to these defendants, but they deny that said Wm. McEwen was insolvent. These defendants have no knowledge or information as to the individual estates of said Gideon and Archibald McEwen, or as to the amount of capital, if any, put into the new firm of McEwen & Sons by them, or either of them, but they deny that the object of the formation of the firm of McEwen & Sons was to float the indebtedness of McEwen & Jones, and they deny that there was no addition to the capital and assets of said firm by the foundation of the new partnership; on the contrary they aver that said Wm. McEwen put into said firm of McEwen & Sons at least $100,000 of his individual means. And they deny that said copartnership was a sham and not intended for the actual transaction of banking and commercial business, but as to the particular nature and character of the business transactions by said firm of McEwen & Sons, or as to whether it consisted in taking up the certificates of McEwen & Jones outstanding, and issuing others of McEwen & Sons in their stead, these

defendants are not informed nor are they able to state what amount of deposits they received from other parties.

These defendants do not admit the allegations in said supplemental petition as to the nature of the business carried on by said McEwen & Jones, or as to what moneys were borrowed by said firm or by said William McEwen in connection with said business; nor are they
70 informed as to the amount of liabilities of said firm at the time of its failure over and above its assets; and so far as said allegations are necessary and material in this matter, they deny the same and require proof thereof.

These defendants expressly deny that the assets of McEwen & Sons were not at any time of any substantial value, or that the credit was given solely upon the individual credit of Wm. McEwen. These defendants are not advised or informed as to how said firm of McEwen & Sons kept their books with reference to the indebtedness of McEwen & Jones, but they expressly deny that said William McEwen became individually indebted to the said firm of McEwen & Sons for and on account of the certificates of deposit of McEwen & Jones, taken up by the firm of McEwen & Sons, in the sums stated in said supplemental petition, or in any sums whatever, or that said William McEwen had drawn out of said firm of McEwen & Sons the said sum of $5,000, or any other sum except as hereinbefore admitted.

These defendants further answering said supplemental petition, deny that it was known to them that the firm of McEwen & Sons had copartnership assets, or that the said William McEwen had used for the purpose of individual speculation in buying real estate, etc., the money deposited with McEwen & Sons and McEwen & Jones. And they expressly charge that the said firm of McEwen & Sons had, at the time they were so declared bankrupts, partnership assets of great value, to wit, of the value of $50,000, and largely in excess of all legitimate expenses chargeable upon said bankruptcy to which the said partnership creditors have a right and are entitled to a priority over these defendants, and they claim that as individual creditors of Wm. McEwen they are entitled in the distribution of his individual estate to a priority over his partnership creditors. And these defendants deny the truth of any matter or thing contained in said petition or supplemental petition that is not specifically averred above.

Wherefore they pray judgment and for all other proper relief.

McDONALD & BUTLER,
HARRINGTON & KORBLY,
Att'ys for individual creditors of Wm. McEwen.

Filed April 5, 1875.

JOHN D. HOWLAND, *Clerk.*

71 In the district court of the United States. In bankruptcy.

IN THE MATTER OF WILLIAM McEWEN, ARCHIbald McEwen and Gideon B. McEwen. }

Joshua D. McQueen, Albert Jones, David Long, John Long, Archibald Thompson, Jesse R. Newsom, Nathan Newsom, Moses Sweeney, John Carr and Joseph I. Irwin, for replication to so much of the answer of the National Bank of Madison and others to the petition of said Joshua D. McQueen and others as they are advised is necessary or material for them to make reply thereto, say that the matters and things set out in their said petition are true in substance and in fact, and they

deny each and every averment and allegation of the answer of said National Bank of Madison and others which contradicts and is inconsistent with the allegations and charges of the petition of said petitioners. Wherefore they pray judgment and all proper relief.

HARRISON, HINES & MILLER,
Attorneys for said Petitioners.

Filed November 30, 1875.

J. D. HOWLAND, *Clerk.*

72 UNITED STATES OF AMERICA,
District of Indiana, ss:

I, Noble C. Butler, clerk of the district court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full and true copy of the petition of the assignees filed August 26th, 1873, and of Exhibit A attached thereto, of the demurrer of Nathan Powell et al., filed Sept. 15th, 1873, of the answer of the individual creditors filed April 5th, 1875, and of the replication filed Nov. 30th, 1875, in the matter of William McEwen et al., in bankruptcy, as fully as the same appears of record and remains on file in my office.

Witness my hand and the seal of said district court, at Indianapolis, in said district, this 9th October, A. D. 1880.

[SEAL.] NOBLE C. BUTLER, *Clerk.*

73 In the Supreme Court of the United States.

EX PARTE WILLIAM W. WOOLEN AND WILLIS S. Webb, in re McEwen & Sons, in bankruptcy.

It is hereby agreed by and between counsel for the respective parties hereto that the clerk of the United States courts for the district of Indiana shall amend the manuscript record in this cause by adding thereto such certified copies of papers and proceeding now on file and of record in said clerk's office as shall make said manuscript record to conform in all respects to the printed record; then and in that case the record as now printed may be filed in said cause, no exception to be taken thereto on the ground of time. This amendment shall be made so as not to work delay in the hearing of the cause.

McDONALD & BUTLER,
For Petitioners.
HEROD & WINTER,
For McEwen Assignees.

OCT. 9, 1880.

(Indorsed:) Supreme Court U. S., 1880, Oct. term. No. 4 original. Ex parte in the matter of William W. Woollen et al. Stipulation of counsel and addition to record. Filed 11th October, 1880.

O

OFFICE SUPREME COURT U. S.
FILED
NOV 22 1890
JAMES H. McKENNEY, Clerk.

Copy.

SUPREME COURT

OF THE

UNITED STATES.

Ex Parte in the Matter of
WILLIAM W. WOOLLEN and
WILLIS S. WEBB,
Petitioners.

No. 4, *Original.*

Answer of THOMAS DRUMMOND, *Respondent.*

F. H. SMITH, PRINTER, 16½ E. WASHINGTON ST., INDIANAPOLIS.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

In the Matter of WILLIAM W. WOOLLEN and WILLIS S. WEBB, *Petitioners.*	No. 4, *Original.*

ON PETITION FOR MANDAMUS.

The undersigned, Judge of the Seventh Judicial Circuit of the United States, for answer to the rule granted by this Court requiring the Circuit Judges of the Circuit Court of the United States for the District of Indiana to show cause why an order which was made by the Circuit Judge in said Circuit Court of the District of Indiana, on the thirtieth day of March, 1880, dismissing the appeal taken by the petitioners in this case to the Circuit Court from an order of the District Court for the District of Indiana, disallowing a certain claim filed by the petitioners against the estate of William McEwen, bankrupt, respectfully states:

IN THE

SUPREME COURT

OF THE

UNITED STATES.

In the Matter of WILLIAM W. WOOLLEN and WILLIS S. WEBB, *Petitioners.*	No. 4, *Original.*

ON PETITION FOR MANDAMUS.

The undersigned, Judge of the Seventh Judicial Circuit of the United States, for answer to the rule granted by this Court requiring the Circuit Judges of the Circuit Court of the United States for the District of Indiana to show cause why an order which was made by the Circuit Judge in said Circuit Court of the District of Indiana, on the thirtieth day of March, 1880, dismissing the appeal taken by the petitioners in this case to the Circuit Court from an order of the District Court for the District of Indiana, disallowing a certain claim filed by the petitioners against the estate of William McEwen, bankrupt, respectfully states:

That as Judge of the Circuit Court of the United States for the District of Indiana, in March last he was present in that Court during its November Term 1879, and heard the motion to dismiss the appeal of said petitioners made at that time. He attended the said Court in the usual way to dispose of the cases that might come before him, and particularly of appeals and writs of error from the District Court. There was a list or calendar of such pending appeals, and of other causes, which it was desired should be heard by him, prepared by the Clerk of the Court, and among them was the appeal of the petitioners in this case. Their appeal was called in the usual way shortly after his attendance commenced on the said Circuit Court. At that time the counsel of both parties were present. It then appeared, by the admission of both parties, that a claim of the petitioners against the bankrupt estate of McEwen had been disallowed by an order of the District Court, made in December, 1879, from which order an appeal had been taken by the petitioners, and allowed by the District Court, and the usual bond given; but, at the time the attention of the Circuit Judge was first called to the case, there had been no record, or paper of any kind filed or presented in the Circuit Court; and the Circuit Judge then had no other knowledge of the case than that which arose from the fact of the appeal having been placed on the calendar, and from the admission of the counsel of the parties. The Circuit Judge knows of no reason why he could not have then heard the case with a jury or otherwise, if it had been entered in the Circuit Court and an issue had been made and the parties ready for trial.

At this time a controversy arose between the counsel of the respective parties as to the status of the appeal. It was contended by the counsel of the petitioners that the case could not under the law, and the rule of the Supreme Court upon the subject, be entered in

the Circuit Court until the May Term, 1880, and, therefore, that the petitioners had the right to postpone the entry of the appeal in the Circuit Court until the commencement of that term; while it was insisted by the counsel on the other side that the appeal should have been entered a long time before the Circuit Judge was in attendance on the Court.

So far as the undersigned recollects, there was no application by the counsel for the petitioners for leave to file the appeal in the Circuit Court, but, on the contrary, he refused to make any such application. The counsel for the assignees then stated, that on bringing the facts properly before the Court, he should move for a dismissal of the appeal; and he subsequently filed in Court a transcript of the record of the case, from which the following facts appeared:

That there was a claim of the petitioners against the bankrupt estate which was finally disallowed by order of the District Court on the 17th of December, 1879, from which order an appeal had been regularly taken, and allowed by the District Court, to the Circuit Court, and that the appellants had not, up to that time, entered an appeal in the Circuit Court, nor filed in the Clerk's office any statement in writing of their claim. On this transcript of the record thus filed in the Circuit Court, the counsel for the assignees moved to dismiss the appeal, and this motion was argued by the counsel for the respective parties, the only question before the Court being whether the petitioners in their appeal had complied with the act of Congress, and the rule of the Supreme Court of the United States, in relation to the appeals of claimants against bankrupt estates, from the District to the Circuit Court of the United States. There was no controversy between the counsel as to the facts of the case, and they were ascertained from the transcript which had been thus filed, or were admitted by the

parties. The motion was heard before the Circuit Judge alone, and he was of the opinion that the appellants had failed to comply with the requirement of the act of Congress, and of the rule of the Supreme Court, and thereupon dismissed the appeal, giving his reasons at the time for so doing, substantially as follows:

DRUMMOND, J.

"This is a motion to dismiss two appeals that have been taken in a bankruptcy case from the order of the District Court, disallowing certain claims against the bankrupt estate. The facts are, that the order disallowing these claims was made by the District Court on the 29th day of November, 1879. That order seems to have been made in the absence of counsel for the claimants, and on application to the Court on the 17th of December, 1879, the Court opened the orders, and re-considered the case for the purpose of allowing parties to take an appeal to this Court, re-affirming the orders in both cases. An appeal was claimed on December 17th, and there is no question that the appeal was taken in proper time, and a bond given so as to consummate the appeal. The appeal was taken during the term of the Court. Indeed, the term of the Court still continues. It now appears that the appellants have not, up to this time, entered their appeal in this Court, and have filed no statement in writing of their claim against the bankrupt estate. The contention between the two parties is: on the part of the assignees, that the appeal should be entered in the Circuit Court during the term of the Court, if the Court is in session at the time the order is entered, and continues in session up to the end of ten days, although it is in the same term. On the other hand, it is claimed by the appellants that the appeal should not be entered nor the statement of claim filed until the term of the Circuit Court which commences on the first Tuesday of May next. I am of the opinion

that according to the true construction of the acts of Congress, and of the rule of the Supreme Court, the appellants should have entered the appeal in the Circuit Court within ten days after the appeal was taken and claimed, although the Court was in session at the time the order was made, and so continued up to the end of ten days.

It is necessary to recur to the language of the original bankrupt act on this subject: "No appeal shall be allowed in any case from the District to the Circuit Court unless it is claimed, and notice given to the Clerk of the District Court, to be entered with the record of proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from." * * "Such appeal shall be entered at the term of the Circuit Court which shall be first held within and for the District next after the expiration of ten days from the time of claiming the same."

The only difference between this language and that now found in the Revised Statutes as a part of the bankrupt law is that the word "first" is left out in the revision, but that clearly can not make any difference in the sense. "The appeal shall be entered at the term of the Circuit Court which shall be held within and for the District next after the expiration of ten days from the time of claiming the same," means precisely the same as though it were, "first held within and for the district," because it is insisted that the word "next" is what gives significance to the sentence, and it means the term succeeding that at which the order is entered next after the expiration of ten days. See sections 4981 and 4982 R. S. U. S.

The true meaning, I think, is, that if the Circuit Court is in session more than ten days after the order is made and appeal claimed, the appeal shall be then en-

tered. That is the term, within the meaning of the law, next after the entering of the order, etc.

The 26th rule made by the Supreme Court under that law, is as follows: "Any supposed creditor who takes an appeal to the Circuit Court from the decision of the District Court, rejecting his claim in whole or in part, according to the provisions of the 8th section of the act, shall give notice of his intention to enter the appeal within ten days from the entry of the final decision of the District Court upon his claim, and he shall file his appeal in the Clerk's office of the Circuit Court, within ten days thereafter, setting forth a statement in writing of his claim in the manner prescribed by said section." The Supreme Court gave a construction of the statute in enacting that rule, and it would seem as though in that way only can we carry out the object which the bankrupt law had in view.

Now, take this district. The Court by statute only has two terms a year, one in May and one in November, and it certainly could not have been the intention of Congress in such a case that there should be an interval of six months or more, as there might be, before the entry of an appeal should be made in the Circuit Court, and therefore the Supreme Court in considering the statute required that the appeal should be entered within ten days after the order made by the District Court.

The statute has been construed in other cases—in Wood *v.* Bailey, 21 Wallace 640; in the matter of Coleman, 7 Blatchford 192, in which the Court held that after the claim of a creditor of a bankrupt estate was rejected by the District Court, and an appeal taken from the decision of the District Court, he must enter his appeal within ten days in the Circuit Court, and comply with order No. 26, and that he must also set forth a statement in writing, etc.

This has been the law ever since the statute was

enacted, and section 4984 of the Revised Statutes requires that upon entering his appeal in the Circuit Court the appellant shall file with the Clerk a statement of his case, and the amount claimed as in a declaration. In the case in 7th Blatchford, the appeal was dismissed because the entry was not made accordingly. And the point is decided the same way in *In re* Place & Sparkman, 4 B. R. 541. And unless the omission of the word "first" in the revision changes the meaning of the law, as it was originally enacted and of the rule, then these decisions are in point. And although the last are not absolutely controlling in this Court, still I think it must be considered the true construction of the act and rule. It is especially the construction which the Supreme Court has placed upon the original bankrupt law, and I do not think the omission of the word "first" changes that construction.

So the appeals will be dismissed in both cases."

These are all the facts which were brought to the knowledge of the Circuit Judge at the time that he disposed of the appeal.

The Circuit Judge submits to the Supreme Court of the United States the question whether from an order of a subordinate court allowing or disallowing a claim like that made by the petitioners against a bankrupt estate there can be any appeal taken, or writ of error allowed, to the Supreme Court of the United States, and if not, then that the writ which has been issued in this case from the Supreme Court of the United States is not in furtherance of its appellate jurisdiction, and so is not maintainable.

And the Circuit Judge further submits to the Supreme Court of the United States the question whether, if the position of the counsel for the petitioners was correct, that they were not obliged to file the appeal, or a statement of the case in the Circuit Court until the com-

mencement of the May term 1880, they have no right to call for the action of the Circuit Court upon their case until after the commencement of that term; and the Circuit Judge states that no application has been made to him, and, as he is informed and believes, no appeal was filed in the Circuit Court, nor statement of the claim made at the May term, in compliance with the statute, and the rule upon the subject, and certainly he has been required to take no action whatever upon the appeal. But while stating this, the Circuit Judge has no other desire than to submit the main question in the case to the Supreme Court of the United States, and if that Court is of opinion that it has jurisdiction over this controversy, in this form, and that the petitioners were not ~~to be~~ required to file their appeal, and the statement of their case, until the May term of the Circuit Court, 1880, then he is willing to take jurisdiction of the case, and hear the appeal from the District Court upon its merits.

The foregoing statement, as the Circuit Judge believes, comprehends all that is material to present the true question in the case for the decision of the Supreme Court; but the following statement has been prepared by counsel in answer to some of the allegations contained in the petition. It is presented only on the assumption that the Court shall be of the opinion that some of the facts stated in the petition and here answered, are material. Of nearly all of them he has no other knowledge than what may be gathered from the record, and what has been obtained from the counsel in the case.

STATEMENT.

As to the allegations of said petition in reference to the proceedings prosecuted by the assignees to have an order made directing the assets of said estate, partnership and individual, to be distributed *pari passu*, etc., the

allegations of said petition in reference thereto are not true in this, viz:

Said assignees did not file said petition against the individual creditors of William McEwen, or make them defendants thereto in any other or different sense than that the partnership and all other creditors of said bankrupts, McEwen & Sons, were made defendants thereto; that before said petition was filed a controversy had arisen between the partnership and individual creditors of said bankrupts as to the manner in which distribution should be made of the assets of said bankrupts, and as it was necessary that said controversy should be determined before any dividend could be made to any of said creditors, said assignees filed in said District Court the petition set out as an exhibit with the petition filed in this honorable Court, and in said petition set out the existence of said controversy and the facts in part which it was asserted by said partnership creditors entitled them to share *pari passu* in the distribution of the individual estate of said William McEwen; that the question as to whether the debt claimed by the petitioners herein to be due them was an individual or partnership debt was in no manner involved in said controversy, and no allegations whatever in reference thereto were made in said petition; that said assignees asked no other relief in said petition than that the Court would determine said controversy and decide the manner in which distribution of said estates should be made, and to that end asked that all the creditors, partnership and individual, should be made parties to said proceeding and required to answer, asserting their respective rights and claims in the premises, and to enable notice to be given to said creditors of the filing of said petition said assignees filed with said petition a list of all persons who had proved debts at that time against said estates, classifying them as individual and partnership creditors according as they appeared by the allowance of the register in

bankruptcy upon their proofs of debts, which is the same list set out in the petition filed in this Court; that upon the filing of said petition said Court ordered the Clerk to notify each of said creditors thereof, and such notice was accordingly given.

It was optional with said petitioners herein, Woollen and Webb, in answering said petition, to assume either side of said controversy, and they were not compelled, by any allegations in said petition, or any action of said assignees, to answer said petition as individual creditors; that certain of the creditors of said bankrupts, who claimed to be partnership creditors, appeared to said petition and filed a supplemental petition, in which they alleged the facts set out in the petition as claimed by them, and other facts, and thereupon demanded that they should share *pari passu* in the individual assets of said William McEwen; that thereupon certain other creditors of said bankrupts, claiming to be individual creditors of said William McEwen, among them the petitioners herein, Woollen and Webb, filed an answer to said original and supplemental petitions, to which said partnership creditors filed the replication set out in the petition filed in this Court, said assignees joining therein as partnership creditors, and not in their official capacity; that it is not true that said assignees, throughout said litigation, recognized said Woollen and Webb as individual creditors, but inasmuch as they joined in the pleadings filed on behalf of the individual creditors, with others who were unquestionably individual creditors, and as the fact as to whether or not they were individual creditors was in no way involved in said litigation, it was wholly immaterial what capacity they assumed in said litigation, and therefore said assignees neither recognized or disputed the assumption of said Woollen and Webb that they were individual creditors.

It is not true that said petitioners were put to or in-

curred any expense by reason of said litigation, but on the contrary immediately after the termination of said litigation, the creditors who had litigated on behalf of the individual creditors, including said Woollen and Webb, filed in said District Court a petition to have all the expenses incurred by them in said litigation, including attorneys fees, paid out of the funds of said bankrupt estates in the hands of said assignees, and said Court so ordered, and all said expenses, including attorneys fees, were so paid by said assignees, so that said petitioners incurred no expense whatever in said litigation.

Nor is it true, as in said petition averred, that during all of said litigation, all of the proved claims against said bankrupts were repeatedly examined and classified, and no objection was ever made to petitioners' claim on the ground that it was not an individual claim, until long after the termination of said litigation, to-wit: November 5, 1879, but the truth is, that during the entire period of said litigation, to-wit: from August, 1873, to March 20, 1878, it was considered by said assignees that in the event said litigation should be decided so as to require a *pari passu* distribution of said estate, it would be immaterial whether a claim was an individual or a partnership debt, and for that reason no examination of the proofs of debts was made until the judgment was rendered in said cause, on the 20th day of March, 1878, whereby it was ordered that each estate be distributed in the first instance to its own proper creditors; that, thereupon, said assignees caused all the proofs of debts to be examined, to ascertain whether they had been filed against the proper estates, and first discovered that the debt of the petitioners herein was a partnership debt of McEwen & Sons, and not an individual debt of William McEwen.

That said assignees immediately thereafter, and on or about the 1st day of May, 1878, filed with the Regis-

ter in Bankruptcy, before whom the first exception to a part only of said petitioners' claim was then pending, the second and additional exception to the whole of said claim on the ground that it was not an individual debt of William McEwen, but a partnership debt of McEwen & Sons, which said exception is the same shown in the record of said matter filed with the petition herein and not other or different; that after said second exception was filed, to-wit: on the 18th day of May, 1878, a dividend was ordered by said Register in Bankruptcy to be made to the individual creditors of said William McEwen, excepting only such claims and parts of claims as were then excepted to by said assignees, and an order was drawn up and spread of record by said Register, which said order was examined, approved, and in all things consented to by said petitioners, Woollen and Webb, by their then attorneys, and in and by which it was distinctly set out and specified that no dividend should be paid on any part of the claim of said Woollen and Webb, for the reason that exceptions to the whole of said claim were then pending in said register's office, and the exceptions referred to in said order are the exceptions shown in the record of said matter set out with the petition herein, and not other or different, and although a large dividend was then paid under said order to the individual creditors of said William McEwen, no dividend was then paid or has since been paid to said Woollen and Webb.

And said petitioners at no time objected or excepted to the filing of said second exception, but went to trial on the merits of the issue presented thereby, before the District Court, at the time shown in the record filed with their petition herein, and none of the facts in reference to said matter averred in said petition were presented by the record which was before the Court, in ruling upon said motion to dismiss the appeal of said petitioners, nor did said petitioners in any way present

or attempt to present any of said alleged facts in answer to said motion. Wherefore, if said alleged facts be true they are wholly immaterial and irrelevant in this cause, and ought not to be considered by the Supreme Court.

And the undersigned, having fully answered all the matters and things contained in said petition, which it is material for him to answer, respectfully requests to be hence dismissed.

Thomas Drummond
Circuit Judge

At Chicago in the 7th Circuit
this Nov 18. 1880

ter in Bankruptcy, before whom the first exception to a part only of said petitioners' claim was then pending, the second and additional exception to the whole of said claim on the ground that it was not an individual debt of William McEwen, but a partnership debt of McEwen & Sons, which said exception is the same shown in the record of said matter filed with the petition herein and not other or different; that after said second exception was filed, to-wit: on the 18th day of May, 1878, a dividend was ordered by said Register in Bankruptcy to be made to the individual creditors of said William McEwen, excepting only such claims and parts of claims as were then excepted to by said assignees, and an order was drawn up and spread of record by said Register, which said order was examined, approved, and in all things consented to by said petitioners, Woollen and Webb, by their then attorneys, and in and by which it was distinctly set out and specified that no dividend should be paid on any part of the claim of said Woollen and Webb, for the reason that exceptions to the whole of said claim were then pending in said register's office, and the exceptions referred to in said order are the exceptions shown in the record of said matter set out with the petition herein, and not other or different, and although a large dividend was then paid under said order to the individual creditors of said William McEwen, no dividend was then paid or has since been paid to said Woollen and Webb.

And said petitioners at no time objected or excepted to the filing of said second exception, but went to trial on the merits of the issue presented thereby, before the District Court, at the time shown in the record filed with their petition herein, and none of the facts in reference to said matter averred in said petition were presented by the record which was before the Court, in ruling upon said motion to dismiss the appeal of said petitioners, nor did said petitioners in any way present

or attempt to present any of said alleged facts in answer to said motion. Wherefore, if said alleged facts be true they are wholly immaterial and irrelevant in this cause, and ought not to be considered by the Supreme Court.

And the undersigned, having fully answered all the matters and things contained in said petition, which it is material for him to answer, respectfully requests to be hence dismissed.

Thomas Drummond
Circuit Judge

At Chicago in the 7th Circuit
this Nov 18. 1880

OFFICE SUPREME COURT U.S.
FILED
SEP 27 1890
JAMES H. McKENNEY, CLERK

IN THE

United States Supreme Court

Ex parte, WILLIAM W. WOOLLEN and WILLIS S. WEBB.

In re, McEWEN & SONS, In Bankruptcy.

BRIEF FOR PETITIONERS.

McDONALD & BUTLER,
Solicitors for Petitioners.

Indianapolis Sentinel Co. Printers and Stationers.

IN THE SUPREME COURT OF THE UNITED STATES.

EX PARTE WILLIAM W. WOOLLEN
AND WILLIS S. WEBB,

IN RE MCEWEN & SONS,
In Bankruptcy.

BRIEF FOR PETITIONERS.

I. FACTS.

1. William McEwen, Gideon B. McEwen and Archibald McEwen, as partners under the firm name of McEwen & Sons, were adjudged bankrupt on the 16th day of May, 1872.

2. On June 17, 1872, petitioners William W. Woollen and Willis S. Webb, as partners under the firm name of Woollen & Webb, filed and proved their claim *against the individual estate of William McEwen.* Their proof of claim was accepted, and the claim regularly allowed by the Register. The amount of the claim allowed is $5,591.69. No objection or exception was then made by the assignees, or any other person, to said claim as allowed.

3. On August 26, 1873, the assignees filed a bill, or petition, against *these petitioners,* with others, *as creditors holding proved claims against the individual estate of William McEwen,* praying that *firm* creditors might be allowed to share *pari passu* with individual creditors in the assets and estate of William McEwen. To this bill these petitioners, with other creditors of the individual estate of William McEwen, filed their demurrer, which was overruled by Hopkins, Judge. *In re McEwen & Sons,* 6 *Bissell,* 294.

Petitioners and other creditors holding proved claims against the individual estate of William McEwen, then filed answer to said bill of said assignees to marshal assets, and a lengthy and very expensive litigation ensued, terminating on *March* 20, 1878, in a

judgment and decree rendered by the District Court and affirmed by the Circuit Court, in favor of the individual creditors of William McEwen, as is shown by certified transcripts of the decrees of the District and Circuit Courts appended to petitioners' petition filed herein.

4. During all the years of this litigation, from August, 1873, to March, 1878, petitioners, by their counsel, took an active part in defending the interests of the individual creditors of William McEwen's estate, and were always throughout said entire litigation recognized and classified by said assignees as creditors of the individual estate of William McEwen, in all the pleadings, evidence and schedules introduced in said litigation.

5. On April 21, 1875, nearly *three years* after petitioners' claim had been regularly allowed by the Register and reported to the assignees, the said assignees filed the *first* exception of the two exceptions found on page 13 of the transcript filed with petioners' petition for mandamus. This exception is not against petitioners' claim, nor is it based upon the ground that petitioners' claim was not properly proved against the individual estate of William McEwen, but is simply an objection to $591.69 of said claim on the ground that it was attorney's fees and interest that ought not to have been allowed.

The *second* of said exceptions appearing in the transcript on page 13, and apparently bearing date of April 21, 1875, *was not filed at that time*, nor for years afterwards. It was added to the objection filed in 1875, upon the same sheet of paper, and therefore did not get the proper file mark upon it. Mr. F. Winter, attorney for assignees, has repeatedly admitted that he wrote this *second exception* and that it was not written until after the close of the litigation upon the bill to marshal assets, which litigation terminated on March 20, 1878. Mr. Winter has stated to me that he wrote this *second exception* in April or May, 1878, but when asked to make a written statement or stipulation as to the time it was written he declines and refuses to do so. The *second exception* is in Mr. Winter's hand writing, while the *first* exception—filed in 1875—is in the hand writing of Col. Stansifer, originally counsel for assignees, but who has taken no part in the litigation for several years. If Mr. Winter wrote this second exception in April or May, 1878, as he now states, it must have been written without leave of court, and certainly without any notice whatever to petitioners.

In our petition for mandamus, we have stated that this *second exception* was written on *November* 5, 1879, at the time of the trial before the District Court. This statement in the petition is based

upon the memory of George C. Butler and Hon. J. E. McDonald, members of the firm of McDonald & Butler. They state that at the time of the trial Mr. Winter asked leave to file this new exception, to the granting of which they objected, but the court permitted it to be filed, and by some inadvertance no record whatever was made upon the matter.

It is quite important to note that the *assignees*, on their own motion, are presenting at this late day, and pressing these exceptions. *No creditor of the individual estate of William McEwen* is offering any objection to the petitioners sharing in the assets of the individual estate of William McEwen, in accordance with the claim as allowed by the Register. No *firm creditor* has presented any exception to the claim as allowed by the Register. The court has never ordered the assignees to resist petitioners' claim as allowed by the Register. No one interested in the distribution of the assets of the firm and individual estates is making any resistance to petitioners' claim as allowed by the Register. But these assignees, after impleading and litigating against petitioners for years as creditors of the individual estate, and after repeatedly in every way recognizing and scheduling and proving petitioners' claim as a claim proved and allowed against the individual estate of William McEwen, and after expending nearly twenty thousand dollars of the estate in their litigation against petitioners *as creditors of the individual estate*, now, after success has been gained for the individual creditors, to gain which petitioners and their counsel labored long and earnestly, bring forward wholly upon their own motion these exceptions and seek to deprive petitioners of all benefit of their victory.

6. On November 27, 1879, the District Court having had the matter under advisement for some days after the close of the trial upon said exceptions rendered judgment against petitioners without any notice to them or their counsel. Neither petitioners nor their counsel having learned or heard of the decision until after the ten days for appeal had expired, petitioners filed a petition for rehearing, which was granted by the District Court.

On December 17, 1879, the District Court again rendered judgment against petitioners, and they at once prayed and claimed an appeal to the Circuit Court in the manner prescribed by law. On December 17, 1879, petitioners claimed their appeal, gave notice thereof to the Clerk of the District Court, and to said assignees, and at the time of claiming said appeal filed their bond duly approved as required by law, and directed a transcript of said proceedings to be prepared for the entering of said appeal in the Circuit

judgment and decree rendered by the District Court and affirmed by the Circuit Court, in favor of the individual creditors of William McEwen, as is shown by certified transcripts of the decrees of the District and Circuit Courts appended to petitioners' petition filed herein.

4. During all the years of this litigation, from August, 1873, to March, 1878, petitioners, by their counsel, took an active part in defending the interests of the individual creditors of William McEwen's estate, and were always throughout said entire litigation recognized and classified by said assignees as creditors of the individual estate of William McEwen, in all the pleadings, evidence and schedules introduced in said litigation.

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upon the memory of George C. Butler and Hon. J. E. McDonald, members of the firm of McDonald & Butler. They state that at the time of the trial Mr. Winter asked leave to file this new exception, to the granting of which they objected, but the court permitted it to be filed, and by some inadvertance no record whatever was made upon the matter.

It is quite important to note that the *assignees*, on their own motion, are presenting at this late day, and pressing these exceptions. *No creditor of the individual estate of William McEwen* is offering any objection to the petitioners sharing in the assets of the individual estate of William McEwen, in accordance with the claim as allowed by the Register. No *firm creditor* has presented any exception to the claim as allowed by the Register. The court has never ordered the assignees to resist petitioners' claim as allowed by the Register. No one interested in the distribution of the assets of the firm and individual estates is making any resistance to petitioners' claim as allowed by the Register. But these assignees, after impleading and litigating against petitioners for years as creditors of the individual estate, and after repeatedly in every way recognizing and scheduling and proving petitioners' claim as a claim proved and allowed against the individual estate of William McEwen, and after expending nearly twenty thousand dollars of the estate in their litigation against petitioners *as creditors of the individual estate*, now, after success has been gained for the individual creditors, to gain which petitioners and their counsel labored long and earnestly, bring forward wholly upon their own motion these exceptions and seek to deprive petitioners of all benefit of their victory.

6. On November 27, 1879, the District Court having had the matter under advisement for some days after the close of the trial upon said exceptions rendered judgment against petitioners without any notice to them or their counsel. Neither petitioners nor their counsel having learned or heard of the decision until after the ten days for appeal had expired, petitioners filed a petition for rehearing, which was granted by the District Court.

On December 17, 1879, the District Court again rendered judgment against petitioners, and they at once prayed and claimed an appeal to the Circuit Court in the manner prescribed by law. On December 17, 1879, petitioners claimed their appeal, gave notice thereof to the Clerk of the District Court, and to said assignees, and at the time of claiming said appeal filed their bond duly approved as required by law, and directed a transcript of said proceedings to be prepared for the entering of said appeal in the Circuit

Court at the time by law required, all of which petitioners did within ten days after the entry of the judgment of the District Court disallowing petitioners' claim. All of which proceedings last above named were had during the November term, 1879, of the Circuit Court of the United States for the District of Indiana, the terms of said Circuit Court beginning on the first Tuesday in May and November of each year.

Petitioners would further show that—

7. Hon. Thomas Drummond, Circuit Judge, was only present in the District of Indiana during the November term of said court, from about March 18, 1880, to March 30, 1880, during which time his attention was mainly given to chancery causes and settlements of railroad receivers. Before Judge Drummond's arrival the District Judge announced that the jury would be discharged for the term at the close of the trial then about to commence. Judge Drummond heard no jury trial, the District Judge discharged the jury at the close of the trial in progress when Judge Drummond arrived.

8. On March 27, 1880, assignees filed in the Circuit Court their motion to dismiss petitioners' cause, alleging for ground of dismissal that petitioners had not filed in said Circuit Court their "statement in writing of their claim, setting forth the same, substantially, as in a declaration at law," and a transcript of the proceedings in the District Court *within ten days after claiming their appeal in said District Court.* In their motion assignees see proper to state that petitioners have failed and refused, and still do fail and refuse, to file said statement, and declare that they will not file the same until the May term of said Circuit Court. These extravagant statements of course prove nothing, and were probably only intended to mean that petitioners had not filed their transcript and declaration in the Circuit Court. That is all they could mean with truth, for no request was made by the assignees to file said papers in the Circuit Court, nor was any opportunity offered for filing them by the court, nor intimation given that they might be then filed. The motion was filed and then called up for argument the same day, I think the same moment it was filed. On March 28 the court sustained the motion and entered an order dismissing the cause, to which petitioners excepted, and, being in doubt as to their proper remedy, prayed the court to grant a writ of error and accept bond to bring the matter before this court, at the same time intimating to the court that perhaps the petition for mandamus was the proper remedy. The court gave twenty days to file bill of exceptions, which was duly prepared and signed by the court and filed within

the time limited, and is found in the transcript filed with the petitioners' petition for mandamus. Afterwards, to wit: April 19, 1880, petitioners filed their bond duly approved by the Court. and their citation signed by the judge and served upon said assignees, all of which appears in said transcript. So that petitioners writ of error is perfected if that is the proper remedy in this case.

9. On April 12, 1880, the same day these petitioners filed in court their bill of exceptions upon the dismissal of their appeal, the District Court, notwithstanding petitioners were diligently prosecuting their proceedings to bring said matter before this court, without any notice to these petitioners or their counsel, entered an order directing said assignees to make final settlement and distribution of all the assets of said bankruptcy on *April* 28, 1880, a certified copy of which order is appended to petitioners' petition for *mandamus*. If this distribution thus ordered, as it seems to us, with undue haste, is permitted to be made petitioners will be left remediless, unless they can hold said assignees personally liable, even if they finally succeed in fully re-establishing their claim.

Something was said by counsel for assignees, upon the argument of the motion to dismiss, about the *delay* occasioned by petitioners. It is not true that these petitioners have caused the long delay in settling this estate, as the records clearly show. The litigation brought and prosecuted by the assignees themselves for the purpose of subjecting the individual estate of William McEwen to the payment of claims against the firm of McEwen & Sons, lasted from August, 1873, to March, 1878, and other litigation remained on the docket long after that; hence there is no justice in charging petitioners with causing unnecessary delay.

Pressed by the foregoing facts these petitioners have in haste prepared and filed their petition for a writ of mandate requiring the Judges of the Circuit Court to reinstate said cause and permit petitioners to file their transcript and declaration and proceed to the trial thereof. And in order to make petitioners' remedy of any effect or value if finally granted, petitioners pray for a restraining order restraining the said assignees from distributing said assets or so much thereof as petitioners' claim would draw in dividends, until petitioners' claim is finally adjudicated.

II. Points.

1. The assignees ought not to be permitted to present and prosecute the exceptions, and particularly the second exception.

a. Because they were not filed in time. The *first* exception was

not filed until nearly *three years* after the claim was regularly proved and allowed by the Register. The statute, Sec. 5,057, strictly *limits* all proceedings *by, or against, assignees to two years.*

The main exception—the second one—was not filed until nearly *six years* after the claim was allowed, if Mr. Winter is correct, and not until *more* than *six years* after the claim was proved and allowed, if we are right in our statement as to the time of filing the second exception.

If the limitation of the statute can apply at all to proceedings of this kind, it would be difficult to find a case in which it could be more applicable.

This is certainly a proceeding brought by the assignees against these petitioners. We see no good reason why the limitation of the statute should not apply.

b. But even if the statute of limitations is held not applicable to this kind of proceeding, still it seems to us that these assignees are *equitably estopped* from presenting any such objection as this *second exception.* They have brought these petitioners into court on the faith of their claims as allowed against the individual estate of William McEwen, made them defendants *as creditors of the individual estate,* and obliged them to litigate over four years in defence of their rights as creditors of the individual estate. They have reported, and repeatedly scheduled, these petitioners as creditors of the individual estate upon this claim as allowed by the Register, and have induced and obliged these petitioners to employ counsel and devote time and labor to the defense of the individual estate. All this they did *before any exception whatever was filed against petitioners' claim.* After such action, such recognition, such inducement to petitioners to expend time and money in defense of their claim, as a claim against the individual estate, can they be permitted or heard to except or object to this claim on the ground that it is not a claim against the individual estate, but is a claim against the firm estate? If they can, the doctrine of equitable estoppel, as laid down in the books is a delusion.

The case might be very different if some creditor just proving his claim, and not heretofore possessed of knowledge of the facts and proceedings, should present such an objection. The lapse of time ought to cut off even such an objector, but these objections are urged by the *assignees* themselves, who have known all the facts all the time, and have acted on them for years, and then present the objection.

They ought not to be heard by the court. No creditor has de-

manded it. The court has not demanded it, and ought not to have permitted it.

First. Because barred by limitation.

Second. Because the assignees are in equity estopped.

2. The order of the Circuit Court dismissing the cause was erroneous.

The law governing this case is found in sections 4,980, 4,981, 4,982, and 4,984, U. S. Revised Statutes.

Section 4,980 gives any creditor the right to "*appeal* from the decision of the District Court to the Circuit Court for the same district."

Section 4,981 provides just what shall be done in the *District Court,* and the *time* within which the proceedings in the *District Court,* touching the appeal, must be had. By this section *five* things are required, and they *all* appertain to the *District Court*:

(1.) The creditor must claim his appeal.

(2.) He must "give notice thereof to the Clerk of the *District Court.*"

(3.) He must give notice thereof to the assignee.

(4.) He must, "at the time of claiming the same, give bond in the manner required in cases of appeals in suits of equity."

(5.) He must do all these things "within ten days after the entry of the decree or decision appealed from.

Section 4,982 fixes the *time* at which the appeal shall be entered in the *Circuit Court,* and is the first section that relates to the proceedings in the Circuit Court. The section reads as follows:

"Such appeal *shall* be entered at *the term* of the Circuit Court which *shall be held* within the district *next after* the *expiration of ten days from the time of claiming the same.*"

This language seems too plain and direct to need comment. How it can possibly be construed to mean that the appeal shall be entered in the Circuit Court within ten days from the time of claiming the same in the District Court, as held by the Circuit Judge in this case, is utterly beyond our comprehension. The statute does not say so, its words can not be made to mean so. If the law makers had intended to require the appeal to be entered in the Circuit Court within ten days from the time of claiming the same in the District Court, it would have been easy to say so, and the section would have read thus: "Such appeal shall be entered in the Circuit Court for the district within ten days from the time of claiming the same in the District Court." No such language is used, no such legislative intent is disclosed. On the contrary the clear and evident intent is

to cause the appeal to be entered as a *new and original suit at law* upon the docket of the Circuit Court for the term *beginning after ten days have elapsed* from the time of claiming the appeal in the District Court. A *term* of the *Circuit Court* can not be said to *be held* next *after the expiration* of a certain ten days, if *one-third* of the term has already passed by *before* the beginning of the certain ten days. Hence if an appeal is taken from the District Court to the Circuit Court *during a term of the Circuit Court*, such appeal is to be entered at the *next ensuing term* of the Circuit Court. That such is the meaning and intent of the statute is plain from its face and wording. To put any other construction upon it requires the interpolation of other words in it, and the eliminating of words now in it from it. This construction is in harmony with the other section of the statute defining the character of the proceeding after it gets into the Circuit Court. It becomes a suit at law, a jury trial may be had, in fact must be had, unless waived by the parties. The intent of the statute therefore was, and is, to put such appeals upon the regular law docket of the next ensuing term of the Circuit Court as new and original suits, and take their regular turn and time for trial by the regular jury. This section is set out by itself, it has only one object, viz ; *to define the term of the Circuit Court at which the appeal shall be entered.* It says it *shall be entered at the term held next after the expiration of ten days from the time of claiming the appeal.* It does *not* say that it shall be entered at the *current term* then partly gone. The words can not be made to mean that, hence we believe the ruling of the Circuit Court in dismissing the case was error.

Section 4,984 defines *what* shall be filed or entered in the Circuit Court in addition to the appeal, and *when* this additional paper shall be filed.

It says : The creditor " shall, upon entering his appeal in the Circuit Court, file in the clerk's office thereof a statement in writing of his claim, setting forth the same, substantially, as in a declaration * at law." This declaration is not to be filed until the appeal is entered, and is to be filed upon entering it. We have already shown that the appeal shall be entered at the *next term* of the Circuit Court, hence that is the time to file the declaration, and the *only time* fixed by law for filing it.

These are all the sections of the statute bearing upon the question. They seem clear and easily understood, and, to us, seem incapable of the construction put upon them by the Circuit Court. We do not think there would, or could, be a doubt as to the mean-

ing of these sections of the statute, were it not for order No. 26 of Orders in Bankruptcy. In regard to this order, we would respectfully suggest:

1. The statute as now enacted, was passed long *after* this order was issued, and is different from the old statute, under which the order was issued, both in the words used and in the order and division of sections, and in the prominence and directness given to the new sections over the old.

2. If this order No. 26 is in conflict with the wording and intent of the present statute, the statute must prevail over the order. All orders followed or adopted are subject to the provisions of the statute, and can not change the statute. *U. S. Rev. Statutes, Sec.* 4,990.

It is quite doubtful if order 26 was ever intended, even under the old law, to apply to cases like this. It certainly can not be made to apply to the present statute without affecting a radical change in the words and intent of the several sections above cited and commented upon.

But at all events this rule is only directory, and neither the rule nor the statute would compel the court to dismiss for failure to file declaration and transcript in Circuit Court within ten days from time of claiming the appeal in the District Court. If it is a matter of *discretion,* the exercise of that discretion must be governed by the rules of equity and law long established, and is reviewable by this court. If held to be a matter of discretion, we most earnestly insist that the discretion was erroneously exercised in this case under the facts and circumstances of the case, and works an injustice to these petitioners which they ought not in equity to be made to endure.

3. That the rule 26 is merely directory the following authorities seem to establish:

Banon et al. vs. *Morris, Assignee,* 14 N. B. Register, 371. Decided by Mr. Justice Bradley.

In connection with this decision we desire to call the attention of the court to the language of section 4,984; it is this: The creditor "shall, *upon entering his appeal in the Circuit Court,* file in the Clerk's office thereof a statement in writing of his claim." From this language it would seem that the declaration and transcript are to be *filed at the same time* and that it is not necessary to file the declaration in advance of the transcript transmitting the appeal.

Baldwin, Assignee, vs. *Rapplee,* 5 N. B. Register, 19. Decided by Woodruff and Hall, Judges.

In re Alexander, 3 N. B. Register, second edition, p. 29. Decided by Chief Justice Chase.

Wiswall et al. vs. *Campbell et al.*, 93 U. S. Rep., 350. Opinion by Chief Justice Waite.

Bump's Bankruptcy, 8 Edition, 277.

THE REMEDY.

That the proper remedy in this case is by petition for *mandamus*, seems fully settled by the following authorities:

Insurance Company vs. *Comstock*, 16 Wallace, 258.

Ex parte Bradstreet, 7 Peters, 634.

Ex parte Crane, 5 Peters, 190.

In fact, it seems from the decision in *Wiswall et al.* vs. *Campbell et al.*, 93 U. S., (3 Otto) 347, that it is the *only remedy* open to petitioners.

We most earnestly insist that this is a case, if one can ever be mad e calling for a writ of *mandamus*. Clearly it falls within the ruling in *Ex parte Newman*, 14 Wall., 165, when the court says: "Applications for a *mandamus* to a subordinate court are warranted "by the principles and usages of law in cases where the subordinate "court, having jurisdiction of a case, refuses to hear and decide the "controversy."

We have tried to show herein that there are merits in our petition, and that the dismissal of the cause was erroneous.

1. Because the assignees are barred by the statute of limitations from presenting the exceptions to petitioners' claim as allowed by the Register.

2. Because, from the facts disclosed in the petition and proved by the transcripts filed therewith, the assignees are *equitably estopped* from now asking the rejection of petitioners' claim.

3. Because the Circuit Court erred in dismissing the case on the ground that petitioners did not file their declaration and transcript in the Circuit Court within ten days after having claimed an appeal in the District Court, from the fact that the statute clearly does not so require.

4. That order No. 26 does not apply to this new statute, and if it does, is only directory, and that the Circuit Court erred in the exercise of its discretion, if the matter rests at all in the discretion of the court, the petition and facts showing that no unnecessary delay has been caused by petitioners, they could not have had a trial by the regular jury of the term even if the declaration and transcript had been on file when the circuit judge arrived. They were entitled to a trial by jury, and by the regular panel.

The order entered by this court upon the filing of the petition herein has had the effect to prevent the final distribution of the assets of the bankrupt estate.

The question remaining for the court to decide is, shall the appeal taken to the Circuit Court stand dismissed because not entered *within* ten days from the time it was claimed, although the statute provides only for the entering of the appeal at the term *next after the expiration of ten days from the time of claiming the same*? Do the words "*next after the expiration of*" mean "*within*?" We can not think this court will tolerate such a construction. We can not believe this court will allow petitioners to be thus construed out of their rights. We most respectfully submit that a mandate should issue directing the reinstatement of said appeal that the same may be tried and determined upon its merits.

Most respectfully submitted,

McDONALD & BUTLER,

Attorneys for Petitioners.

FILED
OCT 26 1881
JAMES H. McKENNEY, CLERK

IN THE SUPREME COURT OF THE UNITED STATES.

No. 4 ORIGINAL.

IN THE MATTER OF
WILLIAM W. WOOLLEN,
WILLIS S. WEBB,
Petitioners.

Ex Parte.

PETITION FOR MANDAMUS.

Brief for Respondent, Thomas Drummond.

CARLON & HOLLENBECK, PRINTERS, INDIANAPOLIS.

In the Supreme Court.

NO. 4, ORIGINAL.

In the Matter of
WILLIAM W. WOOLLEN,
WILLIS S. WEBB,
Petitioners.
} *Ex parte.*

PETITION FOR MANDAMUS.

BRIEF FOR RESPONDENT, THOMAS DRUMMOND.

The material facts, as it seems to us, presented by the record in this cause, are obscured by much immaterial and irrelevant matter, which petitioners have seen proper to incorporate in their petition. Reserving at this stage any further mention or consideration of this immaterial matter, we desire in the first instance to state briefly the material facts of the record as we understand them, and to discuss the legal questions arising upon them.

William McEwen, Archibald McEwen and Gideon B. McEwen, partners, under the firm name of McEwen & Son's

were adjudicated bankrupts. The petitioners, William W. Woollen and Willis S. Webb, on the 17th day of June, 1872, filed a claim against the individual estate of William McEwen, which was allowed by the Register, to the amount of $5,591.69. (Record, pp. 1, 12). The assignees excepted to the allowance of the claim: First, because as to $591.69 thereof, it was in excess of the amount due at the date of the bankruptcy, and second, because as to the whole claim it was a partnership debt of the firm of McEwen & Sons, and not provable against the individual estate of William McEwen. (Record, pp. 1, 13).

These exceptions pended before the Register in Bankruptcy until the 5th day of November, 1879, when, by agreement of the parties, they were certified by the Register to the District Court for trial. (Record, p. 14). On the 29th of November, 1879, they were tried in said court upon the merits, and decided in favor of the assignees, the court holding that the claim was a partnership debt of McEwen & Sons, and not provable against the individual estate of Wm. McEwen, and ordering it to be disallowed as a claim against said latter estate. (Record—Petition, p. 14): The ten days in which an appeal could be taken from the decision were allowed to go by, and no appeal was taken; but upon the 17th day of December, 1879, the petitioners filed in said District Court a petition, stating that they had not known the case was decided until after the expiration of the ten days, and praying the court to review its decision for the purpose of allowing them an appeal. This petition the court granted over the exception of the assignees, and thereupon reviewed and reaffirmed its former decision and from this decision, entered on the 17th day of December, 1879, the petitioners took an appeal to the Circuit Court, and on the same day filed the proper appeal

bond and notice. (Record—Petition, pp. 1, 15, 16, 17,—Answer of Judge Drummond, p. 3).

At the time this appeal was taken, and continuously thereafter until the 20th day of April, 1880, the Circuit Court of the United States for the District of Indiana, to which the appeal had been taken, was in session, (record, petition, pp. 9, 10, 17, 18; answer of Judge Drummond, p. 4.) And from March 18, 1880, to and including March 30, 1880, Judge Drummond, before whom said appeal would be heard, was personally holding said Court, "in the usual way to dispose of the cases that might come before him, and particularly of appeals and writs of error from the District Court." (Record, answer of Judge Drummond, p. 2; petition, p. 2.) But the petitioners, when they took their said appeal, did not intend to enter it in said Circuit Court until the ensuing May term, 1880, thereof; (record, petition, p. 1;) and therefore did not at any time between the 17th day of December, 1879, and the 29th day of March, 1880, after Judge Drummond had come, enter their said appeal in said Court, or file therein any statement of their claim as in the nature of a declaration. (Record, petition, pp. 9, 10; answer of Judge Drummond, p. 2.) The petitioners now say, by way of excuse, that the District Judge had discharged the jury before Judge Drummond came, and that he heard no jury trial. (Record, petition, p. 2, lines 7, 8.) But no such excuse, or any excuse or reason, was stated to Judge Drummond for the omission to enter the appeal when his attention was first called to the matter, or afterward; but Judge Drummond, on the other hand, states "that he knows of no reason why he could not have then heard the case with a jury or otherwise, if it had been entered in the Circuit Court, and an issue had been made, and the parties ready for trial," and that the petitioners

"made no application for leave to file the appeal in the Circuit Court, but on the contrary refused to make such application." (Record, answer of Judge Drummond, pp. 2, 3.) They stood upon their original intention not to enter the appeal until the May term of the Court. (Record, answer of Judge Drummond, pp. 2, 3.)

The petitioners thus refusing to enter their appeal or to proceed in the cause, the assignees gave notice that on bringing the facts properly before the Court, they would move to dismiss the appeal. They subsequently, on the 29th of March, 1880, filed a transcript of the record of the case and a written motion to dismiss, based upon the facts therein shown and hereinbefore stated; first, because the order of the District Court granting a rehearing for the purpose of allowing an appeal after the time therefor had expired, was void; and, second, because the petitioners had failed to perfect their appeal by entering the same in the Circuit Court and filing a statement of their claim, within ten days after taking said appeal. (Record, petition, pp. 1, 2, 9, 10, 11, 12, 13, 14, 15, 16, 17; answer of Judge Drummond, p. 3.)

The petitioners, being notified of the filing of this motion, appeared thereto, and the same was argued by the respective counsel before Judge Drummond, "the only question before the Court being whether the petitioners in their appeal had complied with the act of Congress and the rule of the Supreme Court of the United States in relation to the appeals of claimants against bankrupt estates from the District to the Circuit Court of the United States. There was no controversy between the counsel as to the facts of the case, and they were ascertained from the transcript which had been thus filed, or were admitted by the parties." (Record, petition, p. 10; answer of Judge Drummond, p. 3.)

The motion to dismiss was sustained by Judge Drummond upon the ground that the appeals having been taken while the Circuit Court was in session, and that session continuing for more than ten days thereafter, the appeal should have been entered therein within ten days after it was taken.

The petitioners can have no relief by mandamus in this case, as we think, because:

First. Even if the decision of the Circuit Court was wrong, it can not be reviewed in this form of action.

Second. The decision of the Circuit Court was right.

The decisions of this Court have clearly determined in what classes of cases and upon what principles it will afford relief by mandamus. As we view the cases, they all, with the exception of those where the writ is issued to compel the performance of purely ministerial acts, which of course do not come within the purview of this case, fall within the following classes:

1. Where an inferior Court of the United States, subject to the supervisory power of this Court, refuses to act upon a matter within its jurisdiction, and as to which it is its duty to act;

2. Where such inferior Court has acted without jurisdiction;

3. Where such inferior Court has acted upon a matter within its jurisdiction, but has acted with manifest injustice, or has flagrantly abused its discretion from motives of passion, prejudice or personal hostility;

4. Where the writ is invoked in aid of the appellate jurisdiction of the Court.

The supervisory power of this Court over the inferior Courts of the United States is fully considered, and with

its limitations clearly stated in the case *Ex parte Bradley*, 7 Wallace, 364. It is there decided that the jurisdiction extends to cases where the inferior Court has acted without jurisdiction. The case was an application for a writ of mandamus to the Supreme Court of the District of Columbia, to compel it to restore the petitioner to the office of attorney and counsellor in said Court—said Court having disbarred him for a contempt committed by him in another Court presided over by one of the Judges of the Supreme Court. It was held that the Supreme Court had no jurisdiction to punish for a contempt committed before another Court, and upon this ground alone it was held that the writ should issue. But in the course of the decision it is expressly said, in considering the power of the Supreme Court to supervise the inferior Courts, to restrain their excesses and compel them to act, that the writ of mandamus does not lie to control the judicial discretion of the Judge or Court, and hence, where the action complained of rested in the exercise of this discretion, the remedy fails. This discretion, however, must not be exercised with manifest injustice, or in utter disregard of law, or from passion, prejudice or personal hostility.

This case then establishes the right to issue the writ under the supervisory power of the Court in two of the classes of cases already stated: Where the inferior Court acts without jurisdiction, and where acting within its jurisdiction, it has abused its discretion with manifest injustice and disregard of law, or from improper motives. It further holds that where a Court has acted upon a matter within its jurisdiction, involving judicial discretion and judgment, and has not manifestly abused this discretion, the writ of mandamus will not lie by virtue of the supervisory power of this Court.

Several other cases have been decided by this Court where the remedy by mandamus has been sought to compel an inferior Court to restore a disbarred attorney, and which go far in showing how seldom the writ can properly be granted, even in this class of cases, where, as said in *Ex parte Bradley*, unless the remedy by mandamus can be afforded, there is no remedy.

Ex parte Secombe, 17 Howard 9, was an application for a writ of mandamus to the Supreme Court of the Territory of Minnesota to compel the restoration of the petitioner who had been disbarred, without any notice or information that any accusation had been made against him, by a summary order of the Court for, as was stated in the order, "a willful violation of the second subdivision of section seven of chapter ninety-three of the Revised Statutes of this Territory, and also of a violation of that part of his official oath as such attorney by which he was sworn to conduct himself with fidelity to the Court." This Court held that as the statute did not specify what particular acts should be deemed disrespectful to the Court, it must rest with the Court what acts contributed to a violation of the statute, and that this was a judicial power vested in the Court, and that therefore the removal of the petitioner was the act of a Court done in the exercise of a judicial discretion which the law authorized and required it to exercise, and that this act could not be reviewed and reversed by mandamus however erroneous it might be. It is further said, "We are not aware of any case where a mandamus has issued to an inferior tribunal, commanding it to reverse or annul its decision, where the decision was in its nature a judicial act, and within the scope of its jurisdiction and discretion."

It might well have been said that there was an abuse of jurisdiction in this case for, as we have seen, the petitioner

was disbarred without notice or opportunity to be heard and did not even know until after the Court had adjourned for the term, that proceedings against him had been taken or even intended.

In *Ex parte Burr*, 9 Wheaton, 529, which was an application for a writ of mandamus to restore a disbarred attorney the Court doubted its right to interfere, and chiefly on that ground denied the writ.

In *Tillinghast* v. *Conkling*, referred to in *Ex parte Secombe* and *Ex parte Bradley*, the writ was denied on the ground that this court had no jurisdiction to interfere.

In neither of these cases was there any question of the jurisdiction of the inferior court; the order disbarring the attorney was in both cases sought to be reversed on account of irregularity in the proceedings or abuse of discretion.

In *Ex parte Robinson*, 19 Wallace, 505, the writ of mandamus was granted to restore an attorney, upon the ground that the court in disbarring him acted without jurisdiction.

It will thus be seen that even in this extreme class of cases this court has never attempted to control the discretion of the inferior court, and has only afforded relief where there was a want of jurisdiction.

Reviewing other decisions of this court briefly it will be found that it has uniformly been held that the writ will never be granted to control or reverse the action of the inferior court where its action involves the exercise of discretion and judgment and has been taken within its jurisdiction and without manifest abuse, save in cases where the writ was issued in aid of the appellate jurisdiction of this court, an exception which we shall show further along has no application to this case.

The Commissioner of Patents v. *Whitely*, 4 Wallace, 523,

was a writ of error prosecuted to this court from a judgment of the Supreme Court of the District of Columbia, awarding a peremptory mandamus against the Commissioner of Patents, commanding him to refer a certain application for a patent, to a board of examiners to be examined according to law. The commissioner claimed that he had decided that the applicant was not entitled to the patent and that this was a question, involving the exercise of judgment and discretion, which it was his duty to decide. This court held that the order of the Supreme Court of the District awarding the mandamus was erroneous, and said, "The principles of the law relating to mandamus are well settled. It lies where there is a refusal to perform a ministerial act involving no exercise of judgment or discretion. It lies also, where the exercise of judgment and discretion are involved, and the officer refuses to decide, provided that if he decided, the aggrieved party could have his decision reviewed by another tribunal. It is applicable only in these two classes of cases. It can not be made to perform the functions of a writ of error.

Ex parte Taylor, 14 Howard, 3, was an application for a writ of mandamus to compel the Circuit Court for the District of Columbia to reverse an order made by it refusing to permit the petitioner to appear to a certain action commenced against him in said court, without entering bail to the amount of the debt claimed by the plaintiff in the action. This court said, "In deciding upon the application to discharge Taylor from the custody of the Marshal, the court must necessarily have considered and determined the act of Congress, as well as the affidavit, and determined whether the affidavit was sufficient or not. And certainly, even in England the King's Bench never claimed or exercised the power to issue a mandamus to an inferior court of

record, commanding it to reverse its judgment, in a matter where the law authorized it to judge. In the case before us, the power of deciding on the sufficiency of the affidavit and the amount of bail is a part of the judicial power of the Court. It has exercised this power and passed its judgment. We do not mean to say that this judgment is in any respect erroneous. But assuming it to be so, this Court can not by mandamus command them to reverse it. The writ has never been extended so far, nor ever used to control the discretion and judgment of an inferior Court acting within the scope of its judicial authority." The writ was therefore denied.

The United States on the relation of Crawford v. *Addison*, 22 Howard, 174, was an application for a mandamus to compel the Judges of the Circuit Court for the District of Columbia to execute a judgment in that Court by which the respondent Addison had been directed to be ousted from a certain office. Addison had sued out a writ of error to the Supreme Court, and filed bond, and this, the Circuit Court held, amounted to a supersedeas, and accordingly suspended the judgment of ouster. It was held that the case was not a proper one for a mandamus, as the judgment of the Circuit Court could be revised by writ of error, but the Court said:

"On a mandamus, a Superior Court will never direct in what manner the discretion of an inferior tribunal shall be exercised; but they will in a proper case require the inferior Court to decide. It has repeatedly been decided by this Court that it will not by mandamus direct a Judge as to the exercise of his discretion, but it will require him to act."

The United States v. *Lawrence*, 3 Dallas, 42, was an application for a mandamus to a District Judge to compel

him to issue a warrant for the arrest of the captain of a French ship, which he had refused to issue on the ground that certain evidence offered was inadmissible. The writ was refused, the Court saying:

"We are clearly and unanimously of opinion that a mandamus ought not to issue. It is evident that the District Judge was acting in a judicial capacity when he determined that the evidence was not sufficient to authorize his issuing a warant for apprehending Captain Barre; and whatever might be the difference of sentiment entertained by this Court, we have no power to compel a Court to decide according to the dictates of any judgment but his own."

Ex parte Roberts, 6 Peters, 216, was an application for a mandamus to compel a District Court to set aside a default and inquest had thereunder upon an information to enforce the forfeiture of certain goods seized for breach of the revenue laws. The writ was denied, the Court saying:

"The Court is of opinion that the present is not a proper case for the interposition of this Court by way of mandamus. The application to set aside the default and inquest was an application to the discretion of the District Court, and is not distinguishable in principle from applications to grant new trials. This Court has always considered such applications as resting in the sound discretion of the Court where the cause is pending, and not a matter for a mandamus or writ of error."

The Life and Fire Insurance Company of New York v. *Adams*, 9 Peters, 571, was an application for a mandamus to compel the Judge of the District Court for Louisiana to enter judgment on a confession of judgment filed in his Court, which he had refused to do. The writ was denied. The Court said:

"This Court is requested to issue a mandamus to the

Court for the Eastern District of Louisiana to enter judgment in a case supposed to be depending in that Court, not according to the opinion it may have formed in the matter in controversy, but according to the opinion which may be formed in this Court, on the suggestion of one of the parties. This Court is asked to decide that the merits of the cause are with the plaintiffs, and to command the District Court to render judgment in their favor. It is an attempt to introduce the supervising power of this Court into a cause depending in an inferior Court, and prematurely to decide it. In addition to the obvious unfitness of such a procedure, its direct repugnance to the spirit and letter of our whole judicial system can not escape notice. The Supreme Court, in the exercise of its ordinary appellate jurisdiction, can take cognizance of no case until a final judgment or decree shall have been made in the inferior Court. Though the merits of the controversy may have been substantially decided, while anything though, merely formal, remains to be done, this Court can not pass upon the subject. If, from any intermediate stage in the proceedings, an appeal might be taken to the Supreme Court, the appeal might be repeated to the great oppression of the parties. So, if this Court might interpose by way of mandamus in the progress of a cause, and order a judgment or decree, a writ of error might be brought to the judgment or an appeal prayed from the decree, and a judgment or decree entered in pursuance of a mandamus might be afterward reversed. Such a procedure would subvert our whole system of jurisprudence. * * * * * Though the Supreme Court will not order an inferior tribunal to render judgment for or against either party, it will in a proper case order such Court to proceed to judgment. Should it be possible that in a case ripe for jndgment, the Court before

whom it was depending should perseveringly refuse to terminate the cause, this Court, without indicating the character of the judgment, would be required by its duty to order the rendition of some judgment, but to justify this mandate a plain case of refusing to proceed in the inferior Court ought to be made out. In *ex parte Bradstreet*, 8 Peters, 590, this Court said:

"We have only to say that a Judge must exercise his discretion in those intermediate proceedings which take place between the institution and trial of a suit, and if in the performance of this duty he acts oppressively, it is not to this Court that application must be made."

Ex parte Schwab, 98 U. S., 240, was an application for a mandamus to compel a Circuit Judge to set aside an order granting an injunction against the prosecution of a suit in a State court. The writ was denied, the Court saying: "Mandamus can not be used to perform the office of an appeal or writ of error. The injunction was granted in the course of the administration of the cause When the application was made for the allowance of the injunction, it became the duty of the Court to determine whether the case was one in which that power could be exercised. The question arose in the regular progress of the cause and if decided wrong an error was committed, which, like other errors, may be corrected on appeal after final judgment below."

Ex parte Loring, 94 U. S. 418, was a case where in an action pending in a Circuit Court the plaintiff, after the jury was empanneled, elected to become nonsuit. At the subsequent term of Court, after notice to the defendant, the plaintiff moved to set aside the nonsuit and restore the case to the docket for trial. This was done. Later in this term, the defendant moved to vacate this order, which the

Court refused to do. Thereupon he applied for a mandamus. The application was denied, the Court saying: "It seems clear to us that the object in this case is to use the writ of mandamus as a writ of error. This can not be done. We may require the Circuit Court to decide in a proper case if it refuses to act but can not control its decision. Here the Court has acted and given its decision upon a motion made. We are asked now to require it to reverse that decision. For that, resort must be had to a writ of error after a final judgment has been rendered. The writ of mandamus has no such office to perform."

Ex parte Flippen 94 U. S. 348, was an application for a writ of mandamus to a Circuit Court, to compel it to sustain a motion which it had denied, to vacate an order made by it for a peremptory mandate to compel the payment of a judgment. The application was denied. The Court say: "By mandamus we may compel an inferior Court to decide upon a matter within its jurisdiction and pending before it for judicial determination, but we can not control its decision. Neither can we in that way compel the inferior Court to reverse a decision which it has made in the exercise of its legitimate jurisdiction. That is the office of a writ of error or an appeal in cases to which such proceedings apply, but not of a writ of mandamus."

The case of *Ex parte Newman,* 14 Wallace, 152 is peculiarly in point. Like this, an action had been commenced in the District Court, and in defence is was pleaded that the Court had no jurisdiction, but the defence was overruled and judgment rendered for the plaintiffs. An appeal was taken to the Circuit Court, which sustained the defence of want of jurisdiction in the District Court, and dismissed the cause. An application was made to the Supreme Court to compel the Circuit Court to reinstate the appeal

and to hear and decide the cause on its merits; and the case was like the one at bar in the further respect, that no appeal or writ of error would lie from the decision of the Circuit Court, and therefore that the petitioners were, as the petitioners in this case claim to be, and for the same reason, wholly without remedy if mandamus would not lie. The Circuit Judge likewise made return to the alternative writ, as does the Circuit Judge in this case, that he did not refuse to take jurisdiction of the appeal, but on the contrary entertained jurisdiction thereof, and in the exercise of such jurisdiction decided that the cause should be dismissed. In its every feature the case seems to us to be precisely analagous to the case at bar, and we trust that we may be pardoned for quoting at length from the decision of the Court to show fully the principles upon which it rests. The writ of mandamus was denied, the Court saying: "Applications for a mandamus to a subordinate Court are warranted by the principles and usages of law in cases where the subordinate Court, having jurisdiction of a case, refuses to hear and decide the controversy, or where such a Court having heard the cause, refuses to render judgment or enter a decree in the case, but the principles and usages of law do not warrant the use of the writ to re-examine a judgment or decree of a subordinate Court in any case, nor will the writ be issued to direct what judgment or decree such a Court shall render in any pending case, nor will the writ be issued in any case if the party aggrieved may have a remedy by writ of error or appeal, as the only office of the writ when issued to a subordinate Court is to direct the performance of a ministerial act, or to command the Court to act in a case where the Court has jurisdiction and refuses to act, but the supervisory Court will never prescribe what the decision of the subordinate Court shall be, nor will the

supervisory Court interfere in any way to control the judgment or discretion of the subordinate Court in disposing of the controversy. * * * * * * Confessedly the petitioners are without remedy by appeal or writ of error, as the sum or value in controversy is less than the amount required to give that right, and it is insisted that they ought on that account to have the remedy sought by their petition. Mandamus will not lie, it is true, where the party may have an appeal or writ of error, but it is equally true that it will not lie in many other cases where the party is without remedy by appeal or writ of error. Such remedies are not given, save in patent and revenue cases, except when the sum or value exceeds two thousand dollars, but the writ of mandamus will not lie in any case to a subordinate Court, unless it appear that the Court of which complaint was made, refused to act in respect to a matter within the jurisdiction of the Court and where it is the duty of the Court to act in the premises. * * * * * Superior Courts may by mandamus command an inferior Court to perform a legal duty where there is no other remedy, and the rule applies to judicial as well as ministerial acts, but it does not apply at all to a judicial act to correct an error, as where the act has been erroneously performed. If the duty is unperformed and it be judicial in its character, the mandate will be to the judge directing him to exercise his judicial discretion or judgment, without any direction as to the manner in which it shall be done; or if it be ministerial, the mandamus will direct the specific act to be performed. Power is given to this Court by the Judiciary act under a writ of error or appeal to affirm or reverse the judgment or decree of the Circuit Court, and in certain cases to render such judgment or decree as the Ciruit Court should have rendered or passed, but no such power is given

under a writ of mandamus, nor is it competent for the superior tribunal, under such a writ, to re-examine the judgment or decree of the subordinate Court. Such a writ can not perform the functions of an appeal or writ of error, as the Superior Court will not in any case direct the judge of the subordinate Court what judgment or decree to enter in the case, as the writ does not vest in the Superior Court any power to give any such direction, or to interfere in any manner with the judicial discretion and judgment of the subordinate Court."

In view of this luminous exposition of the law, and its application in denying relief by mandamus in a case so similar in all its facts to the case at bar, we feel that we are trespassing on the patience of the Court in citing any additional authorities; but that the Court may have before it the numerous other cases it has decided, in addition to those already cited, where the writ of mandamus has been refused where it has been invoked for the purpose of reviewing orders or decisions of inferior tribunals, involving the exercise of judgment and discretion, we cite:

Decatur v. *Paulding*, 14 Peters, 497.
United States v. *Guthrie*, 17 Howard, 284.
Ex parte DeGroot, 6 Wallace, 497.
Gaines v. *Thompson*, 7 Wallace, 347.
United States v. *Seaman*, 17 Howard, 225.
United States v. *The Commissioner*, 5 Wallace, 563.
The Secretary v. *McGarrahan*, 9 Wallace, 298.
Litchfield v. *The Register and Receiver*, 9 Wallace, 575.
Ex parte Hoyt, 13 Peters, 291.
Bank of Columbia v. *Sweeney*, 1 Peters, 567.
Ex parte Many, 14 Howard, 24.
Ex parte Davenport, 6 Peters, 661.

Ex parte Whitney, 13 Peters, 404.
Ex parte Sawyer, 21 Wallace, 235.
Ex parte Perry, 102 U. S., 183.
Ex parte Burtis, 103 U. S., 238.
Ex parte Railway Co., 103 U. S., 794.

The law, as applicable to this case, is thus stated by Mr. High in his work on Extraordinary Legal Remedies:

"While the writ, as we have thus seen, is sometimes granted to compel the allowing of an appeal, it will not lie to compel subordinate Courts to reinstate appeals which they have dismissed. Such dismissal, whether made in accordance with a rule of practice of the inferior Court not unlawful in itself, or done in the exercise of a judicial discretion, is held equally beyond control by mandamus, and the party aggrieved will be left to his writ of error. And it is a sufficient objection to interposing by mandamus in such a case, that the Court, in dismissing the appeal, has acted according to the dictates of its own judgment, since, while the writ is freely granted to compel Courts to act, it will not lie to compel the performance of any particular act, nor to control, in any degree, the exercise of judicial discretion.

High's Extraordinary Legal Remedies, p. 188, § 247.

"Frequent applications of the doctrine under discussion have been made in cases where it has been sought to compel an inferior Court to reinstate an appeal which it has dismissed for want of jurisdiction or other cause. And with reference to this class of cases, it may be said generally, that, where the Court, acting in a judicial capacity, has dismissed an appeal from an inferior tribunal, its order of dismissal is to be regarded as a judicial determination of the question, and, however erroneous, it is final and conclusive, and its correctness will not be questioned by man-

damus. Thus, where a Court of general jurisdiction has dismissed an appeal from a justice of the peace, mandamus will not lie to compel it to proceed to a hearing and determination of the appeal, since the effect of the writ in such a case would be to review all the proceedings of the Court below, and to convert the mandamus into a writ of error."

High's Extraordinary Legal Remedies, 150, § 191.

And the fact that there is no remedy by writ of error or appeal will make no difference.

High's Extraordinary Legal Remedies, 150, § 190.

See also §§ 188, 189, 192, 257.

If no authority were cited to show that the motion, which was made in this case in the Circuit Court to dismiss the appeal, presented a judicial question for the determination of the Judge of that Court, which was within his jurisdiction to decide, and which it was his duty to decide, the proposition would still be too clear for argument. It was the right of the assignees in the case below to present for decision the question as to whether the appeal had been entered in the Circuit Court within the time required by law. The Circuit Court alone had jurisdiction to determine this question. It was essentially a question involving the exercise of judicial discretion and judgment. If the Circuit Court had refused to decide the motion, plainly under the decisions cited, the assignees could have procured from this Court a mandamus to compel it to decide. Having then discharged a duty which this Court would have compelled it to discharge if it had refused, can it be said that the party against whom the decision has been made may procure from this Court a mandamus to reverse that decision simply because this Court may have a different opinion as to the decision which should have been made.

Such a doctrine is opposed to the uniform and unbroken current of decisions of this Court from its organization to the present day, and can find no warrant in the decision of the State Courts.

We do not understand petitioners to insist that the Circuit Court had no jurisdiction to entertain the motion to dismiss. If such claim is made it is necessarily dependent upon the proposition that petitioner's appeal was not required by law to be entered in the Circuit Court until the May term, 1880, as contended for by petitioners upon the hearing of the motion to dismiss, and as they now argue, but this was the very question the Circuit Court was required to decide, and which it did decide in passing upon the motion. From the moment the appeal was taken to the Circuit Court by the filing of the proper bond and notice in the District Court, the Circuit Court acquired jurisdiction of the cause, and this embraced jurisdiction to hear and determine all preliminary motions which might be made in the cause. So plain a proposition does not need authority, but we think the precise question has been decided by this Court. In *ex parte Russell*, 13 Wallace, 664, where a writ of mandamus was asked to compel an inferior Court to vacate an order made by it allowing an appeal to the Supreme Court in a case in which it was claimed no appeal would lie, the writ was denied on the ground that the proper remedy was a motion to the Supreme Court to dismiss the appeal. It was suggested, however, that a party wishing to move the dismissal of an appeal is obliged to await the arrival of the term to which the record ought to be returned, which would occasion great delay. In answer to this the Court said:

"The case is virtually in the possession and subject to the control of this Court as soon as the appeal is effectively

taken, and we see no reason why the appellee should not at any time when the Court is in session apply to have the appeal dismissed, provided the question can be properly presented to the Court. Of course the Court would not hear the motion without having the record before it; but that could be procured and presented by the appellee, as is done where the appellant has failed to have the record filed in time. * * * Unless some unforeseen inconvenience shall arise from the practice we shall not refuse to hear a motion to dismiss before the term to which in regular course the record ought to be returned."

If, then, a Court has jurisdiction to determine a motion to dismiss an appeal when it is conceded that the time for entering the appeal in the Court has not arrived, it certainly must be conceded that it would have jurisdiction of such a motion when the dispute was that the time for filing had already elapsed. The contrary doctrine would result in placing it in the power of the appellant to withhold his appeal indefinitely, for whenever the appellee made an effort to have the appeal dismissed, the appellant need only assert that the time for filing had not yet arrived, and the jurisdiction of the Court to take any action in the case would at once be ousted.

We think it must be clear to the Court that the writ of mandamus can not be issued by this Court in this case under its supervisory power over the Circuit Court, because that Court has not refused to act and take jurisdiction of petitioner's appeal, but on the contrary, as stated in Judge Drummond's answer, was at all times ready and willing to hear the appeal upon its merits, and was only prevented from so doing by the refusal of petitioners to enter the appeal and make up the issues for trial, as required by law, and because in dismissing the appeal, after petitioners' re-

fusal to proceed as required, the Circuit Court acted within its jurisdiction in deciding a judicial question which it was its duty to decide. That, in this decision there was no such utter and flagrant disregard of law, or manifest injustice as to authorize the writ of mandamus to issue within the principle laid down in *Ex parte Bradley*, will be made manifest when we come in another connection to consider the proposition that the decision of Judge Drummond was right.

There remains but one other class of cases in which the writ of mandamus is issued by this Court, and that is where it is in aid of the appellate jurisdiction of the Court. That the case at bar does not fall within this class is manifest, from the fact that no writ of error will lie or appeal can be taken to this Court from the final judgment or decision of a Circuit Court upon an appeal taken to that Court from the judgment of the District Court rejecting a debt proved in bankruptcy proceedings. The statute makes the Circuit Court the Court of last resort as to that class of cases. The provision is as follows:

"The final judgment of the Circuit Court rendered upon any appeal provided for in the preceding section shall be conclusive, and the list of debt shall, if necessary, be altered to conform thereto."

Revised Statues U. S., 1875. 971, § 4985.

And in *Wiswall* v. *Campbell*, 93 U. S., 347 this Court expressly decides that in such cases the decision of the Circuit Court is final, and that no appeal can be taken. So clearly is this so, that petitioners concede it in their brief, and urge it as a reason why they should have relief by mandamus, although, as we have seen by the decision of this Court in *Ex parte Newman*, and from the other authorities cited, the fact that there is no other remedy is no ground for granting the mandamus.

But while petitioners expressly concede that this case does not come within the class of cases in which mandamus will be issued in aid of the appellate power of the Court, yet the only authorities they cite to show that relief by mandamus should be granted them, are three decisions of this Court, which are, each and all, put expressly upon the ground of being in aid of the appellate jurisdiction of the Court.

Ex parte Crane, 5 Peters, 190, was an application for a writ of mandamus to compel the Judge of an inferior Court, who had rendered a final judgment in a cause which the Supreme Court had a right to review upon a writ of error, to sign a bill of exceptions, the petition alleging that he refused to sign the bill, thereby obstructing the appellate jurisdiction of this Court. The mandamus was granted upon this ground alone.

Ex parte Bradstreet, 7 Peters, 634, was a case where the judge of the inferior Court had dismissed a motion on the ground that he had no jurisdiction, when, if he had entertained the cause and rendered final judgment on the merits, this final judgment could have been reviewed in the Supreme Court on appeal or writ of error. It was held that the parties could not be prevented from availing themselves of the appellate jurisdiction of this Court, by the refusal of the Court below to take jurisdiction and decide the case upon the merits, and upon this ground mandamus was awarded.

Insurance Company v. *Comstock*, 16 Wallace, 258, is of precisely the same character. Certain creditors of an insurance company filed in the District Court their petition to have the company adjudicated a bankrupt. The company resisted, and an issue being formed and tried in that Court, it was adjudicated that the company was bankrupt.

The company sued out a writ of error from the Circuit Court, but that Court held that it had no jurisdiction to review the judgment of the District Court. The company then sued out a writ of error from the Supreme Court to the Circuit Court, and on motion to dismiss this writ, it was held by this Court that the writ would not lie, solely because the Circuit Court had refused to review the decision of the District Court, and that the Supreme Court would not re-examine any questions coming up from the District Court until they had first been passed upon by the Circuit Court. It was expressly held that a writ of error would lie to the Circuit Court to review its decision upon the merits, and the Court proceeded to say:

"Repeated decisions of this Court have established the rule that this Court has power to issue a mandamus in the exercise of its appellate jurisdiction, and that the writ will lie in a proper case to direct a subordinate Federal Court to decide a pending cause. Power to issue the writ of mandamus to the Circuit Courts is exercised by this Court to compel the Circuit Court to proceed to a final judgment or decree in a cause in order that this Court may exercise the jurisdiction of review given by law, and in the case of *Ex parte Bradstreet* this Court decided, Marshall, C. J. giving the opinion of the Court, that every party has a right to the judgment of this Court in a suit brought by him in one of the inferior courts of the United States, provided the matter in dispute exceeds the sum or value of two thousand dollars, and that the Court in such case will issue the writ to a Circuit Court or a District Court exercising Circuit Court powers, in a case where the subordinate Court had improperly dismissed the case requiring the Court to reinstate the case and to proceed to try and adjudge the issues between the parties. Examined as the case must be in the light of these authorities, it

is quite clear that the respondents, had they petitioned this Court for a mandamus instead of suing out a writ of error, would be entitled to a remedy in some one of the forms in which a remedy is granted in such a case."

From this statement of the case and extract from the decision of the Court, it will be at once seen that in this case, as in the others cited by petitioners, the mandamus was awarded solely on the ground that it was in aid of the appellate jurisdiction of the Court, and it will be apparent that neither of the cases cited can be any authority in the case at bar over which it is conceded that this Court has no appellate jurisdiction.

The case at bar, then, not falling within any of the classes of cases in which this Court awards the writ of mandamus, we respectfully submit that even if the order of the Circuit Court, dismissing the appeal, was erroneous, the petitioners can have no remedy in this form of proceeding.

The order of the Circuit Court dismissing the appeal was right.

In considering the motion to dismiss the appeal, the Circuit Judge had before him only the facts stated in the motion and shown in the transcript of the record of the appeal case which accompanied the motion. These facts were, in brief, that the appeal had been taken on the 17th day of December, 1879, when the Circuit Court was in session, holding its November term, and that, although the Court had been continuously in session from that time to the 29th of March, 1880, the date of filing the motion to dismiss, a period of over three months, the appeal had not been entered in the Circuit Court or any statement of the claim filed therein as required by law. The further facts, which are stated in Judge Drummond's answer, were also before him, that al-

though he had been personally holding the Circuit Court since the 18th day of March and was ready and willing to take up and hear the appeal, by a jury or otherwise, and had called the case for the purpose of disposing of it, from the calendar of pending cases prepared for him by the clerk, immediately after said 18th day of March, the petitioners had still failed to enter their appeal, or take any steps to prepare the same for hearing, and had offered no excuse for not proceeding in the cause except that the law did not require the appeal to be entered until the May term, 1880, before which time they refused to enter it.

The Bankrupt act contains several provisions regulating the manner and time in which decisions, made in the the course of the bankruptcy proceeding proper or in litigation growing out of it, may be reviewed in the superior courts to which appellate or supervisory power is given. Revised Statutes, U. S., 1875, 970, § § 4980, 4981, 4982, 4983, 4984, 4985, 4986, 4989.

By section 4980, appeals and writs of error are allowed from the District to Circuit Courts in all cases in law and equity where the debt or damages claimed amount to more than $500, and any supposed creditor whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the District Court to the Circuit Court.

By section 4981, it is provided that no appeal shall be allowed in any case from the District to the Circuit Court unless it is claimed and notice given to the Clerk of the Court, and to the appellee, within ten days after the entry of the decree or decision appealed from, nor unless the appellant at the time of claiming the same shall give bond.

By section 4982, it is provided "that such appeal shall be entered at the term of the Circuit Court which shall be

held within the District next after the expiration of ten days from the time of claiming the same."

The corresponding provision of the original bankrupt act was a part of section 8 of that statute, and read as follows:

"The appeal shall be entered at the term of the Circuit Court which shall be first held within and for the District next after the expiration of ten days from the time of claiming the same." 14 Statutes at Large, 520, ch. 176, § 8.

By section 4984, it is provided that a supposed creditor who takes an appeal to the Circuit Court from a decision of the District Court, rejecting his claim in whole or in part, shall, upon entering his appeal in the Circuit Court, file in the Clerk's office thereof a statement in writing of his claim, setting forth the same, substantially, as in a declaration for the same cause of action at law; and the assignee shall plead or answer thereto in like manner, and like proceedings shall thereupon be had in the pleadings, trial and determination of the cause, as in actions at law commenced and prosecuted in the usual manner, in the Courts of the United States.

Precisely the same provision was contained in the original bankrupt act. 14 Statutes at Large, 528, ch. 176, § 24.

By the Judiciary Act of 1789, writs of error or appeals could be taken from a District Court to a Circuit Court at any time within one year after the entry of the judgment. Revised Statutes, 1875, 112, § 635.

And the opposite party was entitled to twenty days' notice. Revised Statutes, 1875, 186, § 998.

There was evidently some object in view when so radical a change in the time of taking appeals in bankruptcy cases was made from the time allowed for appeals in other cases. When Congress cut down the time allowed for taking the

not be entered in the Circuit Court until the latter part of the ensuing term, a period of very nearly a year.

The case at bar itself could have been thus delayed. It was decided December 17, 1879, early in the November term. It need not, upon petitioners construction of the law, have been entered in the Circuit Court until the last day of the May term, 1880, a period of more than ten months. And when we add to these considerations the additional facts that under section 4984 appeals of this character are heard in the Circuit Court *de novo*, issues being formed as in an action at law commenced in that Court in the first instance, that a jury trial may be had and motions for a new trial made and heard, all of which will inevitably work delay, it will be seen that the construction contended for by petitioners, if admitted, will defeat the manifest policy of the law.

No construction leading to such a result, will be admitted unless the plain letter of the statute requires it. The letter of the statute not only does not, in our opinion, require it, but is plainly the other way. In the view contended for by petitioners section 4982 is wholly unnecessary; the appeal under the judiciary act of 1789 would have to be entered at the next term.

To convey the meaning contended for by petitioners, the section should read that the appeal shall be entered at the term of the Circuit Court which shall *begin* to be held next after the expiration of ten days from the time of claiming the same. The idea can be expressed only by this or some equivalent expression. The use of the expression, "which shall be *first* held next after the expiration of ten days from the time of claiming the same," in the provision contained in the original bankrupt act, and which was changed in the revision by omitting the word *first*, because it was under-

stood, as we may presume, to add nothing to the sense, does not convey the idea of *beginning* or *commencing* to be held, but is used in the same sense as the word *next* later in the sentence, to express the idea of order or juxtaposition, and was intended to exclude the intervention of a term of the Court between the one at which the appeal was taken and the one at which the appeal must be entered, for otherwise it seems to have been apprehended that as by the other language of the provision fixing the time of entering the appeal, it was not required in any case to be entered before ten days after it was taken, the law would be complied with if it was entered at any term which should be in session after the expiration of ten days, and an appellant desiring delay might, after perfecting his appeal by giving bond and notice, permit one or more terms of the Circuit Court to go by before entering his appeal. The idea of place and juxtaposition and nothing else, is certainly expressed by the word "next" which was contained in the original provision, and is retained in the revision, and that the word "first," which was dropped in the revision only, expressed the same idea we think is clear when we consider in addition to what has already been said, that its retention in the revision in place of the word "next" would not change the sense of the provision as it now stands. As Judge Drummond says in his opinion, delivered in sustaining the motion to dismiss, the expression "first held next after the expiration of ten days," means precisely the same thing as "held next after the expiration of ten days," or "held first after the expiration of ten days." In each and all of these forms of expression, in the connection in which they are used in the bankrupt law, the word first, as we have before said, conveys the idea of order or place, or proximity in place, the same as the word next.

In this view, then, is not a term of the Circuit Court which is in session when an appeal is taken, and which continues in session for more than ten days thereafter, that term of the Court which is next or first holden after the expiration of the ten days. Is it necessary, to meet the requirement that the appeal shall be entered at the term which shall be *held* after the expiration of ten days, that it must also be a term which shall *begin*, in the sense of having its inception, after the expiration of the ten days. The term of the Circuit Court of Indiana, which was in session and being held when the ten days from the time of claiming this appeal expired, was a term of that Court held after the expiration of that ten days. It is true it was the November term, 1879, and had begun before, but this does not prevent it from filling the requirement of law as being a term held after the expiration of the ten days and as being the term next or first held after that time. We do not see the force of the argument that a term of Court which continues to be held after a certain date can not be called the term which is *next* held after that date, simply because it had in part been held before that date.

Petitioners cite no authority in support of their construction, while in opposition to it, in addition to the plain letter of the statute, and the decisions of this Court, already cited, showing the policy of Congress, we have the contemporaneous construction given by this Court, of this particular provision, in framing its orders in bankruptcy under section 10 of the original bankrupt act (Revised Statutes 1875, § 4990), by which power was given to this Court to frame rules and general orders to regulate, among other things, the practice and procedure upon appeals.

Immediately upon the passage of the law, the Court adopted, for the purpose of regulating appeals, general order No. 26, which, as to appeals by creditors from orders disallowing their claims, is as follows:

"Any supposed creditor who takes an appeal to the Circuit Court from a decision of the District Court rejecting his claim, in whole or in part, according to the provisions of the eighth section of the act, shall give notice of his intention to enter the appeal within ten days from the entry of the final decision of the District Court upon his claim, *and he shall file his appeal in the Clerk's office of the Circuit Court within ten days thereafter*, setting forth a statement in writing of his claim in the manner prescribed by said section, and the assignee shall plead or answer thereto in like manner within ten days after the statement shall be filed."

Desty's Federal Procedure, 352.

From this there can be no doubt that this Court then understood the statute just as we now understand it.

The Circuit Courts have, in several cases, passed upon this question, and while such decisions are not binding upon this Court, yet they are the decisions of the Courts, which, by law, are clothed with the final determination of all such cases, and, in this view, as well as for the ability of the judges presiding in them, their decisions are entitled to great weight. In no single case has it been decided that the construction given in general order No. 26, and for which we now contend, is erroneous, but while some cases hold that the order is merely directory, the majority hold that it and the statute are mandatory, and in all cases it is agreed that the statute and general order are in harmony.

In *in re Coleman*, 7 Blatchf. 192, it is held that the statute and the rule require the appeal to be entered and statement filed within ten days after the appeal is claimed, if a term of the Circuit Court is then in session, and, there being no showing that this had been done, the appeal was dismissed, the Court holding that it had no jurisdiction to hear it.

In re Place & Sparkman, 4 N. B. R. 541. Here the appeal was perfected by the giving of bond and notice as required by law, but it was not followed up by entering the appeal and filing a statement in writing of the claim "within the ten days limited thereof," as in the language of the Court, "both the statute and rule require shall be done." The assignee moved to dismiss the appeal for this omission, and the motion was sustained.

In neither of these cases does it appear that the Circuit Court was in session at the expiration of the ten days after the appeal was taken, in which respect the case at bar presents a much stronger case for the application of the law as laid down in these cases.

Baldwin v. *Rapplee*, 5 N. B. R., 19, cited by petitioners, simply holds that the requirement that the appeal shall be entered at the next Circuit is merely directory, and as the appeal had been properly taken, and the omission to enter it within the limited time was shown to have occurred in consequence of an agreement between the parties that it should not be entered, this was held to be a sufficient excuse, and the motion to dismiss was overruled. But the case clearly shows that whether the appeal shall be dismissed or not, is a question within the sound discretion of the Circuit Court, to be decided by it upon all the facts of excuse or otherwise brought before it and being such, and

this Court having no appellate jurisdiction, and the decision of the Circuit Court being conclusive, this Court can not by mandamus reverse that decision, in the absence of facts showing a flagrant abuse of discretion. To admit such power in this Court, would annul the statutory provision that the judgment of the Circuit Court shall in this class of cases be conclusive.

Barron v. *Morris, assignee,* 14 N. B. R. 371, also cited by petitioners, was a case where the appeal was perfected in time by giving the proper notice and bond. Upon a motion to dismiss because the appeal was not entered, and a statement in writing of the claim filed, within ten days after the appeal was claimed, it was shown that the record was so voluminous that the appeal could not be entered, or statement filed before the time at which they had been filed, which was on the 22d day of May, 1875. It was further shown that no term of the Circuit Court had been held, or been in session, after the appeal was taken until the first Monday of June, 1875, so that it appeared that the appellant had literally complied with the statute, by entering their appeal and filing their statement at the term held next after the appeal was taken, and furthermore that they had only failed to comply with the requirement of general order No. 26, that the appeal should be entered within ten days after it was taken, if it be understood to require this although no term of the Court had been held, because they could not procure a transcript of the record within that time.

The Court, Mr. Justice Bradley delivering the opinion, held that the " general order was merely directory, and as all the requirements of the statute had been complied with

the Court had jurisdiction of the appeal, and could hear it or not in its discretion, according as it may or may not be satisfied with the excuse that has been offered for the delay. Although the rule is merely directory, still it is the rule which governs the practice of this Court and, if disregarded, the appellee has a *prima facie* ground of dismissal." In view of the excuse shown, and as no Court had sat until after the appeal was entered, and no judge had been in attendance to try the case, and other considerations adverted to in the opinion, the motion to dismiss was overruled.

We are perfectly willing that Judge Drummond's decision shall be tested by this case alone, as to whether it was right or wrong. There is no intimation that the requirements of the statute are directory. On the contrary, the implication is plain that the Court regards them as mandatory, because it is held that the jurisdiction of the Court to hear the appeal depended solely upon the fact that all the requirements of the statute had been complied with. And while it is said that the general order is merely directory, it is expressly decided that it nevertheless governs the practice of the court, and, unless sufficient excuse for not complying with its requirements is shown, the appeal must be dismissed. In the case at bar the statutory requirement which is mandatory, and upon which the jurisdiction of the court depends, (see also, upon this point, *In Re Alexander*, 3 N. B. R. 29), has been disregarded. For over three months, during all which time the Circuit Court was in session, petitioners utterly refused to enter their appeal. If they had complied with the statute and were only charged with not proceeding according to the requirements of the general order, an omission which might be excused, within

the discretion of the Circuit Judge, upon a sufficient showing, what excuse or reason did they offer? None whatever. On the contrary, as he states in his answer, which is not controverted, they refused to enter the appeal or even apply for leave to enter it, and offered no excuse for not entering it except that under the law, as they construed it, they were not bound to proceed in the case until a subsequent term of the Court. Was not the Circuit Court, in this condition of the case, bound to enforce the general order which governed the practice of his Court, and dismiss the appeal? But in this case as in *Baldwin v. Rapple*, it is distinctly held that the whole matter is one involving the discretion of the Circuit Judge, and in that view is it not clear that the decision of the Circuit Judge is conclusive, so far as to being reviewed by mandamus, even if the statute did not expressly so provide?

Even the excuse which is now made by petitioners in the first instance in this Court, that the appeal was not entered because Judge Drummond had no jury to try it, is shown to be without any foundation in fact, as Judge Drummond expressly states that he could have tried the case by jury if it had been entered properly and put at issue. And it is shown further that the absence of a jury did not in any way influence petitioners, because they expressly aver that when they took their appeal they intended to enter it at the May term, 1880, and Judge Drummond shows that when he first called their attention to the case they refused to proceed, for no other reason than that they were not bound to do so until the May term, 1880.

We therefore respectfully submit, upon this branch of the case, that the order dismissing the appeal was right.

There are many facts averred in the petition and accompanying exhibits, which petitioners claim to be material as establishing that the assignees are barred by the statute of limitations and equitably estopped from contesting the validity of the debt claimed by petitioners against the bankrupt estate. Not one of these facts was brought before the District Court when the case was tried upon its merits. If they have any materiality whatever, that Court was the proper one to which they should have been presented.

None of them were brought before the Circuit Court when it considered the motion to dismiss. If they had any pertinency to that controversy they should have been shown at that time. In what view they can be said to have any materiality or pertinency at the stage the controversy has now reached, we are unable to see. If this Court, upon a writ of mandamus, can take cognizance in the first instance of matters of fact which it is claimed tend to show that the petitioners have a valid debt against the bankrupt estate of William McEwen, it will go far to establish the novel proposition that the jurisdiction of this Court to hear and determine claims against bankrupt estates is a original and concurrent with that of the District and Circuit Courts.

But without reference to the materiality of these allegations contained in the petition and exhibits, the counter statements in reference thereto, contained in the answer of Judge Drummond, show that they are not true in point of fact.

We respectfully ask that the peremptory writ of mandamus be denied.

SHELLABARGER & WILSON,
HEROD & WINTER,
Attorneys for Respondent.

m. 8 13

14-303 Filed.

Dec. 8. 1881

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~737~~ ~~1434~~ 175

WILLIAM LIBBY AND GEORGE FOX, SURVIVORS OF ALEXANDER T. STEWART AND FRANCIS WARDEN, DECEASED, PLAINTIFFS IN ERROR,

vs.

LEWIS C. HOPKINS AND MARIA W. HOPKINS, AND ISAAC M. JORDAN, TRUSTEE IN BANKRUPTCY OF LEWIS C. HOPKINS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED APRIL 12, 1879.

Wood

SUPREME COURT OF THE UNITED STATES.

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WILLIAM LIBBY AND GEORGE FOX, SURVIVORS OF ALEXANDER T. STEWART AND FRANCIS WARDEN, DECEASED, PLAINTIFFS IN ERROR,

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IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the supreme court of the State of Ohio, greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court of Ohio before you or some of you, being the highest court of law or equity in the said State in which a decision could be had in the said suit between William Libby and George Fox, survivors of Alexander T. Stewart and Francis Warden, plaintiffs in error, and Lewis C. Hopkins and Maria W. Hopkins and Isaac M. Jordan, trustee in bankruptcy of Lewis C. Hopkins, defendants in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised by, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of or commission
2 held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of said plaintiffs in error, as by their complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

3 Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court, the twenty-seventh day of January, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] THOS. AMBROSE,
Clerk U. S. Circuit Court, S. D. Ohio.

STATE OF OHIO,
City of Columbus, ss:

To the honorable Supreme Court of the United States:

Pursuant to the command of your within writ of error directed to us, we, under our seal, distinctly and openly, the record and proceedings within mentioned, with all things concerning the same, before the judges within named, in a certain authenticated transcript to this writ attached, do send as within we are commanded.

In witness whereof I, Richard J. Fanning, clerk of the supreme court of Ohio, have set my hand and the seal of said court this 5th day of February, A. D. 1879.

[SEAL.] RICHARD J. FANNING,
Clerk of the Supreme Court of Ohio.

(Indorsed:) Wm. Libby et al., survivors of A. T. Stewart, vs. L. C. Hopkins, et al. Writ of error.

Allowed by—

W. W. JOHNSON,
Ch. Judge Sup. Ct. Commission of Ohio.
WM. WHITE,
Chief Justice of Supreme Court of Ohio.

4 THE STATE OF OHIO:

At a supreme court of the State of Ohio, begun and held in the court room in the capitol at the city of Columbus, within and for said State, of Monday, the second day of December, in the year of our Lord one thousand eight hundred and seventy-eight, before the honorable William White, chief justice, Hon. W. J. Gilmore, Hon. George W. McIlvaine, Hon. W. W. Boynton, and the Hon. John W. Oakey, judges of said court; among other proceedings were the following, to wit:

Error to the superior court of Cincinnati.

A. T. STEWART AND CO.
vs.
L. C. HOPKINS.

Be it remembered that heretofore, to wit, on the 10th day of December, A. D. 1872, A. T. Stewart & Co., by leave of court first had and obtained, filed in the office of the clerk of our said supreme court their petition in error, with exhibits attached, against the said L. C. Hopkins, which petition and exhibits were in the words and figures following, to wit:

Pet. in error.

Supreme court of the State of Ohio.

ALEXANDER T. STEWART, FRANCIS WARDEN, George Fox and William Libby, partners as A. T. Stewart and Company, plaintiffs in error,
5
against
LEWIS C. HOPKINS, MARIA W. HOPKINS, HIS wife, Isaac M. Jordan, and George Maxwell, trustees, defendants in error.
} Petition in error.

The said plaintiffs in error complain of the said defendants in error, for that at the June term, A. D. 1872, of the superior court of Cincinnati, Ohio, in general term sitting, a judgment was rendered by the consideration of said court, in several particulars, in favor of said defendants in error and against the said plaintiffs in error, in a certain action then pending in said court, wherein the said plaintiffs in error were plaintiffs, and the said defendants in error were defendants, an authenticated transcript of the docket and journal entries, and of the final decree made and entered in the case, together with a printed copy of the pleadings and testimony in the case, agreed to by counsel as being true and correct copies thereof, are filed herewith, marked Exhibit A, and made a part of this petition.

And said plaintiffs in error aver that there is error in said proceedings, record, and decree, in this, to wit:

6 First. That said court erred in finding and decreeing that said payment made by said Lewis C. Hopkins, on November 12, 1867, was legally a credit on said note under the circumstances.

Second. That said court erred in finding and decreeing that said payment made by said Lewis C. Hopkins on December 23, 1867, of $17,000.83, was legally a credit on said note under the circumstances.

Third. That said court erred in finding and decreeing that said sum of $10,000 remitted by said Lewis C. Hopkins, and received by plaintiffs on December 31, 1867; and said sum of $58,025.00 remitted by said Lewis C. Hopkins, and received by plaintiffs on January 2, 1868, though not applicable to the note, could not be held by plaintiffs as against the trustees in bankruptcy of said Lewis C. Hopkins, as a set-off or cross-demand to the general indebtedness of said Lewis C. Hopkins to said plaintiffs, on an account in a much larger sum; and in rendering a judgment in favor of said Isaac M. Jordan and George Maxwell, trustees, and against the plaintiffs for the amount thereof.

Fourth. That said court erred in overruling the motion of said plaintiffs to set aside the said decree, and for a new trial, upon the points in said motion stated.

Fifth. For other reasons.

7 Plaintiffs in error, therefore, pray that the said judgment, in the particulars mentioned, may be reversed, and that they may be restored to all things they have lost by reason thereof.

PERRY & JENNEY,
COLLINS & HERRON,
For Plaintiffs in Error.

Waiver of process in error.

We hereby waive the issuing and service of process in error on the within-named defendants in error.

JORDAN, JORDAN & WILLIAMS,
Of Counsel for Defendants in Error.

Bill of exceptions.

In the general term of the superior court of Cincinnati.

ALEXANDER T. STEWART, FRANCIS WARDEN, George Fox, and William Libbey, plaintiffs,
against
LEWIS C. HOPKINS AND MARIA W. HOPKINS, his wife, and George Maxwell and Isaac M. Jordan, trustees of the estate of the said Lewis C. Hopkins, a bankrupt, defendants.

Be it remembered that this action was tried in the general term upon the testimony, and no other, contained in the printed volume hereunto annexed, marked Exhibit A, and made a part of this bill; the parties consenting that said volume should be substituted for the certified statement of all the evidence made, and signed by the judge sit-

8 ting in special term, which statement has been lost, and no copy thereof can be found, and each party, the plaintiffs upon the one side, and George Maxwell and Isaac M. Jordan, trustees, upon the

other, having excepted to the finding and judgment of the court, as the same appears of record, as well in matters of fact as of law, and also excepted to the order of the court overruling their motions (respectively) to set aside the finding and judgment aforesaid, and to grant a new trial of the issues, this bill containing all the testimony adduced at the said trial is, upon the request and by the consent of both parties, to be regarded as a bill of exceptions, taken by each of them respectively, and is at the request of each allowed, signed, and sealed as a bill of such exceptions, and is made a part of the record. This at the term of trial; that is, the term of June, in the year eighteen hundred and seventy-two.

[SEAL.] M. B. HAGANS, *P. J.*
[SEAL.] T. O. O'CONNOR, *Judge.*
[SEAL.] ALFRED YAPLE, *Judge.*

No. 1669 in gen'l term. No. 23518. Superior court. Stewart et al., pl'ff, against Hopkins et al., def'ts. Bill of exceptions. Correct. Collins & H. 1872, June 20. M. 429. G. T. Filed, allowed, & made part of the record. H. H. Tinker, cl'k; Wild, dep'ty.

9 *Exhibit A to bill of exceptions.*

Superior court of Cincinnati, Hamilton County, Ohio.

ALEXANDER T. STEWART, FRANCIS WARDEN, George Fox, and William Libbey, partners, as A. T. Stewart & Co., plaintiffs, *against* LEWIS C. HOPKINS, MARIA W. HOHKINS, HIS wife, Isaac M. Jordan, and George Maxwell, trustees, defendants.	23513.

Record of pleadings and testimony in the above case, printed by agreement of the parties. Collins & Herron, and Perry & Jenny, attorneys for plaintiffs; George E. Pugh, Isaac Dayton, and Jordan, Jordan & Williams, attorneys for defendants.

10 It is hereby agreed that this printed record contains full copies of the pl'adings in this case upon which it was heard, and that this printed record, and copies thereof, may be used on application to the supreme court of Ohio for leave to file a petition in error therein, and also upon the hearing of the case in that court, in case such leave be given, in place of the original pleadings or authenticated copies thereof.

JORDAN, JORDAN & WILLIAMS,
Att'ys for Defendants.
PFRRY & JENNEY,
Of Attorneys for Plaintiffs.

11 *Petition.*

Superior court of Cincinnati.

STATE OF OHIO,
Hamilton County, ss:

ALEXANDER T. STEWART, FRANCIS WARDEN, George Fox, and William Libbey, partners, as A. T. Stewart & Co., plaintiffs,
against
LEWIS C. HOPKINS, MARIA W. HOPKINS, his wife, Isaac M. Jordan, and George Maxwell, trustees, defendants.

Plaintiffs state that they are a firm doing business in the city of New York under the style of A. T. Stewart & Co., that, on the 6th day of June, 1866, said defendant, Lewis C. Hopkins, being indebted to plaintiffs in the sum of one hundred thousand dollars, for so much money then and there loaned by plaintiffs to said Hopkins, did there, to wit, at New York, execute and deliver to plaintiffs his promissory note of that date, payable to the order of plaintiffs, for said sum with interest, at the rate of seven per cent. per annum, payable quarterly. The following is a copy of said note, and of all endorsements thereon:

$100,000.] NEW YORK, *June* 6, 1866.

On demand, after date, I promise to pay to the order of Alex. T.
12 Stewart & Co. one hundred thousand dollars with interest from date, at the rate of seven per cent. per annum, payable quarter-yearly, until paid; for value received.

L. C. HOPKINS.

[Internal revenue stamps, $100, cancelled.

(Endorsed or entered at foot of note:)

May 4, 1868, received $25,000 on account of the above.

A. T. S. & Co.,
Per H. H.

Plaintiffs further say that, at the time when said note was made, the legal rate of interest in New York, where said note was made, was seven per cent. per annum.

Plaintiffs further say that there is now due to them on said note from said defendant, L. C. Hopkins, after applying all proper credits, the sum of one hundred thousand dollars, with interest from June 6, 1866, at seven per cent. per annum, quarterly, less twenty-five thousand dollars paid on account thereof, and endorsed thereon May 4, 1867.

Plaintiffs further state that said defendants, L. C. Hopkins and Maria W. Hopkins, his wife, in order to secure to plaintiffs the payment of said note, and in conformity with the agreement to that effect, made at the time said money was loaned, and said note executed and delivered, did on the 22nd of June, A. D. 1866, execute in due form of law, and deliver to Alex. T. Stewart, one of said plaintiffs, and for the account and benefit of the plaintiffs, said firm, six certain mortgages on premises situate in Cincinnati, Hamilton County, Ohio, and described as follows, to wit:

First. The undivided two-elevenths (2-11) of a certain lot on the north-

east corner of Fifth and Vine streets, Cincinnati, and being thirty-four feet and six inches in front on the north side of Fifth street, by sev-
13 enty-four feet, more or less, in depth on the east side of Vine street to the center of a partition wall; and being a part of in-lot, number one hundred and ninety-three (193) on the original plan of Cincinnati, subject to the dower estate of Lucy Ann Williams, and the life-estate of Mary Ann Field; and being the same property conveyed to L. C. Hopkins by two deeds, one from P. G. Weatherby, dated August, 1862, recorded in book 276, page 252; the other, from James S. Weatherby, deed of November 6, 1862, recorded in book 275, page 625, in records of Hamilton County.

Second. All the leasehold interest of said Lewis and Maria W. Hopkins in two lots, described as follows: Commencing on the west side of Elm street, in Cincinnati, eighty-four (84) feet southwardly from the southwest corner of Elm and Fourth streets in said city; thence westwardly along the south line of a lot leased by J. H. Barker to L. C. Hopkins, one hundred and twenty (120) feet, more or less, to a lot purchased by J. H. Barker of H. M. Harbaugh; thence southwardly along the east line of said lot eighty-four (84) feet, more or less, to McFarland street; thence on the north line of McFarland street east one hundred and twenty feet (120), more or less, to Elm street; thence north on the west side of Elm street eighty-four (84) feet, more or less, to the beginning, and being the same property leased to said Hopkins by J. H. Barker and wife, February 2, 1866, by deed recorded in Lease Book 28, page 345, of the records of Hamilton County.

Third. All the leasehold interest of L. C. Hopkins and wife in a certain lot in Cincinnati, commencing at a point on the west side of Elm street, twenty-eight (28) feet south of the southwest corner of Elm and Fourth streets; thence running along the south line of the lot formerly known as the Austin property, sixty (60) feet, more or less, to the lot
14 conveyed to Jonathan H. Barker by sheriff's deed from estate of Daniel Robinson; thence southwardly fifty-six (56) feet, more or less, to the north line of a lot formerly belonging to Joshua L. Wilson; thence along the north line of the said Wilson lot, sixty (60) feet, more or less, to Elm street; thence northwardly on the west side of Elm street fifty-six (56) feet, more or less, to the place of beginning; and being a part of the property leased by J. H. Barker to said Hopkins in Lease Book 28, page 345, of the records of said county.

Fourth. All the leasehold interest of said L. C. Hopkins and wife in a certain lot in Cincinnati, commencing at a point on the south line of Fourth street, sixty (60) feet west of the southwest corner of Fourth and Elm streets; thence on said line of Fourth street westwardly forty (40) feet, more or less, to the east line of the property conveyed to the widow of Daniel Robinson, deceased, by the sheriff; thence south at right angles to the line of Fourth street eighty-four (84) feet, more or less, to a lot formerly belonging to Joshua L. Wilson; thence eastwardly along said line to a lot formerly belonging to Alexander McKenzie; thence north along the west line of the McKenzie lot, and of a lot formerly belonging to R. W. Keys, and a lot known as the Austin lot, to the place of beginning; and being the same conveyed to L. C. Hopkins by lease from J. H. Barker, recorded in Lease Book No. 23, page 345, in the records of said county.

Fifth. All that lot situate on the southwest corner of Fourth and Elm streets, in the city of Cincinnati, beginning on said corner; thence running southwardly with Elm street twenty-eight (28) feet; thence

westwardly parallel with Fourth street sixty feet, more or less, to the line formerly of Tristam Folger; thence parallel with Elm street along said line twenty-eight (28) feet to Fourth street; thence eastwardly
with Fourth street sixty (60) feet, more or less, to the beginning;
15 and being the same property conveyed to said Hopkins by James
Austin and wife by deed of October 26, 1865, recorded in book 322, page 464, of the records of Hamilton County, Ohio.

Sixth. Lots numbered twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26), twenty seven (27), twenty eight (28), twenty-nine (29), thirty (30), thirty-one (31), thirty-two (32), and a strip of ground off the east end of lots thirty-three (33) and thirty-four (34), of one hundred feet in width, fronting on Josephine street, and running through from Saunders street to Carmalt street, as laid down on the plat and subdivision of the estate of John A. Bigelow, deceased, situate in the city of Cincinnati, which plat is on file in the records of the probate court, and being a part of the property conveyed to L. C. Hopkins by John B. Warren, administrator of John A. Bigelow, by deed of June 23, 1862, recorded in book 276, page 177, of the records of said county.

The condition of each of said mortgages were substantially the same as that of the first, namely: "If the said Lewis C. Hopkins shall cause to be paid to the said Alex. T. Stewart a certain promissory note for one hundred thousand dollars, dated New York, June 6, 1866, and payable on demand after date to the order of Messrs. Alex. T. Stewart & Co., with interest from date at the rate of seven per cent. per annum, payable quarterly until paid, for value received, the said note being given to secure the payment of borrowed money in the amount of one hundred thousand dollars, then these presents shall be void."

Said mortgages were all left for record with the recorder of Hamilton County, Ohio, on the 2d day of January, 1868, and duly recorded in book 290, page 472, and following, of mortgage records; and copies thereof are herewith filed, marked Exhibits A, B, C, D, E, and F, respectively.

Plaintiffs further state that on the thirtieth day of March, 1868,
16 said L. C. Hopkins was duly adjudged a bankrupt in the United
States district court in and for the southern district of Ohio, and thereafter, on the 30th day of April, 1868, the said defendants, Isaac M. Jordan and George Maxwell, were duly appointed his trustees in bankruptcy, and are now acting as such, claim to have some title or interest in each of the several lots hereinabove described.

Wherefore plaintiffs ask that an account may be taken of the amount now due to them from said L. C. Hopkins on said mortgage note; that the amount so found due may be adjudged the first and best lien on said mortgaged premises; and that if the same be not paid within a day to be named after such finding, the said premises, or so much thereof as may be necessary, may be ordered to be sold, and that plaintiffs' said claim with costs may be satisfied from the proceeds, and for such other and further relief as equity and the nature of the case may require.

COLLINS & HERRON,
Attorneys for Plaintiff.

STATE OF NEW YORK,
City and County of New York, ss:

William Libbey, one of said plaintiffs, being duly sworn, says that he believes the statements of the foregoing petition are true.

WILLIAM LIBBEY.

Sworn to before me and subscribed in my presence this 31st August, 1868.

J. B. NONES,
Commissioner of the Commonwealth of Ohio for New York, No. 262 Broadway.

17 *Answer and counter-claim.*

Superior court of Cincinnati.

ALEXANDER T. STEWART, FRANCIS WARDEN, George Fox, and William Libbey, partners, as A. Stewart & Co., plaintiffs,
against
LEWIS C. HOPKINS, MARIA W. HOPKINS, George Maxwell, and Isaac M. Jordan, trustees, defendants.

Said George Maxwell and Isaac M. Jordan aver that on the 29th day of February, A. D. 1868, James M. Billings, Edward J. Chaffee, and George H. Shreve, certain of the creditors of the said Lewis C. Hopkins, filed their petition against him in the district court of the United States for the southern district of Ohio, alleging that prior to that time he had committed an act of bankruptcy; that in said proceedings on March 30, A. D. 1868, the said Lewis C. Hopkins was adjudged by the said court to have become a bankrupt, as stated in said petition, and as such subject to the provisions of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," passed March 2, 1867; that afterward, on the 30th day of April, A. D. 1868, such further proceedings were had in conformity to the forty third section of said act, that they, the said George Maxwell and Isaac M. Jordan, were duly appointed by the said court trustees in bankruptcy of the said Lewis C. Hopkins, and have since been duly qualified as such, and that thereupon the said Lewis C. Hopkins did, under
18 oath, convey, transfer, and deliver to them as such trustees as aforesaid all his property and estate, and that by virtue of said conveyance and by force of the act of Congress above mentioned they are entitled to have and to hold the property and estate of said bankrupt in the manner and for the purposes specified in said act.

First. Said trustees admit that on or about June 6, 1866, the said Lewis C. Hopkins executed and delivered to the said plaintiff the promissory note for $100,000, mentioned in the petition, but they deny that the consideration of the same was money loaned to said Hopkins by the said plaintiffs.

They aver that the said plaintiffs were the bankers and correspondents of said Hopkins in New York City, and as such agreed to give him credit on his account with them for the sum of $100,000, and that such promise formed and was the only consideration on which said note was made.

Second. Said trustees further aver that the act of Congress approved June 30, 1864, and in force at the time said note was made and delivered, provided that there should be levied, collected, and paid upon every note so made and delivered a duty of .05 cents on each $100 for which such note was given, and further provided that any person making, signing, receiving, or accepting any such promissory note without the same being duly stamped or having thereon an adhesive stamp for

denoting the duty chargeable thereon with intent to evade the provisions of said act, should forfeit the sum of $200, and that such promissory note should be deemed invalid and of no effect. They further aver that by the provisions of said act the duty on said note of $100,000 was $1,000; that the same was not levied, collected, or paid thereon, and that said note was signed and accepted without having been stamped and without having thereon an adhesive stamp for denoting the
19 duty chargeable thereon, and with intent to evade the provisions of said act, and that by reason thereof said note was and is void, invalid, and of no effect.

Third. Said trustees aver that the said Hopkins paid and the said A. T. Stewart & Co. received on account of said note and the interest due thereon the following sums of money at the times following:

A. D. 1867, May 4th	$25,000 00
A. D. 1867, November 12th	10,000 00
A. D. 1867, December 23d	17,000 00
A. D. 1867, December 28th	10,000 00
A. D. 1867, December 30th	48,025 50
	$110,025 50

and that therefore the said note has been fully paid and discharged.

Fourth. Said trustees further aver that they admit the execution and delivery by the said L. C. Hopkins and wife to the said Alex. T. Stewart of the several mortgages mentioned in the petition, but they aver that the act of Congress of June 30, 1864, and in force at the time said mortgages were delivered, provided that there should be levied, collected, and paid upon each and every mortgage made and delivered a duty of ten cents for each $100 for which such mortgage was given, and that every person making, signing, executing, receiving, or accepting such mortgage without the same being duly stamped or without having thereon an adhesive stamp for denoting the duty chargeable thereon, with intent to evade the provisions of said act, shall forfeit $200, and the said mortgage should be deemed invalid and of no effect; that said act further provided that it should not be lawful to record any such instrument or mortgage required by law to be stamped, unless a stamp or stamps of the proper amount were fixed thereon, and that the
20 record of any such instrument or mortgage should be utterly void. Said trustees further say that by the provisions of said act the duty on each of the mortgages mentioned in the petition was $1,000; that said mortgages were signed, delivered, received, and accepted without having been stamped, and without having thereon an adhesive stamp for denoting the duty chargeable thereon and with intent to evade the provisions of said act, and that said mortgages were recorded without having affixed thereon any stamp or stamps as required by the provisions of said act of Congress. Said trustees therefore aver that said mortgages were invalid and of no effect, and that the record of the same was and is void.

Fifth. Said George Maxwell and Isaac M. Jordan, trustees as aforesaid, by way of counter-claim, aver that on or about June 6, 1866, for a long time before and thereafter, the said plaintiffs, A. T. Stewart & Co., were merchants trading in dry goods at wholesale in the city of New York, and the said Lewis C. Hopkins was a merchant trading in dry goods at wholesale and retail in Cincinnati, Ohio; that the said Hopkins was largely indebted on the 6th day of June, 1866, to said A. T.

Sworn to before me and subscribed in my presence this 31st August, 1868.

J. B. NONES,
Commissioner of the Commonwealth of Ohio for New York, No. 262 Broadway.

17 *Answer and counter-claim.*

Superior court of Cincinnati.

ALEXANDER T. STEWART, FRANCIS WARDEN, George Fox, and William Libbey, partners, as A. Stewart & Co., plaintiffs,
against
LEWIS C. HOPKINS, MARIA W. HOPKINS, George Maxwell, and Isaac M. Jordan, trustees, defendants.

Said George Maxwell and Isaac M. Jordan aver that on the 29th day of February, A. D. 1868, James M. Billings, Edward J. Chaffee, and George H. Shreve, certain of the creditors of the said Lewis C. Hopkins, filed their petition against him in the district court of the United States for the southern district of Ohio, alleging that prior to that time he had committed an act of bankruptcy; that in said proceedings on March 30, A. D. 1868, the said Lewis C. Hopkins was adjudged by the said court to have become a bankrupt, as stated in said petition, and as such subject to the provisions of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," passed March 2, 1867; that afterward, on the 30th day of April, A. D. 1868, such further proceedings were had in conformity to the forty third section of said act, that they, the said George Maxwell and Isaac M. Jordan, were duly appointe l by the said court trustees in bankruptcy of the said Lewis C. Hopkins, and have since been duly qualified as such, and that thereupon the said Lewis C. Hopkins did, under
18 oath, convey, transfer, and deliver to them as such trustees as aforesaid all his property and estate, and that by virtue of said conveyance and by force of the act of Congress above mentioned they are entitled to have and to hold the property and estate of said bankrupt in the manner and for the purposes specified in said act.

First. Said trustees admit that on or about June 6, 1866, the said Lewis C. Hopkins executed and delivered to the said plaintiff the promissory note for $100,000, mentioned in the petition, but they deny that the consideration of the same was money loaned to said Hopkins by the said plaintiffs.

They aver that the said plaintiffs were the bankers and correspondents of said Hopkins in New York City, and as such agreed to give him credit on his account with them for the sum of $100,000, and that such promise formed and was the only consideration on which said note was made.

Second. Said trustees further aver that the act of Congress approved June 30, 1864, and in force at the time said note was made and delivered, provided that there should be levied, collected, and paid upon every note so made and delivered a duty of .05 cents on each $100 for which such note was given, and further provided that any person making, signing, receiving, or accepting any such promissory note without the same being duly stamped or having thereon an adhesive stamp for

denoting the duty chargeable thereon with intent to evade the provisions of said act, should forfeit the sum of $200, and that such promissory note should be deemed invalid and of no effect. They further aver that by the provisions of said act the duty on said note of $100,000 was $1,000; that the same was not levied, collected, or paid thereon, and that said note was signed and accepted without having been stamped and without having thereon an adhesive stamp for denoting the
19 duty chargeable thereon, and with intent to evade the provisions of said act, and that by reason thereof said note was and is void, invalid, and of no effect.

Third. Said trustees aver that the said Hopkins paid and the said A. T. Stewart & Co. received on account of said note and the interest due thereon the following sums of money at the times following:

A. D. 1867, May 4th	$25,000 00
A. D. 1867, November 12th	10,000 00
A. D. 1867, December 23d	17,000 00
A. D. 1867, December 28th	10,000 00
A. D. 1867, December 30th	48,025 50
	$110,025 50

and that therefore the said note has been fully paid and discharged.

Fourth. Said trustees further aver that they admit the execution and delivery by the said L. C. Hopkins and wife to the said Alex. T. Stewart of the several mortgages mentioned in the petition, but they aver that the act of Congress of June 30, 1864, and in force at the time said mortgages were delivered, provided that there should be levied, collected, and paid upon each and every mortgage made and delivered a duty of ten cents for each $100 for which such mortgage was given, and that every person making, signing, executing, receiving, or accepting such mortgage without the same being duly stamped or without having thereon an adhesive stamp for denoting the duty chargeable thereon, with intent to evade the provisions of said act, shall forfeit $200, and the said mortgage should be deemed invalid and of no effect; that said act further provided that it should not be lawful to record any such instrument or mortgage required by law to be stamped, unless a stamp or stamps of the proper amount were fixed thereon, and that the
20 record of any such instrument or mortgage should be utterly void. Said trustees further say that by the provisions of said act the duty on each of the mortgages mentioned in the petition was $1,000; that said mortgages were signed, delivered, received, and accepted without having been stamped, and without having thereon an adhesive stamp for denoting the duty chargeable thereon and with intent to evade the provisions of said act, and that said mortgages were recorded without having affixed thereon any stamp or stamps as required by the provisions of said act of Congress. Said trustees therefore aver that said mortgages were invalid and of no effect, and that the record of the same was and is void.

Fifth. Said George Maxwell and Isaac M. Jordan, trustees as aforesaid, by way of counter-claim, aver that on or about June 6, 1866, for a long time before and thereafter, the said plaintiffs, A. T. Stewart & Co., were merchants trading in dry goods at wholesale in the city of New York, and the said Lewis C. Hopkins was a merchant trading in dry goods at wholesale and retail in Cincinnati, Ohio; that the said Hopkins was largely indebted on the 6th day of June, 1866, to said A. T.

Stewart & Co. in the sum of about $150,000, and was also largely indebted to other persons, which indebtedness he was unable to pay.

They further say that the said Hopkins had entered into a contract with B. Simon & Co. for a lease of the lot at the southwest corner of Fourth and Race streets and of the new and extensive buildings thereon for the term of five years from August the 1st, 1866, at the annual rent of $30,000, and intended and expected to buy from the said A. T. Stewart & Co. and others a large amount of merchandise on credit; that the said A. T. Stewart & Co. were at the said time the bankers and correspondents of said Hopkins, and on friendly and confidential terms with him, and fully acquainted with the condition of his affairs and with his plans
21 and intentions, as above stated; that the said A. T. Stewart & Co. and the said Hopkins were well aware of the risk and uncertainties of the business in which said Hopkins was about to embark, and apprehensive that the said business might not be successful, entered into an agreement by which the said A. T. Stewart & Co. were to, and did, give to the said Hopkins a credit upon his private account with them in the sum of $100,000, and the said Hopkins was to execute to them the note sued on in this case; that it was the expectation and understanding that all or a greater part of said sum of $100,000 should be applied and appropriated in payment of the indebtedness owing at that time by said Hopkins to said A. T. Stewart & Co., and they aver that in pursuance of said understanding on June 9, 1866, three days thereafter, the said Hopkins directed the said A. T. Stewart & Co. to appropriate and apply about $80,000 of said sum or credit of H. $100,000 to the payment of the indebtedness owing by him to them at the time said credit was given, although such indebtedness was not due.

Said trustees further say that said mortgages which it is claimed were intended to secure said note for $100,000 and which were in reality intended to secure any future indebtedness of the said Hopkins to said A. T. Stewart & Co., were not executed and delivered until June 22, 1866, and not recorded until January 2, 1868.

Said trustees further aver, that it was agreed between the said A. T. Stewart & Co. and the said Hopkins, and it was a condition on which they were given, that the said mortgages should be kept secret and not made public in order that the credit of said Hopkins might not be injured, that the same should not be recorded so long as the said Hopkins continued to pay interest on the said note of $100,000, nor without the knowledge and consent of said Hopkins, and the said mortgages were left unstamped so that they could not be recorded; that it was further agreed that the said Hopkins should have the right to
22 sell and dispose of any and all of said real estate covered by said mortgages, without the knowledge and consent of A. T. Stewart & Co.

Said trustees further say that said Hopkins did pay all the interest due upon said notes according to the terms of the same, and that the said mortgages were recorded without the knowledge or consent of said Hopkins and contrary to the agreement between the said A. T. Stewart & Co. and said Hopkins, and that the said Hopkins sold the greater part of the real estate covered by said mortgages, and used the proceeds for his own purposes.

Said trustees further aver that said mortgages were made and executed to said A. T. Stewart, in trust, for the benefit of the said A. T. Stewart & Co. in contemplation of insolvency, and were made to prefer the said A. T. Stew' & Co. to the other creditors of said Hopkins, and

were made to delay and hinder the other creditors of the said Hopkins in the collection of their claims.

Said trustees further say that the said Lewis C. Hopkins has paid said note and mortgages to A. T. Stewart & Co. as follows: May 4, 1867, $25,000; November 12, 1867, $10,000; December 23, 1867, $17,000; December 28, 1867, $10,000; December 30, 1867, $48,025.50; in all $110,025.50.

Said trustees further say that they are entitled to receive said amount for distribution among the creditors of the said Hopkins, that the said A. T. Stewart & Co. held the said money in trust for the benefit of the creditors of said Hopkins.

Sixth. Said trustees further aver that on the 2dd day of January, 1868, the same being the day upon which the several mortgages mentioned in the petition were left for record with the recorder of Hamilton County, Ohio, the said L. C. Hopkins was insolvent, and was contemplating bankruptcy, and that the said mortgages were made, executed, and recorded for the purpose of giving the said A. T. Stewart & Co. a
23 preference over the other creditors of said Hopkins; that said mortgages were so made, executed, and recorded in fraud of the provisions of the bankrupt act of March 2, 1867, and with a view to prevent the property of said Hopkins from coming to his assignees in bankruptcy, or from being distributed under the provisions of said act, all of which the said A. T. Stewart and A. T. Stewart & Co. had reasonable cause to know, and in fact did well know.

Seventh. Said trustees further say, by way of counter claim against said plaintiffs, that the said L. C. Hopkins paid to the said A. T. Stewart & Co. the following sums of money at the times following:

1867, November 12th	$10,000 00
1867, December 23d	17,000 00
1867, December 28th	10,000 00
1867, December 30th	48,025 50
In all the sum of	$85,025 50

Said trustees further aver that at the time said several payments were made the said Lewis C. Hopkins was insolvent and unable to pay his debts, and that he was adjudged a bankrupt by the district court of the United States for the southern district of Ohio, on March 30, 1868, upon a petition filed in said court against him February 29, 1868, as stated in the first part of this answer. The said trustees further aver that the payment of the said several sums of money were made by the said Lewis C. Hopkins to the said A. T. Stewart & Co. with a view to give them a preference over his other creditors on a certain claim made by them against him on a certain note for $100,000, dated June 6, 1866.

Said trustees further say that at the time said several payments
24 were made said A. T. Stewart & Co. had reasonable cause to believe that said L. C. Hopkins was insolvent, and that such payments were made in fraud of the provisions of the bankrupt act of March 2, 1867, and that such payments were made with a view to prevent the said several sums of money from being distributed among his creditors under said act.

Said trustees aver that they are entitled to recover said several sums of money for distribution among the creditors of said Hopkins. Said George Maxwell and Isaac M. Jordan, trustees as aforesaid, therefore pray judgment against said plaintiffs for the sum of $110,025.50, and in-

terest from December 30, 1867, that the mortgages set up in the petition may be adjudged invalid, and that the plaintiffs may be decreed to cancel the same of record, and for such other and further relief as may be equitable and just.

GEO. E. PUGH & ISAAC DAYTON,
JORDAN, JORDAN & WILLIAMS,
Attorneys for Hopkins' Trustees.

STATE OF OHIO,
Hamilton County, ss:

George Maxwell and Isaac M. Jordan, being sworn, say that they believe the facts stated in the foregoing answer and counter claim are true.

GEORGE MAXWELL.
ISAAC M. JORDAN.

Sworn to before me and signed in my presence this June 7, 1871.
[NOTARIAL SEAL.] G. MAXWELL, JR.,
Notary Public, Hamilton Co., Ohio.

25 *Reply.*

Superior court of Cincinnati.

A. T. STEWART & CO.
versus } 23513.
LEWIS C. HOPKINS ET AL.

Said plaintiffs, for reply to the answer and cross-petition of George Maxwell and Isaac M. Jordan, trustees, say:

First. They deny that the act of Congress, in force at the time said note was made, provided that a duty of $1,000 should be levied and paid on said note; they deny that said note was signed and accepted without having been stamped, and without having thereon an adhesive stamp for denoting the duty chargeable thereon, and with intent to evade the provisions of said act; and they deny that said note was or is void by reason of anything in said act of Congress contained.

Second. Plaintiffs deny the averment in the third defense set up, that they received on account of said note the several payments therein specified, excepting only the first, viz, $25,000, which payment was credited on said note as in their petition shown.

Third. Plaintiffs deny that said mortgages were void for want of revenue stamps as in the fourth defense of said defendants averred; and aver that no stamp was necessary upon said mortgages, the said
26 note, which they were given to secure, being itself stamped; and that any omission there may have been to put a sufficient stamp on said note was not caused by any intent on the part of the parties thereto to evade the provisions of said revenue act.

Fourth. Plaintiffs deny that said Hopkins was indebted to them on said 6th of June, 1866, in the sum of $150,000; and they deny that he was largely indebted to other persons at that time in sums which he was unable to pay; they deny that they were, at that time, fully acquainted with the condition and affairs of said Hopkins, or with his plans and intentions, further than that he was enlarging his business, and wanted to borrow from one of the plaintiffs said sum of $100,000, in order to make him perfectly easy in his business until he should sell

some of the large amounts of real estate which he then held, and which he represented to plaintiffs to be unincumbered.

Defendants deny that any agreement was entered into to give said Hopkins a credit of $100,000 on his cash account; but, on the contrary, a check was given him for said $100,000, without any agreement as to what use he should make of the same; they deny that there was any understanding that all, or a greater part of said $100,000, should be applied in payment of the indebtedness owing by said Hopkins to plaintiffs at that time, although said Hopkins did, in a few days thereafter, pay to plaintiffs a large sum on merchandise account, to wit, about $70,000, and received a discount on same, in accordance with the rules of the plaintiffs' business.

Plaintiffs deny that said mortgages were given to secure any future indebtedness of said Hopkins; they deny that it was a condition on which they were given that they should be kept secret, in order that the credit of said Hopkins might not be injured, or that there was any understanding that said mortgages should not be recorded so long as said Hopkins continued to pay interest on said note, nor until
27 said Hopkins was advised thereof and consented to such recording; they deny that it was agreed that said Hopkins should have the right to sell and dispose of any and all of said real estate, covered by the said mortgages, without the knowledge and consent of plaintiffs.

Plaintiffs deny that said Hopkins paid all the interest due upon said notes according to the terms of the same; and they deny that said mortgages were recorded contrary to any agreement between them and said Hopkins; they deny also that said Hopkins sold the greater part of the real estate covered by said mortgages, but admit that he did sell one small piece for the sum of $1,500, covered by a mortgage not set up in this suit, and aver that he did so without their knowledge or consent.

Plaintiffs deny that said mortgages were executed by said Hopkins in contemplation of insolvency, or with a view to prefer plaintiffs to his other creditors, or with a view to hinder and delay his creditors in the collection of their claims, or with a view to give plaintiffs a preference over the other creditors of said Hopkins, and in fraud of the provisions of the bankrupt act.

Fifth. Plaintiffs deny the payment by said Hopkins of the several sums in the sixth defence specified on said mortgage debt; but plaintiffs admit that said Hopkins remitted to them the following sums, on the dates following, viz:

1867, Nov. 9	$10,000 00
" Dec. 20	17,000 00
" " 28	10,000 00
" " 31	48,025 50

and that said remittances were received by plaintiffs in the regular course of business, on the third day after they were made, that
28 * said Hopkins requested said remittances to be credited on said mortgage debt, and, by false and fraudulent representations, obtained the consent of one J. M. Hopkins, a clerk in the employ of plaintiffs, to credit the first two of said remittances on said mortgage note; although said remittances were, in fact, never so credited, nor had plaintiffs any knowledge of such assent being procured, nor had said L. C. Hopkins any right to so direct the application of either of said remittances, having previously procured the delivery to him of large

amounts, to wit, nearly one hundred thousand dollars in value, in cash merchandise, on the express promise that he would appropriate all the surplus proceeds from the sales of same, with other goods, as they should be daily received, towards paying for said cash merchandise, and making his account for such merchandise, and for cash paid out by plaintiffs for him to other persons, satisfactory to plaintiffs; on which account plaintiffs immediately advised said L. C. Hopkins that they would not consent to apply said last two remittances to said mortgage debt; plaintiffs aver that they held all of said remittances subject to the order of said L. C. Hopkins, as they held all other monies remitted to or deposited with them by said L. C. Hopkins, at the time when the rights of said Jordan and Maxwell, trustees, accrued, and subject to such law of set-off as is provided in said bankrupt act.

Plaintiffs deny that said Hopkins made said several remittances with a view to give them a preference over his other creditors as averred; and aver that his sole motive and purpose were to remove said mortgage incumbrance from his real estate, that he might be able thereby to procure a more favorable settlement with his creditors.

Neither did plaintiffs believe, or have reasonable cause to believe at that time, that said Hopkins was insolvent, but, on the contrary, they continued to pay out money for said L. C. Hopkins during the whole of said month of December, and knew of no paper of said Hopkins going to protest until the 8th day of January thereafter, nor was
29 said Hopkins adjudged a bankrupt until the 30th day of March thereafter; wherefore plaintiffs pray judgment as in their petition.

COLLINS & HERRON AND A. F. PERRY,
Plaintiff's' Attorneys.

Verification waived.

JORDAN, JORDAN & WILLIAMS,
Of Counsel for Defendants.

The plaintiffs, to maintain the issue joined between the parties, offered the following testimony:

First. A note executed to A. T. Stewart & Co., by Lewis C. Hopkins, in the following words and figures:

$100,000.] NEW YORK, *June* 6, 1866.

On demand, after date, I promise to pay to the order of Messrs. Alexander T. Stewart & Co. one hundred thousand dollars, with interest from date, at the rate of seven per cent. per annum, payable quarter-yearly until paid, for value received.

L. C. HOPKINS.

(Endorsed as follows:)

May 4, 1867. Received $25,000 on account of the above.

A. T. STEWART & CO.,
Per H. H.

Second. Six mortgages executed by Lewis C. Hopkins and wife, on June 22, 1866, to Alex. T. Stewart, on six separate pieces of real estate in Cincinnati, each mortgage expressing on its face a consideration of $100,000, and given to secure the note above set out. All of said mortgages received for record in the recorder's office of Hamilton
30 County, Ohio, on January 2, A. D. 1868, at 12 o'clock and five minutes.

The first of said mortgages on the following real estate:

The undivided 2-11 of a lot 34½ by 74 feet, situated at the northeast corner of Fifth and Vine streets, Cincinnati, being part of lot No. 193.

The second of said mortgages on the following property: That certain leasehold estate in two lots commencing on the west side of Elm street, 84 feet from the southwest corner of Elm and Fourth, 100 feet, and being the same conveyed to said Hopkins by J. H. Barker and wife.

The third mortgage on the following described property: The leasehold interest of said Hopkins in a lot situated, lying, and being in the city of Cincinnati, commencing at a point on the west side of Elm street, 28 feet south of the southwest corner of Fourth and Elm streets; thence running along the line of the lot known as the Austin property 60 feet, more or less, to a lot conveyed to J. H. Barker by sheriff, and by Barker leased to L. C. Hopkins; thence south 56 feet to the line of a lot belonging to Joshua A. Wilson; thence east along the north line of said Wilson's property 60 feet, more or less, to Elm street; thence north on the west side of Elm street 56 feet to the beginning.

The fourth mortgage on the following described property: The leasehold interest of said Hopkins in a lot commencing on the south line of Fourth street 60 feet west of the southwest corner of Fourth and Elm streets; thence on Fourth street 40 feet west; thence south at right angles to Fourth street, 84 feet, more or less, to J. L. Wilson's lot; thence eastwardly along said line to the lot formerly belonging to Alex. McKinzie and of the lot purchased of J. H. Barker, being the same leased by perpetual lease, with privilege of purchase, by deed dated February 2, 1866, recorded in book 28, page 365.

The fifth mortgage on the following described property: Lots
31 Nos. 23, 24, 25, 26, 27, 28, 29, 30, 31, and 32, and a strip of ground off the east end of lots No. 33 and 34 of 100 feet in width, fronting on Josephine street, running through from Saunders street to Carmalt street, as laid down in the plat of Bigelow estate, situated in the city of Cincinnati, and part of property conveyed to Hopkins June 23, 1862.

The sixth mortgage on the following property: All that lot of ground situated on the southwest corner of Fourth and Elm streets, being 28 feet on Elm street by 60 feet on Fourth street, conveyed by Austin and wife to Hopkins by deed dated October 25, 1865.

The plaintiffs having introduced the foregoing testimony, rested their case, and the defendants, to maintain the issues on their behalf, offered the following testimony:

First. The testimony of LEWIS C. HOPKINS, who, being sworn, said:

My name is Lewis C. Hopkins; I am one of the defendants in this case; George Maxwell and Isaac M. Jordan, my trustees in bankruptcy, are the other defendants. On the 6th of June, 1866, Benjamin F. Turner was in partnership with me under the firm name of L. C. Hopkins & Co. Mr. Turner had been associated for about six months previous to that time in said firm. We dissolved that firm in December, 1866, and Mr. Turner withdrew entirely from the firm with his capital, and I continued the business under the same name. I had no partner afterwards nor at the time of the adjudication in bankruptcy. The business I carried on was dealing in dry goods at wholesale and retail. My place of business was at the corner of Fourth and Race streets and at the corner of Fifth and Vine streets, Cincinnati, O. I commenced business at the corner of Fourth and Race streets shortly after the date of the note of June 6, 1866, to wit, about August 1, 1866, when I leased this store, consisting of two-thirds of the whole building from the base

ment to the roof, from B. Simon & Co., for five years, at a renta
32 of $30,000 per year. There were three buildings, and I had two of them. I had been dealing with the firm of A. T. Stewart & Co. for about fifteen years prior to this time; they were dealers in dry goods at wholesale in the city of New York; I was not personally acquainted with all the members of the firm, and did not know who all of them were; I knew A. T. Stewart and William Libbey; these were all I knew to be members of the firm; I had known Mr. Stewart for about fifteen years, and Mr. Libbey ever since he came into the house; I suppose he was a partner from the time when he came in. My business with the firm of A. T. Stewart & Co. consisted simply in my being a purchaser of dry goods from them; I was a large operator and purchaser; my transactions with them were merely buying dry goods; I had very large operations with them also in my army contracts, over a million of dollars; I deposited money with them, simply my cash account; they were my bankers and correspondents; this commenced as early as 1864 or 1865, and continued up to my failure; I drew checks or drafts on them as I would on ordinary bankers; my check-book with them will show the form of the check or draft; it is the common form of a blank check-book, with the name of A. T. Stewart & Co. printed in the check; I always used these in drawing. I attach one of the checks to my testimony. It will show the form of all. It is as follows:

L. C. HOPKINS & CO., Cincinnati.

No..... CINCINNATI..... STAMP.

MESSRS. A. T. STEWART & CO., N. Y.,

Pay to the order of.....

.....Dollars.

$.....

.....

33 I drew on them to pay everything in this manner except when I was in New York and had with me considerable money, when I would draw on or use it. My ordinary style of paying was by check or draft on them in the form stated. I drew on them in this form to pay the bills I owed them, as well as to pay others. I have drawn in this way on my cash account with them to pay my merchandise account to them. The character of my purchases from them was that I had two accounts with them; one was called "cash bills" and the other "time bills." Cash bills were bills payable in thirty days, and time bills were payable in three months, with three per cent. off. Net bills and cash bills are the same, payable in thirty days. If I paid in ten days it was two per cent. or one per cent. off, I forget which. The regular time in New York is six months, and if you pay in less than that there is a corresponding reduction of one per cent. a month; if you pay in two months, two per cent. off; if in three months, three per cent off. This per cent. is taken from the credit price of the goods, the value of the goods being predicated on a six months' credit. The kind of check or draft used in June, 1866, at the time the note was given to A. T. Stewart & Co., was the same as I have before stated, and continued to the close of the business carried on by me. I quit carrying on business as L. C. Hopkins & Co., as near as I can remember, January 1, 1868. I stopped business about

that time altogether. I had no notes coming due until about the 8th or 10th of January, 1868. On the 28th or 27th day of December, 1867, I agreed to sell to Messrs. Turner and Littster my retail stock at not over 75 cents on the dollar, the price to be fixed before transfer, and they then paid me $20,000 in bank notes, which was a part of my remittance to A. T. Stewart & Co. in final payment of my note. On the first day of January, 1868, I made invoice of the goods, and it amounted to $36,669.20. I called in one merchant, and they another, and all mutually agreed that 62½ cents' cost would be a fair rate. The invoice was
34 too large, and goods were taken out of the stock so as to bring the amount down to $20,000, at 62½ cents. I afterwards sold them the retail stock on Fifth street, amounting to $3,154.50, which they paid at different times during the month of January, 1868, and was credited to merchandise. An invoice was given to the committee of creditors upon the examination of my books. My wholesale stock amounted, as appraised by committee, to $30,000, and from it I had sold from time to time, as per my cash book, about $3,000. The remainder I sold to Turner and Littster February 6, 1868, for $25,000, and made the following entry in my sales journal:

"Turner & Littster, to merchandise $25,000
"Remaining stock of merchandise closed out to them this date, payment to be made in installments, all due, and to be met prior to July 1, 1868."

I made the sale of the retail stock first. I turned over the proceeds of the wholesale stock sold to Turner and Littster to Messrs. Jordan and Maxwell, the trustees in bankruptcy, when they were appointed. In 1866 I leased the property before stated of B. Simon & Co. for my new store. I wanted to put into it a large and commanding stock, and open a large wholesale and retail house. I had a good deal of real estate in Cincinnati unincumbered. I conceived the idea of borrowing money of A. T. Stewart; he was familiar with my business, and had my cash account, and I had had large transactions with him. I conceived the idea of borrowing $100,000 of him. When I went to New York, about the first of June, 1866, I made the proposition to Mr. Stewart. Mr. Stewart and Mr. Libbey had separate desks in the same room. It was my customary way to first see Mr. Libbey about anything I wanted, as I knew him very well, and I first went to him in the matter of this loan. I then went to Mr. Stewart; whether Mr. Libbey was with me I can't remember. I had free access to the office, and was always ad-
35 mitted. There were glass doors and windows to the office, and whenever I made my appearance I was always invited in, and felt perfectly free to go in. I went to Mr. Stewart and told him what I wanted, and the reason of wanting it. I told him I wanted $100,000. Stewart said very little; he said it was an unusual thing, it was a pretty large sum, he would think it over, and I must come in again. I told him that I was going into a new store, and I wanted to have a commanding stock of goods, and feel perfectly easy; that I had large quantities of real estate in Cincinnati unincumbered and laying idle; I felt I could raise capital on that; I so stated to Mr. Stewart. He said that it was a large transaction, that he would think the matter over, and that I should come in again. That is about all that passed at that conversation. Within a day or so I went in again to see Mr. Stewart, and after a very short conversation Stewart told me I could have the money. At this time Judge Hilton was present. He was present when the note

was made; whether it is in his handwriting I can't say. There may have been three conversations in regard to the matter, although I cannot recollect but two. They were all short, not over fifteen minutes at any one time. The result was I got $100,000—got a check for it. This is the identical check. It is in the following words, and is Exhibit No. to deposition of William Libbey. Check is in the following words:

No. 5395.] NEW YORK, *June* 6, 1866.

Cashier Merchants' National Bank, New York, pay to L. C. Hopkins & Co. or order one hundred thousand dollars in current funds.

ALEX. T. STEWART & CO.

$100,000.

(Endorsed:)

Pay to order of A. T. Stewart & Co.

L. C. HOPKINS & CO.
A. T. STEWART & CO.,
Per GEORGE B. BUTLER.

36 I can't remember whether Mr. Libbey was present when I got the check, and I cannot state whose handwriting the body of the check is in. I cannot recollect whether the check was originally signed by A. T. Stewart alone or A. T. Stewart & Co. My recollection is that the check was brought in and placed before Mr. Stewart for his signature, and that he signed it. The check given me was a check on the Merchants' National Bank, payable to my order, for $100,000. I did not present the check to the Merchants' National Bank; I took it and gave it to the cashier of A. T. Stewart & Co.; I did not use it. I may have carried it to the hotel, but when I parted with it I left it with A. T. Stewart & Co., after first endorsing it. It was to be put in my cash account, the same as was done with all our checks, but I did not collect it.

(The defendants offer said check in evidence.)

A. T. Stewart & Co., during my business relations with them, were in the habit of sending me statements of the balance of the cash account from time to time, also separate statements of the merchandise account. This and other checks were to be carried to the credit of my cash accounts, subject to my draft. These were not to be carried to credit of my merchandise account. There was no regular time for sending them; sometimes they sent them of their own motion, and sometimes at our request. The cash account was always sent by itself, separate from the merchandise account. We kept them as separate as if the business had been done in separate houses, as if the account was at another establishment. At the time I executed the note for $100,000, on June 6, 1866, I was indebted to A. T. Stewart & Co. I don't think any of it was due; I was not behindhand with them. A man would not be apt to borrow $100,000 from them if he was behindhand. I find that I stated in my examination in bankruptcy that "I owed A. T. Stewart & Co. on June 6, 1866, $142,106.42, and that none of it was past due."

That is correct. This was on merchandise account; I did not owe
37 them anything on any cash account. This amount was independent of the $100,000 note which I then made. I was not behindhand at that time in my cash account with them or with any one else. I had always a balance of cash there, and then had about $5,000. I was not behindhand in either account. I drew on A. T. Stewart & Co., in their own favor, on June 9, 1866, two checks or drafts on my

cash account with them, one for $8,315.72, and the other for $70,000, in all $78,315.72. The draft or check for $70,000 was to pay A. T. Stewart & Co. on account of time bills. I can't tell exactly whether they were due or whether I anticipated them. The draft or check for $8,315.72 was for payment of merchandise bills. I find in my letter-book two letters, inclosing these two checks to A. T. Stewart & Co., and I attach copies of the same, as follows:

CINCINNATI, *June* 9, 1866.

Messrs. A. T. STEWART & CO., *New York:*

Enclosed is check No. 11, seventy thousand dollars; account of time bills $70,000.

C. W. TAYLER.

CINCINNATI, *June* 9, 1866.

Messrs. A. T. STEWART & CO., *New York:*

Enclosed is check No. 12 for eight thousand three hundred and fifteen and seventy-two one-hundredth dollars.

March 19th	$702 35
March 20th	448 60
March 20th	1,671 86
March 20th	2,928 01
March 21st	763 92
March 21st	533 33
March 21st	469 92
March 21st	423 93
March 21st	473 80
	$8,315 72

C. W. TAYLER.

38 C. W. Tayler was my clerk and wrote these letters, and forwarded the checks for me.

At the time of my conversation with A. T. Stewart in regard to the loan of $100,000, I told Mr. Stewart I had a large amount of real estate in Cincinnati, unincumbered, and that I had leases at the corner of Fifth and Vine streets, and Fourth and Elm streets; I told him I would give him mortgages on this property; I said I had other property but did not describe it; I told him also that I had some $60,000 in life insurance policies, and, in order to secure him, that I would assign him the policies on my life, and would give him mortgages on the real estate; I don't remember whether I mentioned the Covington real estate or not; I gave him the note and got the check, and told him I would send him the mortgages when I got home, also the policies on my life; I told Mr. Stewart when I made the negotiation with him, that I wanted to sell the real estate, and that I would pay the loan, from time to time, out of the sales of the real estate mortgaged to him; I told him I wanted him to hold the mortgages, I mean not record them; that my transactions were large, and that I would pay the loan in that way; I told him that I wanted to borrow this money, and that I would give this security; that the real estate was unincumbered, except the leasehold property; that I would make the mortgages and assign the life policies; that I wanted him to keep the mortgages, not record them, because I wanted to sell the real estate, from time to time, and pay off the loan and have him return the mortgages to me so that I could destroy them; I stated

this to him, and furthermore, that I did not want the mortgages recorded because it would hurt my credit; that I wanted him to keep them so that I might pay them off.

Question. What did he say to that? Did you say anything more to him?

Answer. Well, that was all—I made my request.

Q. Did he assent to that proposition?

39 A. They neither assented or dissented. They never assent to anything in that house; they listen to what you have to say, and then they act.

Q. How did they act after this?

A. They gave me the check for $100,000. This conversation was at the time when they gave the check, before I left them. This was all understood before I left the house; it was part of the discussion; in the meantime the check may have been brought in, and that was all understood; this was when I agreed to give the mortgages. The mortgages were not really given for some days; I came home from New York before they were given; I don't remember whether I saw the note for $100,000 stamped; I cancelled the stamp for $50, the right-hand stamp; the cancellation is in my handwriting; I have no recollection of it, but the initials and cancellation are mine; I cannot say whether the other stamp was there when I signed the note; I did not cancel it. In speaking of the leasehold property as encumbered, I meant simply that it was leased property, for which rent had to be paid; that there was no mortgage on it; I did not assign the policies of life insurance or make the mortgages when I made the note or when I was in New York; they left that all to me, and I made the mortgages after I came home on the 22d day of June, 1866, and think I assigned the policies after I came home also; I had not the policies in New York, and I had no description of the real estate with me in New York; the policies of life insurance have never been returned to me; I returned from New York I think before June 9, 1866, because the two checks for $70,000 and $8,315.72 to A. T. Stewart & Co. are in my handwriting.

Q. When you returned to Cincinnati how many mortgages did you execute and send to A. T. Stewart & Co.?

A. I can't tell.

Q. Well, about how many?

A. Ten or twelve mortgages; the six mentioned in the petition

40 are a part of them; none of these six are on lands in Covington, Ky.; some of the mortgages I executed at that time to A. T. Stewart were on lands in Covington, Ky., but I cannot remember how many of them; I wrote all of the mortgages myself; I made separate mortgages because it was difficult to put all the descriptions in one; I did not employ any counsel or scriviner; I never employ any one to do such things—I do it for myself; I did this at home at night; after I had drawn them all up at home, I went to William Winters, a notary public, who took the acknowledgements; I don't remember how I forwarded or sent them to A. T. Stewart; I suppose I executed them at the same time they were acknowledged; it was done at his office; my impression is that he got the acknowledgement of my wife at my store; the acknowledgements are dated June 22, 1866.

Q. Was there any pieces of property covered by these mortgages that you afterwards sold?

A. Yes, I think there was one; I think there was more than that; it is my impression I sold two pieces that were mortgaged to A. T. Stewart, one on McFarland street to James Carson, and one on Mt. Auburn

on Sycamore street, just at the top of the hill to Huntington; I am of the impression that I sold that property, and wrote to A. T. Stewart & Co. to send me the mortgages; I think I got them and destroyed them.

Q. Do you remember at any time of writing to A. T. Stewart & Co. to send you any of these unrecorded mortgages?

A. I wrote them once, and they made the excuse to me that Mr. Stewart was in Europe, and that they preferred not to disturb the matter, or that he had charge of the papers and to let them be until he returned and it would be all right; the date of this I can't state, but it was in the summer of 1867 before Mr. Stewart got back from Europe.

Q. You did then sell a piece of property, and notified them of the fact, and requested a return of the mortgage?

41 A. I notified them to return some of the mortgages for some reason, and my impression is, it was because I had sold the property, because I did sell the property, and there was an agreement with them—A. T. Stewart & Co.—that when I sold the property I should apply the money or a corresponding amount to the payment of the loan I had made; I had sent the money on account of the loan, and the whole thing is in keeping with this understanding; the mortgage here handed to me is made to A. T. Stewart & Co., and is dated June 22, 1866, to secure $100,000, and is one of the mortgages; this is the mortgage on the lot I sold Huntington; I sold this lot as unincumbered, and gave a warranty deed at the same time; A. T. Stewart held a mortgage on it, but it was not recorded; I sent the proceeds to A. T. Stewart & Co.; this was, I think, in December, 1867; the amount I got for this lot was, I think, $1,000 or $1,500; I will not say; I remitted to A. T. Stewart & Co. the identical money that I got for that lot from Huntington, but I remitted a corresponding amount; this is the mortgage that I did not get back from A. T. Stewart; there was an understanding that I should have the mortgages returned and I should remit them the sales; I sold some of the property, and wrote them to return the mortgages; I did not keep a copy of the letter; the date of the letter was about the date of my sale to Judge Noyes; a part of the property I sold him was mortgaged to A. T. Stewart; it was not about the piece sold to Noyes that I wrote them; it was another piece I wrote about; they answered that Mr. Stewart was in Europe; I can't tell just which piece it was that I wrote about, unless I see Judge Noyes; the piece sold Huntington was one of the lots; when I gave Huntington the deed for it I had remitted the money to Stewart, and thought the property free, and did not thing the mortgages would ever appear.

Q. Well, Mr. Hopkins, when did you first make payments on these mortgages?

42 A. I can't state the date from memory, but can by looking at the papers; I sent A. T. Stewart & Co. about May 1, 1867, $125,000, and received a letter dated May 4, 1867, acknowledging receipt for this money; the body of the letter is in the handwriting of Judge Hilton, and the signature is in the handwriting of Mr. Stewart; the letter in which I sent the money was in the following words:

CINCINNATI, *May* 2, 1867.

A. T. STEWART, Esq.:

MY DEAR SIR: Enclosed please find draft upon yourselves for twenty-five thousand dollars, to be applied towards paying my note for $100,000. Please endorse the same on the back and send a duplicate receipt to me.

With many thanks for your uniform kindness, yours, very truly,

L. C. HOPKINS.

Their letter acknowledging receipt was in the following words:

NEW YORK, *May* 4, 1867.

L. C. HOPKINS, Esq., *Cincinnati, O.:*

DEAR SIR: We take pleasure in acknowledging receipt of your favor of 2d inst. covering your check on us for $25,000, which, as you requested, we have applied in part payment of your note for $100,000 held by us.

Very truly, yours,

ALEX. T. STEWART & CO.

(The original letter is here offered in evidence by defendant's counsel. The signature is in the handwriting of A. T. Stewart, and the body of it is in Judge Hilton's.)

Q. State the next payment on the note and mortgage?

A. It was on November 12, 1867; I paid $10,000; I sent it by the Merchants' Union Express Company on the 9th of November, 1867, and sent them a letter in the following words:

43 CINCINNATI, *November* 9, 1867.

Messrs. A. T. STEWART & CO.:

I owe you on my individual note $75,000, and have to-day sent by Merchants' Union Express Company ten thousand dollars, to be applied towards the payment of the same, leaving a balance of $65,000, which will be paid before the first day of January next.

Yours, very truly,

L. C. HOP I .

(The original letter is here offered in evidence.)

The Merchants' Union Express Company on November 9, 1867, gave me a receipt for the $10,000 sent to A. T. Stewart & Co.

(The receipt is here offered in evidence by defendant's counsel.)

I received from A. T. Stewart & Co. a letter in the following words, acknowledging the receipt of the $10,000:

NEW YORK, *November* 13, 1867.

Mr. L. C. HOPKINS, *Cincinnati, O.:*

DEAR SIR: We have to acknowledge receipt of your favor of 9th inst., also the remittance of $10,000, to which it refers, and have placed the amount to credit as requested.

Very truly, yours,

A. T. STEWART & CO.,
Per J. M. HOPKINS.

The Mr. J. M. Hopkins, whose name is signed to this letter, is not related to me; I know him very well; I know his handwriting; he was a clerk of A. T. Stewart & Co.; I think I sometimes received letters from A. T. Stewart & Co. in his handwriting, in answer to my business letters, but can't be positive; he is one of the business men of the house, and connected with it in that capacity; I can't say that I know his signature; I have had a great deal of business to transact with him at A. T. Stewart & Co.'s; you may have in that package (referring to letters, etc., attached to deposition of plaintiff) from him twenty letters in the same handwriting; that letter of November 13, 1867,
44 came from A. T. Stewart & Co. in answer to mine remitting the money.

Q. This letter of November 13, 1867, appears to be a private letter from them to yourself, and not to the firm?

A. Let me explain this; at the time when I had the talk with Mr. Libbey in the office, I told him about my affairs; I told him about Mr. Turner having gone out, and about my wanting to make a loan, and that I wanted to give the mortgage in the name of L. C. Hopkins, and that I wanted the money in the name of L. C. Hopkins; that was all the name I gave him all the way through; I told him I was alone, and that accounts for the letter being addressed to L. C. Hopkins instead of L. C. Hopkins & Co.; I told Mr. Libbey early in 1867, in his private office in New York, that I had dissolved partnership with Mr. Turner in December, 1866; I told him this at that time and before; I told him that I was alone, had no partner; I told Libbey that it was late in December when we concluded to dissolve partnership—that we had neglected to give notice on the first of January, 1867, in the newspapers, and when we went East in the early part of January, 1867, we went around and notified our creditors of our dissolution; I told Mr. Libbey in the early part of January, and Mr. Turner went afterwards and told him; this transaction was personal with me all the way through, and that is the reason why some of the letters were not in the letter-book; on November 9, 1867, I sent A. T. Stewart & Co. $20,050, to be placed to the credit of my cash account with them; this was in addition to the $10,000 sent on that day, to be applied on the note; the letter in which I sent the $20,050 is here offered in evidence, and is in the following words:

CINCINNATI, *November* 9, 1867.

Messrs. A. T. STEWART & Co.:

Herewith please find three checks, as follows:

45	No. 6247, First National Bank, Cincinnati, on Ocean National Bank, New York, for	$10,000 00
	No. 4690, Bank of Ohio Valley, Cincinnati	10,000 00
	No. 217, for	50 00
	Amounting to	$20,050 00

Twenty thousand and fifty dollars, which amount please place to credit on cash account, and advise.

Very truly, &c.,

L. C. HOPKINS & CO.,
Per R.

This remittance was sent by draft or check, as the letter shows, and had nothing to do with the $10,000 sent the same day by Merchants' Union Express, in currency, to be applied on the note. On December 20, 1867, I remitted A. T. Stewart & Co. $17,000 to be applied on the note of $100,000. The letter in which I enclosed the drafts for the money is in my handwriting, and is here offered in evidence. The following is a copy of the letter:

CINCINNATI, *December* 20, 1867.

Messrs. A. T. STEWART & Co.,
New York City:

GENTLEMEN: I am still indebted to your house some $65,000 on the personal note, and herewith send for credit upon the same,

Draft No. 9318, National Exchange Bank upon National Park Bank, New York, for	$4,025 00

Draft No. 15626, Bank of Ohio Valley upon American Exchange National Bank, New York, for	2,525 00
Draft No. 7437, First National Bank, Cincinnati, on Central National Bank, New York, for	10,000 00
Draft No. 15797, Bank of Ohio Valley upon American Exchange National Bank, New York, for	450 00
Total, seventeen thousand dollars	$17,000 00

46 Will you be good enough to calculate the interest due on the note to January 1, 1868, and send immediately the balance due, and oblige,

Yours, truly,

L. C. HOPKINS.

I received from A. T. Stewart & Co. an answer to that letter. This letter now handed me, and which is here offered in evidence by defendants' counsel, is the letter; the letter had enclosed in it the statement referred to therein. The letter is as follows:

NEW YORK, *December* 23, 1867.

L. C. HOPKINS,
Cincinnati:

DEAR SIR: We are in receipt of your favor of 20th inst., containing remittance for private account to amount of $17,000.83, which is at your credit, and enclosed we hand statement of account to January 1 next, as requested. Balance remaining at your debit of $58,025.51, which we trust you will find entirely correct.

Very truly, yours,

A. T. STEWART & CO.,
Per J. M. HOPKINS.

The statement referred to in said letter is as follows:

47 *Messrs. L. C. Hopkins & Co. with A. T. Stewart & Co., Dr.*

March 7, 1866.	Loan	$100,000 00
1867, May 4.	Int. to date, 10 mo. 27 d., 7 per ct	6,358 31
		$106,358 31
" "	Cr. by cash	25,000 00
		81,358 00
" Nov. 12.	Int. to date, 6 mo. 8 d., 7 per ct	2,974 10
		84,332 41
" "	Cr. by cash	10,000 00
		74,332 41
" Dec. 23.	Int. to date, 1 mo. 11 d., 7 per ct	592 58
		74,924 99
" "	Cr. by cash	17,000 83
		57,924 16
	Int. to Jan. 1, 1868, 9 d., 7 per ct	101 35
Balance due A. T. S. & Co., Jan. 1, 1868		58,025 51

E. E.

NEW YORK, *December* 23, 1867.

The statement of account and the letter are in the handwriting of J. M. Hopkins. The next payment on the note was made December 28, 1867, when I sent them $10,000. I sent with this $10,000 the letter, which was in the following words:

CINCINNATI, *December* 28, 1867.

Messrs. A. T. STEWART & Co.,
New York:

With this please find ten thousand dollars, to be credited to Mr. Hopkins on his private note.

Yours, truly,

L. C. HOPKINS & CO.

48 I sent this $10,000, with the letter, by the Merchants' Union Express Company, and have the receipt of the company for the money, dated December 28, 1867. The original letter is offered in evidence by defendant's counsel, as also express receipt. The next and final payment on the note was made December 30, 1867, when I sent A. T. Stewart & Co. $48,025.51, the balance due on the note. I sent the money by drafts and in currency, as is shown in the letter I sent at the same time, and which I enclosed the drafts and currency. The letter is here offered in evidence, and is in the following words and figures:

CINCINNATI, *December* 30, 1867.

Messrs. A. T. STEWART & Co.,
New York City:

GENTLEMEN: Inclosed please find forty-eight thousand twenty-five and fifty-one hundredth dollars, as follows:

Draft No. 7948, First National Bank, Cincinnati, Ocean National Bank, New York	$23,000 00
Draft No. 7949, same, upon Fourth National Bank, New York	25,000 00
Currency	25 51
	$48,025 51

This is to be applied in payment of balance due on my individual loan or note, and is payment in full. Please return all the mortgages and life policy assignments immediately by Merchants' Union Express, cancelled.

Yours, truly,

L. C. HOPKINS.

They never returned me the policies of life insurance or the mortgages, as requested by this letter. The following account was sent by A. T. Stewart & Co. to me in the regular course of business about December 14, 1867. The credit side of the account shows amounts of money
49 sent by me to A. T. Stewart & Co. at the time stated in said account, exclusive of the moneys sent on the note. The following is the account:

(Folio 1179.)

L. C. Hopkins & Co. in account with A. T. Stewart & Co

NEW YORK, *December* 14, 1867.

Dr.			Cr.		
1867.			1867.		
Oct. 29	To balance, as cash	$171, 017 42	Nov. 2	Cash	$898 74
Nov. 4	To m'd'se	84, 626 08	" 4	"	55, 837 10
" 4	Cash	600	" 6	"	118 13
Nov. 9	"	75	" 8	"	811 45
" 15	"	1, 972 84	" 7	"	161 07
" 18	"	2, 648 20	" 12	"	20, 050
" 20	"	2, 659 08	" 14	"	655 14
" 22	"	15, 014 09	" 16	"	15, 069
" 23	"	4, 842 13	" 19	"	10, 000
" 25	"	8, 174 71	" 21	"	300
" 29	"	715 80	" 20	"	272
" 30	"	724 48	" 23	"	175
Dec. 2	"	3, 392 54	" 27	"	264 02
" 4	"	14, 013 92	" 29	"	113 16
" 12	"	3, 799 14	Dec. 3	"	83 24
Sept. 19	M'd'se, 5-90	20, 724 35	" 6	"	20, 347 25
Oct. 24	" 30	872 47	" 7	"	4, 900
" 30	" 4-30	957 43	" 9	"	5, 100
Nov. 6	" 1-30	25, 372 03	" 10	"	5, 300
" 11	" 4-30	240 10	" 11	"	5, 500
		$362, 441 85	Balance		216, 486 55
1867.					
Dec. 14	To balance, subject interest adjustment	$216, 486 55			
					$362, 441 84

50 Q. Please look at the accounts, and see and state if there is any credit in the account sent you of the $10,000 sent November 9, and the $17,000 sent December 23, 1867?

A. I have looked at the account, and neither of the sums are credited in the account.

Q. Did you find a credit of $20,050, sent on November 9, 1867?

A. Yes; I find that credited. A. T. Stewart & Co. have never sent us any account in which they have given us credit in the merchandise account with the $10,000 sent November 9 and the $17,000 sent December 20, 1867. Neither are these sums credited in the cash account. They have never sent us any account in which the $10,000 sent them December 28 and the $48,025.50 sent them December 30, 1867, have been credited, either in the merchandise or cash account. They have never rendered us any account at all in regard to these two amounts. The defendants' counsel offer in evidence the account above referred to, dated December 14, 1867, No. 1179.

Q. What did you say this morning upon the subject of the mortgages being recorded without your consent?

A. I did not say anything about my consent; I made the request at the time I made the loan; I stated that I would give them mortgages and life policies; I stated to them that it would hurt my credit to have the mortgages recorded, and I wanted them to keep them and not record them.

Q. Did they assent to it or not?

A. I made that request. They did not say anything.

Q. Did they dissent from it?

A. They did not say anything. I said to them, it would hurt my credit to do it, and that I did not want them to do it.

Q. Did you or not consent to the recording of those mortgages at the time they were recorded?

A. I did not know they were recorded until after it was done.
51 I know that the signature of the letter handed me, dated January 20, 1868, is Mr. Libbey's. I have seen him write, and have received letters from him. After procuring the accommodation from A. T. Stewart & Co., on June 6, 1866, I did make purchase of merchandise from other houses in the city of New York. I bought from the same houses I usually bought of right along; I continued dealing, just as usual, with the same houses, making some changes; merchants add to and change houses sometimes; I can't say whether I increased the amount of my purchases. Between the date of the loan of June 6, 1866, and the date of my suspension, I bought merchandise from various merchants, among others, of Bacon & Co., of Kutter, Luckemyer & Co., Geo. Bliss & Co., H. B. Cl fin & Co., of Escher & Co., of David Valentine & Co.; I was indebted at the time of my suspension to each of these firms; I was also indebted to Joseph Lee & Co. at date of my suspension.

When I made the purchases of these and other merchants, after I got the loan of June 6, 18.6, of A. T. Stewart & Co., I did not say anything to any of them about my condition, responsibility or means; I did not say anything about the mortgages I had given to Stewart.

I had no conversation afterwards, up to the time of recording these mortgages in January, 1866, with any of these houses, except in a general way; I talked with some of these houses about my condition. It was usual to do so on going East twice a year to talk about our condition.

Some of them who had known me long, would not ask anything; I never told any of them about these mortgages I had given to A. T. Stewart; in the fall of 1867, I may have spoken to the house of Escher & Co. about my condition; I presume I did; I did not tell them about the mortgages; I think I had bought goods of Escher & Co. before June, 1866, on regular credit, also of Kutter, Luckemyer & Co. By looking at my bills payable book, I find that in 1865 I bought of
52 Kutter, Luckemeyer & Co. $6,000 in merchandise at three different times, at another time $1,600; I have in my hand the stub of my note book from 1862 until my business left me in 1867; in 1865 I bought $18,000 or $19,000 of them; that was the year of my big sale; that was the year I bought so many goods and had to have a big cash sale; that is the purchase I got tripped up on; I bought $10,000 of Kutter, Luckemeyer & Co., October 21, 1865. On looking at this book, that shows all the notes given for goods; I can't find any given to Escher & Co. before June, 1866.

Q. Had you reduced your stock largely within thirty, sixty, or ninety days, prior to your suspension?

A. I had, sir.

Q. By sales here in the city?

A. Yes, sir.

Q. For less than cost?

A. Yes, sir.

Q. To what extent?

A. I don't know. Oh, Lord, I don't.

Q. Well, about the amount of your sales

A. I don't know anything about it, sir.

Q. Say, within the month of December, November, or October?

A. I don't know. The sales for the year, according to this paper handed me, being a bill of my sales for the year, was large. The bill shows a total of $1,644,767.81. The total of sales is here offered in evidence, as follows:

53 *Sales for the year* 1867, *commencing January* 25.

Sold before commencement of fiscal year..... $42,483 13

	CASH.	CREDIT.	
Jan.	$6,563 82	$2,182 82	
		Less goods returned,	$74 50— $8,671 14
Feb.,	30,857 40	15,554 96	
		Less goods returned,	313 21— 46,099 15
March,	54,548 88	43,521 39	
		Less goods returned,	449 55— 97,631 62
April,	66,613 33	97,911 43	
		Less goods returned,	722 81—163,801 95
May,	60,455 10	74,612 32	
		Less goods returned,	547 54—134,519 88
June,	52,767 97	69,453 22	
		Less goods returned,	532 45—121,686 74
July,	46,678 34	58,248 31	
		Less goods returned,	558 51—104,368 14
Aug.,	40,331 85	112,729 52	
		Less goods returned,	153 85—152,907 57
Sept.,	41,359 33	167,378 72	
		Less goods returned,	257 85—208,480 20
Oct.,	68,178 08	210,863 48	
		Less goods returned,	926 39—278,115 17
Nov.	104,487 85	90,944 36	
		Less goods returned,	1,395 91—194,436 34
Dec.,	75,687 90	36,865 19	
		Less goods returned,	985 31—111,566 78
			$1,644 767 81

Q. For what length of time had these sales of stock at less than cost continued before the sale to Turner and Littster?

A. All the fall; all the time after the break in the price in August. I think as soon as all of us had bought goods in August there
54 was a break down in the Eastern markets; everybody sold goods at a loss. I did not do it alone; all of Cincinnati and all of the United States did that. The strongest man held out the longest; that is the way that was.

On cross-examination by Mr. PERRY, Mr. Hopkins said:

Q. You say after Turner went out you continued under the same firm name?

A. Yes, sir; I think I took the firm name of L. C. Hopkins & Co. when I first went into business, when I bought out the firm of Cole & Hopkins; this was in 1857; I had no partner at that time. I have always kept up that firm name. I do so now, although I have no partner. There was no change made in the firm name when Turner went out, and when I sold out to Turner & Littster it was with the understanding they should still keep the firm name of L. C. Hopkins & Co. over the door.

I was well acquainted with A. T. Stewart & Co. as early as when I started in business for myself after buying out Cole in 1861. It was about that time I had my largest transactions with them—A. T. Stewart

& Co. It was when the war broke out. I had army contracts with them to large amounts.

I first commenced keeping my cash accounts with A. T. Stewart & Co. at the time there was a good deal of trouble between this country and England. There was a firm of J. R. Jaffray & Sons in England and a firm called J. E. Jaffray & Co., belonging to the same house, in New York. My account had been with J. E. Jaffray & Co., the New York house. They anticipated some trouble between the two countries and they wanted me to change my account on account of difficulties anticipated, and also the nature of the currency was not desirable for them to keep the account. I told them I would take it elsewhere. I went to see Libbey, of A. T. Stewart & Co., and at first they said they did not
55 want to take it. My account was very large, and there was some risk. I told them it would be a special favor if they would take it, and after consultation they did so. I had a merchandise account and a cash account at A. T. Stewart & Co.'s, and I drew on my cash account just as I would on a banker.

None of my paper was not met or went to protest before about January 8th or 10th, 1868. I had kept my paper up to that time promptly met in New York. I called a meeting of my creditors in New York at the time I made of my failure, and at the meeting they appointed a committee of creditors to come out and examine into my affairs. I can't remember the date when I called this meeting; my impression is that it was before the 10th of January, 1868; can't say whether it was before or after my paper went to protest. The committee of creditors was here at the time I made that sale to Turner & Littster. They knew it was to be made and looked at it; and I don't know but that they advised it to be made. Mr. Prothero, of A. T. Stewart & Co.'s house, was here; Mr. Phillips was here, and represented the house of Jaffray & Co. I can't say they advised the sale—they knew of it. In regard to the statement I made as to my condition when I made the loan from A. T. Stewart & Co., there is a paper among the exhibits to Mr. Libbey's testimony that seems to have a statement of my condition in it, and some remarks made indicate that I made that statement. I don't remember. I presume I did. I have no recollection of making it, although I presume I made it. It would be very natural when I came to make a loan to say something of my affairs. I have no doubt that I represented that I was able to pay, because I was able. I recollect of but one meeting with Mr. Libbey, and the subsequent meeting with A. T. Stewart, when Hilton was present; by bare possibility there may have been another.

Q. Do you recollect at which of these meetings you made the request that the mortgages should not be recorded?

56 A. It was when we were sitting at the table after the matter had been talked over. I then made the suggestion that I did not want them to record the mortgages—that it would hurt my credit.

Q. To which they made no answer?

A. They did not answer anything; they don't answer anything at that house.

Q. They heard what you had to say?

A. They heard what I had to say.

Q. They took the mortgages and let you have the money?

A. They gave me the check for $100,000.

Q. They did not make any promises not to record the mortgages?

A. No, sir; nothing was said but just that I made the suggestion. When I got the check for $100,000 it was placed to my credit to my cash account. I subsequently drew on it to pay A. T. Stewart & Co.

and other merchants. I drew on it in my regular course of business my books show what for. I can't state the date I wrote to A. T. Stewart to return me certain mortgages, and they wrote that Mr. Stewart was absent, and that they preferred not to do anything until he returned; it was evidently before his return from Europe, and my impression is that Mr. Stewart retured home the last of September, 1867. I suppose I wrote for the return of the mortgages after I made the first payment on it for $25,000; but I cannot tell.

Q. Did you or not become aware, Mr. Hopkins, either from the course of business or otherwise, that the note and mortgages was a transaction in charge of their attorney all the time, Mr. Hilton?

A. No; no more than I have been in the office where Judge Hilton and Mr. Stewart stay a good deal of the time, and I have seen that tin trunk brought out a good deal back and forth.

Q. Who had charge of that?

57 A. I don't know at all; I have seen the trunk in the office; these papers were put in the box.

Q. Was the office where Mr. Stewart himself sets?

A. Yes, and Mr. Hilton; Mr. Hilton spends part of his time at the same office with Mr. Stewart, and it was at their office. I suppose A. T. Stewart & Co. have about five hundred clerks in their employ in the wholesale store; I know nothing as to the retail store, which is two miles away.

Q. Do you know whether all the clerks write letters on matters of business connected with the firm, or are particular branches assigned to particular clerks? Do you know enough of their organization to know that?

A. I know enough to know that the main writing of the house is done inside the railing where the desks are for the clerks; there is the principal office with Mr. Libbey at one end, and the cashier and the man who buys gold at the other; that is the main cashier and the one who has the credit-book; all these are ranged one after the other inside that railing; I know this, because I have had transactions with almost all of them—with numbers of them; the shipping clerk also had his desk there.

Q. Each one has his particular business, is that it?

A. Yes; each desk has its occupation; there may be more than one desk to attend to one thing.

Q. You have recognized the names of one or two clerks who wrote letters for them. Do you know the position that was occupied in the establishment by any clerk who signed letters for them—I mean these letters signed by the clerks? Do you know the position of any of these men whose names are signed to any of these letters in that store?

A. I know generally; for instance, there is one J. M. Hopkins; I don't know how far his powers extend or where the limit is; I know I have had a good deal to do with him.

Q. I understood you to say that you were not sure you ever received a letter before or since written by him?

58 A. It is not necessary to receive a letter from the firm signed by a clerk in order to have a good deal to do with him. I have had a good deal to do with those inside the railing. I may have received twenty letters written by J. M. Hopkins, which I would recognize if you would show them to me, yet I don't remember them without seeing them. The marks in pencil on the letters of November 9, 1867, in which I sent A. T. Stewart & Co. $10,000 on the note and mortgage, are as follows: "Ans. November 13, by J. M. H."; this means answered November 13,

by J. M. Hopkins; the writing and initials in the letter are his. After the proceedings in bankruptcy the trustees have had charge of my books and papers, and have now, as I suppose.

On re-examination-in-chief Mr. Hopkins said:

My paper first went to protest January 8, 1868; it was in New York City; I called the meeting of creditors in New York before I went on there; I did it by telegraphing to them to have a meeting. I went on to the meeting, and a committee of creditors was appointed by the meeting to come out and look into my affairs; they came on with me; Mr. Prothero was one of them; he represented the house of A. T. Stewart & Co.; I can't say that all my real estate was unincumbered at the time, in June, 1866, which I offered to mortgage to Messrs. Stewart & Co. There was a mortgage at that time for $20,000 to Charter Oak Insurance Company on my former residence, at the corner of Summit street and Auburn avenue, and the property on Albion Place, where I now live; this was given before June, 1866; it has been paid off by the trustees in bankruptcy—not by me. My best recollection is that A. T. Stewart returned from Europe the last of September, 1867.

In regard to Mr. J. M. Hopkins, I have seen him inside the railing I have spoken of in Stewart & Co.'s establishment, and have there conversed with him about my business with the firm. The letters of Novem-
59 ber 13, 1867, and December 23, 1867, acknowledging the receipt of money—the $10,000 and $17,000—were in the handwriting of J. M. Hopkins above referred to.

When Mr. Libbey was here, I told him that I had sent them—A. T. Stewart & Co.—the balance due on the note and mortgages, and my impression is that he said they had received the $10,000 sent December 28, 1867, before he left New York. I have never received from them any receipt for the money sent on December 28 and 30, or any account of these moneys; they have never written me on the subject. Mr. Benjamin F. Turner acted for me, making purchases during the fall of 1867, perhaps Mr. Lettster once or twice.

The counsel for the plaintiffs admitted here, without proof, that the initials J. M. H., on the letter of December 30, 1867, sent by Hopkins to A. T. Stewart & Co., are those of J. M. Hopkins, in employ of A. T. Stewart & Co.

Benjamin C. Turner being called for, on behalf of the defendants, testified as follows:

Q. At what time did you cease to be a partner with Mr. L. C. Hopkins, if at any time? State when the partnership commenced and when it ended.

A. It was some time in 1865 when it commenced; I can't tell the exact date now, but it terminated in December, 1866.

Q. After that time did you have any interest in his affairs?

A. No, sir.

Q. State whether or not you told Mr. Libbey that you had gone out of the firm—were you acquainted with him?

A. Yes, sir.

Q. State whether at any time you told Mr. Libbey of the fact of this dissolution; and, if so, when and where?

60 A. I think it was in the last of January or in the first of February, when I went to New York.

Q. In what year?

A. 1867. I was doing the buying at that time. I always used to go to Mr. Libbey in the first place; Mr. Hopkins always kept his account there, and at that time I had told him that I had withdrawn from the firm of L. C. Hopkins & Co.

Q. You still remained in Hopkins' employment?

A. Yes, sir; I still remained as buyer.

Q. Were you there in the months of September and October, 1867?

A. I think I was there every month during the year of 1867.

Q. Were you there to make purchases for Hopkins?

A. Yes, sir.

Q. State if you remember anything that you stated yourself, either as agent or as reporting upon the authority of Mr. Hopkins, to Libbey about remittances.

A. I can't tell what month it was in.

Q. State any occasion of refusal to deliver goods, or to sell them to you.

A. On one occasion, I think it was probably in September or October; I can't tell the month when I went there. Mr. Libbey had before that stated to me that Mr. Hopkins was slow in settling up his account, and he must write to him, and he said he did write to him on several occasions, a private letter which I never saw, and don't know the contents of; and at this time Hopkins told me to say to Libbey that if he would let him have what goods he wanted of him he would remit the money forthwith; and it strikes me, he sent a letter by me; whether he did or not, I can't tell now, but I believe he sent a letter to that effect to Mr. Libbey.

Q. But you did deliver a verbal message?

A. Yes, sir; I did deliver a verbal message.

61 Q. Did you deliver any other message upon the subject, except the one you have stated?

A. No, sir.

Q. Did you ever say to Libbey that Mr. Hopkins would remit the proceeds of any specific articles of property, goods or land?

A. Not that I remember; I think not. I told him this: That Mr. Hopkins had requested me to say, that he would remit for that lot of goods that I bought at that time; they were domestic goods—sheetings and prints—that if he would send the goods, he would remit the money forthwith; and on those conditions he let me have the goods.

Q. But, as I understand it, there was no promise to remit the proceeds of specific goods—either those goods, or any other goods?

A. I don't remember about that. At that same time Mr. Letson, who had charge of his prints and domestic stock, was present when we had the conversation. I merely told him, at first, the object of letting me have the goods; and I said to him, "I know nothing about it, only what Mr. Hopkins tells me to say to you; and if you let me have the goods, Hopkins promises that the money shall be sent forthwith, for the goods."

Q. That was all the instructions you had from Mr. Hopkins?

A. Yes, sir.

Q. State what reasons he gave for not delivering the goods according to this agreement.

A. I think he said Hopkins already owed him a large amount, and was slow in payments.

Q. You say you were in New York every month of that year?

A. Yes, sir; I think so.

Q. How long did you remain each month?

A. It would depend upon the season.

62 Q. Suppose we say the latter part of August—the months of August, September, October, November, and December.

A. I will take in January. I would go, perhaps, the 20th of January, and remain, perhaps, until the 20th of February; that was the first purchase. After that, I would go on and be gone, perhaps, ten days—sometimes not over a week, and sometimes two weeks.

Q. Your partnership ended in December, 1866?

A. Yes, sir.

Q. And the goods you were about to buy, they were to be paid for in cash. Did he let you have them?

A. They were bought in the last of 1867—in September or October, I think.

By Mr. JORDAN:

State to the court exactly when that conversation occurred, when he refused this credit, unless you would make this contract.

A. I think it was September or October of 1867, but I can't tell the exact month. It was at the time there was a great deal of talk about Hopkins, both here and in New York.

Q. You say there was a great deal of talk in New York and here about Hopkins' credit?

A. Yes, sir.

By Mr. PUGH:

Q. What time was that?

A. All along from the first of July, 1867, up to the failure. This is the only time that I remember that Mr. Libbey ever refused, or ever made any objections to my having goods. And that time he said to me, that Mr. Hopkins' account was very large already. He asked me how he stood; I told him I knew nothing at all about it, as I had told him previously. During the whole year he had often asked me how Hopkins' affairs stood. I said, "I know nothing about that, Mr. Libbey; you will have to confer with Mr. Hopkins himself. He is a man who keeps his own affairs to himself. He his speculating in this and in that, and I know nothing about this." He had often asked me how he stood, and I know that he used to write him personal letters about his
63 his account; but I never saw them or knew what they were.

Q. He did not show them to you?

A. No, sir.

Q. From July, onwards, to the end of 1867, was Hopkins' credit bad in New York?

A. There was talk about him, but I never had any difficulty in buying goods.

Q. What do you mean by "talk about him"?

A. Merchants would say, "He is too wild; he is speculating, and selling his goods below cost."

Q. Was it common or general?

A. I would not say it was common; for instance, I would go into the house of H. B. Claflin, and he would say, "How is Hopkins getting along? Is he not selling goods too cheap? Is he going to go through?" and all such remarks as that. Perhaps I would go into the house of Jaffray & Co., and they would say: "We don't like the way Hopkins is doing business"; and others would say the same.

Q. Those persons from whom he habitually purchased?

A. Yes, sir.

Q. Did you hear any such remark by Mr. Libbey?

A. No, sir; I did not, that I know of. As I said before, he would say to me: "He owes us a large amount."

Q. Did he ever say anything about Hopkins selling his goods at less than cost?

A. He would frequently say that there were complaints made by his customers of his way of doing business.

Q. Whose customers?

A. Stewart's. Mr. Libbey would say: "How is he selling his goods?" A customer from Cincinnati, or Indianapolis, or Louisville, would say that "Hopkins is selling goods less than we can sell them."

Q. Other customers of the house of Stewart & Co.?

A. Yes, sir.

Q. About what time was this remark made?

64 A. I can't tell. I should say it was in the fall of 1867.

Q. When you were here, during the intervals, there were times when you were in the establishment here?

A. Yes, sir.

Q. Was he selling goods at less than cost then?

A. Yes, sir; he was.

Q. Habitually?

A. No, sir.

Q. How much? What proportion of his stock, or sales?

A. I could not tell you.

Q. Twenty-five per cent.?

A. He would take certain goods and make a "leader" of them. For instance, he would take silks—he did not until last month, I think—but he would take silks, for instance a silk that, perhaps, would cost $1.50, would be marked $1.00, or less than that. I was never in the stock; my business was to buy for him. I was always from the city, probably, two-thirds of the year.

Q. When you were here, did you observe the course of business?

A. I did not observe the selling of goods at all, until the last time I came home. That might have been in November.

Q. What do you mean by taking a "leader" in an article?

A. For instance, as he takes a "leader" now; he will take domestic goods and sell them for just what they cost in New York, to sell other goods. In that way he makes a "leader" of domestic goods.

Q. Do you mean to get the customers there, and imbrace the occasion to sell them something else along with it?

A. Certainly.

By the COURT.

I don't know that I comprehend that?

A. What I mean by making a "leader," of certain goods, I will illustrate it by taking a Lonsdale shirting that cost 15½ cents east.

65 If he takes that home and sells it for 15 cents he makes a "leader" of it. Most of the customers that come in and want a shirt will buy a piece of Lonsdale shirting, and he makes a profit on other goods.

Mr. JORDAN. You said he would take silk at $1.50 and put it down to $1.00?

A. I think there were goods of that kind, but is so long back that I don't remember exactly.

Q. That would be much more of a "leader" than is ordinary?

A. Yes, sir.

Q. You noticed it when you returned from New York the last time?

A. Yes, sir; when I returned the last time from New York, I found a policeman at the door. It was either in October or November; I think it was in November. I had been on to New York, and had bought some goods for Mr. Hopkins. I think I had bought most of my goods at Jaffray's. I had gone to him as I had to the others, and he mentioned to me that there was talk about Hopkins; and I said "Sell me your goods or not, I know nothing about the matter," and when I came home, I found a policeman at the door, and such a crowd that I could hardly get into the store, and I went in and found goods selling remarkably cheap.

Q. Was that the last visit you made to New York before Mr. Hopkins suspended payment?

A. I can't tell exactly; I think I was there in December.

Q. Were you here at the time he stopped business?

A. Yes, sir.

Q. Were you in New York at the time of this meeting of the creditors?

A. Yes, sir.

Q. Can you tell where that happened?

A. It was at the St. Nicholas Hotel.

Q. Was it the 8th of January?

66 A. I should think it was later than that, but I can't tell you; I should think it was in January, but I can't tell the date.

Q. Who were present?

A. I can't tell all.

Q. Was Mr. Phillips there?

A. Yes, sir, and Mr. Jaffray.

Q. Was the house of A. T. Stewart & Co. represented?

A. I think it was represented by the gentleman who was out here—Mr. Prothero—or somebody.

Q. Did you go around and give the notices to those creditors in New York to meet?

A. No, sir; I knew nothing about that.

Q. Mr. Hopkins was there in person?

A. Yes, sir; and Mr. Reackert, his brother-in-law.

By Mr. PUGH:

Did you make a proposition to buy Hopkins' retail stock?

A. I did not make the proposition.

Q. Was it made to you?

A. It was made to us, I should think from the 25th to the 28th of December, 1867; I can't tell the exact date.

Q. What day was the bargain concluded, or the determination come to on both sides, that you should purchase the retail stock?

A. I think it was the night before New Years.

Q. The last day of December?

A. Yes, sir.

Q. You purchased the retail stock in the store?

A. Yes, sir; we took stock, I think, on January 1. We called in two men to take the stock.

By Mr. JORDAN:

Do you remember whether you bought any goods of Stewart in the month of December, 1867?

A. I don't remember.

Q. You don't remember of buying any?

A. I don't remember now whether I did or not.

67 Cross-examination:

Q. If I understand you correctly, you are not able to fix very definitely the time when you had that conversation with Mr. Libbey about sending money?

A. No, sir; I cannot more particularly. It was either in September or October—it might have been in November.

Q. Might it not vary a month either way from September?

A. Yes, sir; I think, perhaps, it was October or November.

Q. Might it not have been in August?

A. I think not. I am very sure it was not.

Q. Speaking about the policemen there at Hopkins' store when you got back, was not there the same condition of things, pretty much, at Shillito's?

A. I don't know. I was never there. I presume it was.

Q. There was a great run upon both stores?

A. Yes, sir.

Redirect examination:

Q. What time before November did they hesitate to let Hopkins have goods?

A. I can't tell you just the time when they hesitated about delivering the goods, but it strikes me now that it was before November, 1867, on account of the amount. I remember that the amount of the bill was some $40,000 or $45,000, perhaps more; and he objected on the ground that it was a large bill of domestic goods. I should think September would be nearer the time, between the 7th and the 16th.

Q. Were the domestic goods cash goods?

A. They are considered cash at thirty days.

68 Q. They occupy, in the New York trade, with their jobbing merchants, the same relation to certain articles that you speak of as "leaders"—they sold without much profit?

A. I suppose they would be called "leaders."

Q. That heavy purchase you speak of was all that class of goods?

A. I think so. I am not sure, but I think it was almost altogether. I think it was prints and bleached and brown shirting.

Q. That was the character of the goods?

A. Yes, sir; there were other goods bought at that purchase.

Q. But the bulk of them were these cash goods?

A. Yes, sir; I did not usually buy so much as that in domestics.

Q. Your recollection is not clearly distinct, after that length of time, as to the date of the transaction?

A. No, sir; I don't think I could remember.

L. A. COLE, a witness called on behalf of the defendant, testifies as follows:

Q. Were you in the employ of Mr. Hopkins in 1867?

A. I was, sir.

Q. Up to what time?

A. Until he failed; and I was afterwards in the employ of the firm of Turner & Lettster.

Q. What department was you employed in by Mr. Hopkins?

A. Assistant bookkeeper.

Q. Are you familiar with his books?

A. I am tolerably familiar with them.

Q. Did you receive the accounts current from A. T. Stewart & Co.?

A. No, sir; that was not a part of my duty.

Q. Have you examined them since?

69 A. I have examined them since. They came under my charge immediately after the failure, and I became familiar with them since.

Q. They have had you to examine them after the failure of Mr. Hopkins?

A. Yes, sir.

Q. What time was the failure?

A. The first notice I had of it was on the first day of January, 1868, which appeared in the Cincinnati Enquirer on the first, if they published on that day, and if not, on the second. It was either the first of January or on the second.

Q. After that you say you examined the books and papers, especially these accounts rendered from time to time by Stewart & Co. and others?

A. Yes, sir.

Q. You understand book-keeping, do you?

A. That is my profession.

Q. Now, will you state, from the examination which you made, whether or no the sum of $10,000, purporting to have been remitted on the 9th of November, 1867, and the sum of $17,000, were anywhere credited to Mr. Hopkins, in any account rendered by A. T. Stewart & Co. to L. C. Hopkins & Co.?

A. I have examined his books, and they don't appear on his books.

Q. Do you mean they are not on his books at all?

A. Not on his books to the best of my knowledge.

Q. Mr. Hopkins' books, nowhere?

A. No, sir.

Q. Nor on the invoice of the accounts rendered to him by Stewart & Co.?

A. No, sir; those credits do not appear there; they do not appear on the credits.

Q. Were you in receipt constantly of A. T. Stewart & Co.'s accounts?

A. Yes, sir.

70 Q. And they don't appear in them, either in cash or merchandise?

A. No, sir; they don't appear.

Q. If that (handing him a paper) is a true statement made by yourself you may read it, or give it in narrative form, with reference to the books of the house and the accounts with A. T. Stewart & Co., as shown by the books of A. T. Stewart & Co.

A. I have prepared a statement in my own handwriting, which is correct, and which is as follows:

The only reference on the books of L. C. Hopkins which refers to the $100,000 on A. T. Stewart & Co.'s loan, is found on the "Journal" for 1866, under date of June 25, and is of the following tenor, viz:

Copy.)

A. T. Stewart & Co. Cash acc't	$100,000
To L. C. Hopkins. Stock acc't. Dr. for amount handed them by Mr. H., June 6, as per their receipt	$100,000

This shows that Mr. Hopkins, after negotiating the loan, placed it to the credit of his cash accounts the same as a remittance, and drew on them for it, by draft, in payment of sundry merchandise accounts, their own and others, indiscriminately.

67 Cross-examination:

Q. If I understand you correctly, you are not able to fix very definitely the time when you had that conversation with Mr. Libbey about sending money?

A. No, sir; I cannot more particularly. It was either in September or October—it might have been in November.

Q. Might it not vary a month either way from September?

A. Yes, sir; I think, perhaps, it was October or November.

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Q. Speaking about the policemen there at Hopkins' store when you got back, was not there the same condition of things, pretty much, at Shillito's?

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Q. Your recollection is not clearly distinct, after that length of time, as to the date of the transaction?

A. No, sir; I don't think I could remember.

L. A. Cole, a witness called on behalf of the defendant, testifies as follows:

Q. Were you in the employ of Mr. Hopkins in 1867?

A. I was, sir.

Q. Up to what time?

A. Until he failed; and I was afterwards in the employ of the firm of Turner & Lettster.

Q. What department was you employed in by Mr. Hopkins?

A. Assistant bookkeeper.

Q. Are you familiar with his books?

A. I am tolerably familiar with them.

Q. Did you receive the accounts current from A. T. Stewart & Co.?

A. No, sir; that was not a part of my duty.

Q. Have you examined them since?

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Q. They have had you to examine them after the failure of Mr. Hopkins?

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Q. After that you say you examined the books and papers, especially these accounts rendered from time to time by Stewart & Co. and others?

A. Yes, sir.

Q. You understand book-keeping, do you?

A. That is my profession.

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This shows that Mr. Hopkins, after negotiating the loan, placed it to the credit of his cash accounts the same as a remittance, and drew on them for it, by draft, in payment of sundry merchandise accounts, their own and others, indiscriminately.

The only future evidences of payments on that loan are found in his letters remitting to them and their receipts; none appear on the books of the house, the letter-book excepted.

With reference to the $10,000 and $17,000.81 payments, it is only necessary to say that they do not appear on the books of L. C. Hopkins & Co. as being charged to A. T. S. & Co. in any of his accounts, neither credited to merchandise nor debited to cash account. They were distinct and separate from the business, and were remitted for application to the loan account alone.

L. A. COLE.

71 By Mr. JORDAN:

You say those two credits do not appear in any of the accounts current sent by A. T. Stewart & Co. to L. C. Hopkins & Co.?

A. No, sir; they do not.

Cross-examined:

Q. Who drew up that statement you have been reading from?

A. I drew it up myself when I was about to leave the city last spring. Mr. Jordan requested me to come to his office. I went there, but he was not in; and as I was about to leave the city, and fearing I would not see him again, I wrote that out hurriedly in his office, and left it there.

Q. Any corrections made on it since?

A. None at all; that is my original copy.

Q. Any one with you at the time?

A. No one at all; Mr. Maxwell was in the office at that time.

Q. Were the books before you when you wrote that?

A. Yes, sir, the books were before me; I could not have told it without reference to them.

Q. Just state this, whether on the 9th of November there is a credit for $10,000; whether on the 9th, 10th, 11th, 12th, or 13th, or anywhere else along there, there is a credit for that $10,000 or $17,000, above referred to.

A. There is not.

Q. Mr. Cole, just state to the court, from the examination of the books of Mr. Hopkins, the amount of money that was remitted from L. C. Hopkins & Co. to A. T. Stewart & Co., on the merchandise account here, from June, 1866, up to the time of the suspension.

A. On the merchandise account it would take me some little time to find out. The amount remitted to credit of cash account was over a million and a half dollars from June 1, 1866, to January 1, 1868,
72 This includes the $100,000, which was credited as if remitted. The exact amount I found to be $1,469,205.71.

Q. Will you now state, also, what amount of money L. C. Hopkins & Co. had deposited with or in the hands of A. T. Stewart & Co. on the 6th of June, 1866?

A. There was a balance to the credit of L. C. Hopkins & Co. of some $6,000 on the 6th of June, 1866.

Q. How was it on the 25th of June, 1866?

A. There is a balance to the credit of L. C. Hopkins & Co. on the 25th, according to the books, of some $25,000.

Q. Now, how much money, according to these books, did L. C. Hopkins & Co. have applied, from this bank account of A. T. Stewart & Co. to the payment of A. T. Stewart & Co. on the 9th of June, 1866?

A. He remitted $70,000 on account of time bills, and on the same day he remitted, on the account net of cash bills, $8,315.72.

Q. Now, how was that done?

A. It was a draft drawn on A. T. Stewart & Co., in their own favor, by a printed check.

Q. Was it all in one draft?

A. No, sir; the $70,000 and the $8,315.72 were in two different drafts.

By Mr. PERRY:

Both on the 9th?

A. Both on the 9th of the month; yes, sir.

JOHN E. REIS, a witness called on behalf of the defense, testified as follows:

Q. What was your office, if any, in the latter part of 1867, or 1st of January, 1868?

A. I was recorder of Hamilton County, Ohio.

Q. State whether or not you recollect the delivery of these papers for record to you—these seven mortgages.

A. Yes, sir.

Q. Who came to the office?

73 A. I think it was Mr. Thompson; perhaps some one with him.

Q. And these mortgages were offered to you for record?

A. Yes, sir.

Q. State, if any, what objection you made.

A. I objected to receiving the papers at the time on account of there being no stamps on them as required by law.

Q. What was done then, or said, or agreed upon?

A. The gentlemen then consulted about it, and finally left them with me for record. I told them I would take them for record. Let me go a little behind that. They said that these mortgages were given for a note—that is, to secure the payment of a note, and I think they said the note was stamped—and that was the reason they did not put stamps on the mortgage paper. I finally agreed to receive them and put them on record, and if stamps were required, after they found it out, they should be recorded, and they should have the privilege of putting the stamps on the mortgages, and have them entered on the record book before the mortgages were taken from the office.

Q. Well, sir, were they taken from the office during your time?

A. Not during my time.

Q. When did your time expire?

A. On the 4th day of January, 1868.

Q. And they had not then been taken from the office?

A. They had not then been taken fron the office.

Q. Did they pay for recording them?

A. They did not.

Q. State whether they made any request to have them recorded out of their order.

A. They appeared to be in a hurry and wanted it done immediately. They wanted the papers finished up, and I had them recorded within three days.

Q. What day was it they were brought?

74 A. The 2nd day of January.

Q. About what time in the day?

A. They were filed at 12.5 2nd of January.

Q. What induced you to go and tell Hopkins that you had received those mortgages?

A. I went down to see Mr. Hopkins on the same evening, before night; I told him there had been seven mortgages left there, and there

was no stamps on the mortgages, and I called his attention to it; Mr. Hopkins appeared very much surprised when I came and told him; I did not know anything about any circumstances attending it. I told him that the parties ought certainly to have the stamps put on these mortgages, and I came down to apprise him that there was no stamps on them.

Q. You left the mortgages in your office under that agreement when your term expired?

A. Yes, sir; I see they were receipted for by Thompson & Nesmith.

Q. What do you know about some examination of the records having been made by your son for Thompson & Nesmith, or having been made for A. T. Stewaat, prior to that time, of Mr. Hopkins' property?

A. I know there was an enquiry instituted in regard to Mr. Hopkins' property.

Q. You know there was some examinatiom made before that?

A. There was some examination made before this by some parties from New York, and they employed my son, who was my deputy in the office, to go over the books and see what property Mr. Hopkins had in his name, and he did so; that is all I know of it.

Q. That was just to search the record for his property?

A. Yes, sir.

Cross-examination by Mr. PERRY:

75 A. About how long before the mortgages were brought was your son employed by some one from New York?

A. Well, it may have been a month, and it might not have been more than two weeks; I can't say about that.

By Mr. COLLINS:

Might it not have been the same day the mortgages were left by Thompson & Nesmith?

A. I don't think it could have been the same day, for he would not have had time to have made the examination that he did in one day, or in a part of a day.

Deposition of FREDERICK A. MACY, who, being sworn, deposeth and saith:

By Mr. DAYTON:

Mr. Macy, you were one of the firm of David Valentine & Co. in the year 1866?

A. I became a member of that firm January 1, 1866.

Q. Did that firm sell goods to L. C. Hopkins & Co., of Cincinnati, Ohio?

A. They did, sir.

Q. Can you state what amount in 1866, prior to June?

A. A large amount.

Q. Can you state how much was due from L. C. Hopkins & Co. to David Valentine & Co. on the 6th of June, 1866?

A. I cannot without referring to the books. He seldom, or ever, owed us less than from $20,000 to $25,000 in the year 1866.

Q. Did L. C. Hopkins, or L. C. Hopkins & Co., continue to buy goods of David Valentine & Co. after the 6th of June, 1866? If so, down to what period?

A. We did continue to sell them, and sold them till the fall of 1867.

Q. Can you state what amount David Valentine & Co. sold Hopkins subsequently to June 6, 1866?

A. I can't tell the exact amount without referring to the books—
$50,000 at least. The balance now due is between $9,000 and $10,000.

76 Q. Were David Valentine & Co. ever informed, or did they know, that L. C. Hopkins, on or about the 6th of June, 1866, gave mortgages upon his real estate in Cincinnati to A. T. Stewart, or any mortgage or mortgages upon any property, to A. T. Stewart?

(Question objected to by counsel for A. T. Stewart & Co., as immaterial.)

A. They were not informed of it until after his failure.

Q. Were David Valentine & Co. ever informed, or did they know, that in or about the month of June, 1866, L. C. Hopkins gave to A. T. Stewart seven several mortgages, dated June 22, 1866, to secure indebtedness described as a note dated June 6, 1866, for $100,000, payable on demand, with interest?

(Objected to as immaterial and not within the issue.)

A. We had no knowledge of the existence of those mortgages until the spring of 1868. I am under the impression that the first we heard of them was at the meeting of the creditors of L. C. Hopkins in the spring of 1868, just after the first of January, 1868.

Q. Were you aware that L. C. Hopkins, in the year 1866, was buying goods of other houses besides the house of David Valentine & Co.?

(Question objected to as before.)

A. Yes, sir.

Q. What houses, according to your recollection, were they aware he was buying goods from?

(Same objection.)

A. I heard that he was buying of Stewart, Claflin, Arnolds, George Bliss & Co., Jaffrays, and Paton & Co.; that is about all I remember now.

(Answer objected to, and Judge Hilton moves to strike it out as hearsay evidence.)

Q. How long have you been a merchant in New York?

A. I have been in the dry-goods trade over twenty years.

77 Q. From your knowledge of trade and experience as a merchant, what would have been the effect on the credit of L. C. Hopkins, had it been known that in June, 1866, he mortgaged his property in Cincinnati for $100,000?

(Question objected to as not within the issue, and the enquiry is not within the province of an expert to answer.)

A. It would have had a damaging effect on his credit.

Q. Would David Valentine & Co. have trusted him?

A. Not without further information about his business.

Q. Did David Valentine & Co. inquire of L. C. Hopkins during 1866, or subsequently to June, 1866, as to his condition and circumstances? If so, what did he say?

(Question objected to as immaterial and incompetent evidence.)

A. We did not ask him for any special information.

Q. How long had the house of David Valentine & Co., or the predecessor of it, sold goods to L. C. Hopkins & Co., or the predecessor of that house?

(Question objected to as immaterial and incompetent evidence.)

A. Since 1857, I think.

Q. Will you furnish, to be annexed to your deposition, a statement showing the amount due from L. C. Hopkins & Co. to David Valentine & Co. on the 6th and 22d of June, 1866, the amount sold by your house

to L. C. Hopkins & Co. subsequently to that time, and the amount remaining due?

(Same objection as last.)

A. Yes, sir; I will furnish that.

Cross-examination by Judge HILTON:

To whom did you sell goods—to L. C. Hopkins or to L. C. Hopkins & Co.?

A. To L. C. Hopkins & Co.

Q. Did you ever inquire of A. T. Stewart or of any member of the firm of A. T. Stewart & Co., whether either member of that firm or the firm held any mortgage security from L. C. Hopkins or L. C. Hopkins & Co.?

A. No, sir.

78 Redirect by Mr. DAYTON:

Had you any ground, reason, or suspicion which would lead you to suppose that A. T. Stewart & Co. had taken mortgages from L. C. Hopkins or L. C. Hopkins & Co., to secure A. T. Stewart or A. T. Stewart & Co.?

(Question objected to as immaterial and incompetent evidence.)

A. Not the slightest.

F. A. MACY.

[Office of David Valentine & Company, 356 Broadway. Paris, 20 Rue Lepelletier.]

NEW YORK, *Oct.* 12, 1870.

DEAR SIR: On the 6th of June, 1866, L. C. Hopkins & Co. owed David Valentine & Co. $30,709.01, and on the 22d of the same month, $30,892.41. The total amount of their purchases subsequent to that time was $66,499.93, and they owed D. V. & Co., at the time of the failure, $9,867.87.

F. A. MACY.

Hon. ISAAC DAYTON, *Present.*

Statement furnished by witness Frederick A. Macy, pursuant to his testimony of Oct. 11, 1870.

HENRY H. RICE,
Notary Public.

JOSEPH P. BAKER, being called by the defendants and sworn, testified as follows:

I am one of the firm of Arnold, Constable & Co., of this city, and was through the year 1866.

Q. How long have L. C. Hopkins & Co. bought goods of Arnold, Constable & Co.?

A. Ever since that firm have been in existence. The present firm of Arnold, Constable & Co. have sold goods to L. C. Hopkins & Co. and their predecessors, Cole & Hopkins, (of which L. C. Hopkins was a member), for twenty or twenty-five years.

79 Q. Were L. C. Hopkins & Co. indebted to Arnold, Constable & Co. for goods sold in June, 1866? If so, state what amount L. C. Hopkins & Co. owed Arnold, Constable & Co. on the 6th and also on the 22d of June, 1866.

A. I cannot answer that question without referring to my books at home. I think that he was indebted—I feel pretty certain that he was—but I had better refer to my books.

Q. Did Arnold, Constable & Co. sell goods on credit to L. C. Hopkins & Co. after June, 1866?

A. They did. I cannot state the amount without reference to my books. I will prepare a statement showing the indebtedness of L. C. Hopkins & Co. to Arnold, Constable & Co. on the 6th and 22d of June, 1866, and the subsequent indebtedness of that house to Arnold, Constable & Co.

Q. Did Arnold, Constable & Co. know, or were they informed that A. T. Stewart & Co. or A. T. Stewart held mortgages given in June, 1866, on real estate of L. C. Hopkins in Cincinnati, as security for $100,000?

(Question objected to as incompetent and irrelevant.)

A. They did not know, nor were they informed that such was the case until subsequent to Mr. Hopkins' failure.

Q. If they had known of the existence of those mortgages, would they have trusted L. C. Hopkins & Co.?

(Same objection as last.)

A. Most assuredly they would not.

Q. Are there agencies by which, if those mortgages had been put on record, Arnold, Constable & Co. would have been informed of the fact of such record and of the existence of the mortgages?

(Same objection.)

A. There are.

(Same objection.)

80 Q. State in what way.

(Same objection.)

A. We should have been informed of it by at least three or four agencies which we pay for furnishing us information, and in all probability by our attorneys in Cincinnati, who look after our interests.

Cross-examination by Judge HILTON:

To what extent was your firm willing to sell L. C. Hopkins & Co. goods upon credit during the period of his dealings with you? I mean, what was the extent of his credit line?

A. He had no limited amount. It was unlimited; there was no restriction.

Q. Do all merchants deal upon their own capital, or are there not some who deal upon borrowed capital?

A. I think there are very many who deal upon borrowed capital.

Q. Has your firm ever borrowed money to use in its business?

(Question objected to.)

A. Not for many years.

Q. How many years since you have?

A. I don't think we have for ten or fifteen years, to the best of my knowledge and belief.

Q. When you did borrow money to use in your business, state, in some instances, the amount you borrowed, and whether you gave any security for it.

A. I have no knowledge of our ever having borrowed money for the purposes of our business, other than obtaining discounts at bank on our business paper.

Q. Do you not consider that borrowing money upon security?

A. I do.

Q. When did you last borrow money on such security, and to what amount?

81 A. I can't call to mind the last time.

Q. Have you no recollection of the amount you so borrowed?

A. I have not.

Q. Can you not ascertain from your books?

A. I can.

Q. Will you, at the next meeting, produce a statement showing such amounts?

A. If I am ordered to do so by competent authority I will.

Q. How is it possible for you to know that your partners were not aware of the fact of Hopkins having borrowed $100,000 in cash, to use in his business, and had given as security therefor mortgages on his real estate?

A. For the last twenty or twenty-five years I have been the sole dispenser of credit in the house of Arnold, Constable & Co., of which I am a member, my other partners having nothing to do with that, not coming within their province, and any such information in the natural course of business would come to me and not to my partners.

(Question repeated.)

A. I do not know how I can answer that question any more than I have.

Q. Do you possess all the knowledge of your co-partners in respect to the business of your firm?

A. I do not.

Q. Then, how is it possible for you to know all that they know in regard to Hopkins' affairs?

A. I doubt if there is any member of our firm ever knew anything of Hopkins' affairs, unless it be such information as I have imparted to them.

(Motion to strike out answer as not responsive and question repeated.)

82 A. If they knew anything that I did not know they have received their information from a source unknown to me.

(Similar objection and question repeated.)

A. I cannot answer it any better.

Q. Mr. Baker, are you able now to give us any instances when your firm borrowed money to use in its business? If so, please do so.

(Question objected to by Mr. Dayton, counsel for defendants, as irrelevant.

Counsel for A. T. Stewart & Co. proposes to show by this witness that his firm of Arnold, Constable & Co. has frequently borrowed money upon security to use in its business and withheld from persons of whom they purchased goods upon credit, at or about the time, information upon the subject, and that the parties from whom they borrowed money never communicated any information to the creditors of Arnold, Constable & Co., and that Arnold, Constable & Co. never informed the commercial agencies of their having so borrowed money.)

A. I am able to give the information but decline doing so, as being irrelevant to the case.

(Counsel for A. T. Stewart & Co. moves to strike out the entire testimony of the witness.)

Q. When your firm borrowed money upon security to use in its business, did you make a practice of giving or did you ever, in any instance, give information on the subject to persons from whom you were then purchasing goods on credit?

(Question objected to as before.)

A. I decline to answer that question for the same reason as before.

(Last motion by counsel for A. T. Stewart I Co. to strike out repeated.)

Q. When you so borrowed money upon security to use in your business, did you not request or desire or intend that the party of whom
83 you so borrowed money should conceal or withhold information on the subject from your creditors and from those from whom you were making purchases of goods upon credit?

(Question objected to by counsel for defendants as irrelevant.)

A. I decline answering for the same reasons before given.

(Motion made by counsel for A. T. Stewart & Co. to strike out as before.)

Q. Did you believe you was committing any fraud or wrong in withholding information of the fact from the parties from whom you were purchasing goods upon credit that your firm was so using money borrowed upon security?

(Question objected to as before.)

A. I decline answering for the same reasons as before given.

(Similar motion as before to strike out.)

Q. Did you or do you consider it was the duty of the party of whom you so borrowed money to use in your business to inquire as to whom you were purchasing goods upon credit, and your other creditors, and communicate to them the fact of having made the loan to you?

(Question objected to as irrelevant.)

A. I decline answering as before.

(Similar motion as before to strike out.)

Q. Has your firm ever loaned to a debtor of it money upon security to enable him to carry on his business or to use in his business?

A. They have.

Q. Give us some instances, date, name, and amount, and character of security taken.

A. In August, 1868, my firm loaned $50,000, taking mortgage security therefor, at the same time, which mortgage was, on the date of loaning the money, put upon record, and is still upon record, no portion
84 of the money having been repaid; I think it was August 27th. The party to whom we loaned the money was J. M. Hafleigh, of Philadelphia.

Q. Specify any other instance or instances where you so loaned money and took security and did not put the security upon record.

A. To the best of my knowledge and belief no such instance existed during the period of our business.

Q. Specify any other instance or instances where you so loaned money and took security and recorded the evidence of the security.

A. I cannot now call to mind any other instance.

Q. Do you mean me to understand that your firm during the whole period of its existence, of over forty years' duration, never, but in the instance referred to, loaned money to a customer of the house upon security to enable him to carry on his business? Is this the only instance you can recollect?

A. I cannot recollect any other instance.

Q. In the instance referred to, after making the loan, did you or not inquire as to whom Mr. Hafleigh was purchasing goods upon credit from in this city and communicate to them the fact of having made the loan? Did you or did you not?

A. I don't recollect that I did.

Q. Assuming that Mr. Stewart loaned Hopkins $100,000 to use in his business, was it, in your opinion, the duty of Mr. Stewart to inquire where and of whom Hopkins was purchasing goods in this city and inform the parties of the fact of having made the loan?

A. I do not conceive it to have been Mr. Stewart's duty——

(The witness was proceeding to answer further and counsel for A. T. Stewart & Co. objects to his further answering.

85 The counsel for the defendants insists upon the witness proceeding with his answer.)

A. I don't conceive it to have been Mr. Stewart's duty to inform any other persons than such as applied for the information; but I do conceive it——

(Counsel for A. T. Stewart & Co. objects to the witness going on as he proposes, having already answered the question.)

(Witness continuing:) But I do conceive it to have been Mr. Stewart's duty to have put his mortgage on record.

(Motion made by counsel for A. T. Stewart & Co. to strike out the last part of this answer as not responsive to the question.)

Q. If Hopkins had informed you that a friend in Cincinnati had loaned him $100,000 upon security of his real estate, and that he was using or had used it in his business, and that the mortgages were not recorded, would his credit with you have been injuriously affected?

A. It would.

Q. Explain why.

A. Because I would have wanted a full exhibit of his affairs.

(Question repeated.)

A. Because I should have thought his affairs were in a critical condition, and I should want a full exhibit before selling him.

(Question repeated.)

A. I don't know how to answer the question any better, or any more correctly.

Q. If the exhibit of his affairs showed that he had used the money in his business in paying for goods purchased and on hand, would the fact of the loan having thus been made have injuriously affected his credit with your firm?

A. It would.

Q. Explain why.

86 A. The necessity for a loan would, in my opinion, indicate overtrading, and the fact of the mortgage not being on record would indicate a desire for concealment.

Q. If he had informed you that he had borrowed that amount upon security of his bills receivable, and used it to increase his business commensurate with his new store, which he was then opening, would that have affected his credit with your firm injuriously?

A. I think not.

Q. If he had informed you that he had realized from the sale of his real estate $100,000 to use in his business, would that have affected his credit with your firm?

A. It would have affected it favorably.

Q. Explain why this difference, if you were satisfied that this money was actually received by him and used in his business.

A. The one would have been an absolute sale of the property, and realization of the money without borrowing it, while the other would render the property liable, provided the mortgage had been recorded.

Q. Assuming that the real estate was well located in Cincinnati for an increase in value, and was well worth considerably beyond the amount loaned, would that have made any difference in your opinion about his credit, under the circumstances?

A. It would.

Q. Explain why.

A. My judgment and my opinion would have been in favor of a sale instead of a loan upon the property.

Q. Is that the only explanation or reason you can assign?

A. I assign no other reason.

Q. How frequently, during Hopkins' business intercourse with your firm in purchasing goods, during the period of many years referred to by you, did you require of him a statement of his condition and affairs?

87 A. I can't call to mind that we ever did. He has sometimes volunteered information.

Q. State when, and what information he volunteered.

A. I have no data or figures from which to make such statement.

Q. State from your best recollection.

A. I cannot, sir.

Q. Had you any knowledge of his owning real estate?

A. I had not.

Q. What was the amount of his indebtedness at the time of his failure, to your firm, in January, 1868?

A. $4,188.78.

(Counsel for A. T. Stewart & Co. objects to the witness being further examined on behalf of the defendants until he answers the questions propounded on behalf of the plaintiffs.)

Direct examination resumed:

By Mr. DAYTON:

What was the amount of the indebtedness of Hopkins & Co. to your firm on the 6th and 22nd of June, 1868?

A. $1,291.50. The amount of his purchases from us subsequent to June 22, 1866, and prior to his failure, was $20,667.93.

JOSEPH P. BAKER.

HORACE B. CLAFLIN, sworn and examined on behalf of the defendants, deposed as follows:

I am one of the partners of the firm of H. B. Claflin & Co., of this city. I was one of the partners of that firm in the year 1866. The firm at that time consisted of myself, John J. Donaldson, and Edward E. Eames.

Q. Was L. C. Hopkins or L. C. Hopkins & Co. a customer of your firm in 1866?

A. Yes, sir.

Q. Can you state whether any, and if any, what amount was due from L. C. Hopkins & Co. to H. B. Claflin & Co. on the 6th and 22nd of June, 1866?

88 A. I can't state the amount, for I have not looked.

Examination having been adjourned, is resumed:

Q. What was the amount due from L. C. Hopkins, or L. C. Hopkins & Co. to H. B. Claflin & Co. on the 6th day of June and the 22nd of June, 1866?

A. I got the amount here as I took it. On the 6th day of June, 1866, $54,570; on the 22nd of June, 1866, $47,823.

Q. Did H. B. Claflin & Co. continue to sell goods to L. C. Hopkins, or L. C. Hopkins & Co., on credit, after the 22nd of June, 1866?

A. Yes, sir; we did.

Q. To what amount?

A. I don't know the exact amount. I know he owed us a large amount all the while. We sold him all the while, and he owed us all the while.

Q. What amount was due from L. C. Hopkins & Co. to H. B. Claflin & Co. when Hopkins failed?

A. $58,305.

Q. Had H. B. Claflin & Co. any knowledge or information of a mortgage or mortgages given by L. C. Hopkins upon real estate in Cincinnati and elsewhere, to A. T. Stewart, as security for the payment of a promissory note dated the 6th of June, 1866, for $100,000, payable on demand, such mortgage or mortgages bearing date on or about the 22nd of June, 1866?

(Question objected to by Judge Hilton, as immaterial and irrelevant.)

A. No, sir; we had no knowledge of any such mortgages.

Q. Or of the promissory note?

(Same objection.)

A. No, sir.

89 Q. If you had known or been informed of such mortgage or mortgages, what effect would such knowledge or information have had in respect to your giving credit to L. C. Hopkins, or to L. C. Hopkins & Co.?

(Same objection.)

A. I think it would have injured his credit with us. It would with me very much. I don't think we should have trusted him at all.

(Judge Hilton moves to strike out this answer, as irrelevant and immaterial.)

Q. If such mortgage or mortgages had been put on record in Cincinnati, would or would not H. B. Claflin & Co have been informed of the recording of such mortgages?

(Same objection as last.)

A. I suppose we should have heard of it at once, as we took one mortgage ourselves in that same city within a year for about $100,000, and the information came back within a week to all the creditors.

(Judge Hilton moves to strike out the first part of this answer, as immaterial, being merely supposition; and the last part, as not being responsive, and immaterial.)

Q. In what way would such information have come to you, and in what way did the information come to New York of the mortgage in the case you have just spoken of?

(Question objected to as involving two distinct inquiries and not single in character, and also as not material or relevant.)

A. It came through the agencies.

Q. Is that all your answer to the question I have just put?

A. The information came through the agencies, of the one I spoke of.

(Same motion as before, to strike out.)

Q. Were there such agencies in 1866?

(Similar objection to this question.)

A. Yes, sir.

90 Cross-examination by Mr. HILTON:

For what period of time did you sell goods to L. C. Hopkins & Co.?

A. I am not sure how long; but I think we have sold him more or less since the firm existed.

Q. What was the extent or line of credit of Hopkins & Co. with your house?

A. I don't know that he had any fixed amount or line.

Q. Did you ever inform him of any limit to his purchases of your house?

A. I don't remember that I ever fixed any particular amount.

Q. Did you ever refuse to deliver him any goods that he desired to purchase?

A. I think I have told him at times that he owed me enough.

(Question repeated.)

A. No; I don't think I ever laid back any that he had bought after he had actually laid them out.

Q. Did you ever lend him any money for his business purposes or otherwise?

A. I don't think I ever did.

Q. Did you ever get from him a statement of his condition, pecuniarily and financially?

A. I don't think I ever did—a full statement.

Q. What actual knowledge had you of his pecuniary responsibility?

A. I don't think I ever had any positive knowledge. I have heard him say he considered himself worth a certain sum of money.

Q. What sum did he state?

A. I think over a hundred thousand dollars.

Q. When was this statement made, and where?

A. I am not quite sure as to when. It was at my store.

91 Q. What knowledge had you of Hopkins owning any real estate?

A. I have heard him say that he owned a large real estate.

Q. Did you make any inquiry as to its value or character?

A. He has told me, in the course of conversation, how much real estate he owned and where it was, and how much it was worth; but I don't remember now the particulars.

Q. State, as far as you can remember, what he said on the subject.

A. It was four years ago, and I cannot say whether he said it was worth a hundred or two hundred thousand dollars, more or less. It might have been more than either sum.

(Question repeated.)

A. I don't remember whether he said his real estate was worth one hundred or two hundred thousand dollars. It might be more or less than either sum. It was four years ago—five years ago. This conversation must have been five years ago. It was before his failure. It was between four and five years ago.

Q. Have you stated all your recollection upon the subject?

A. I have.

Q. How do you fix in your mind the time when this statement was made to you?

A. I remember talking with him about his matters the year before he failed.

Q. Is that the only fact to aid your recollection on that point?

A. That is the only thing I think of now.

Q. Is it or not unusual for a merchant to borrow upon security to use in his business?

A. No, sir; it is not.

Q. Is it or not usual for a merchant, borrowing money upon

92 security to use in his business, to communicate the fact to those from whom he may at the time or thereafter be purchasing goods on credit?

A. I don't think it is usual. If he borrows on real estate, the records show it. If he bor'ows on bills receivable, it is a matter of notoriety.

Q. How does it necessarily become a matter of notoriety when a man borrows money on security of bills receivable or otherwise?

A. If he borrows at a bank, the officers and directors know it. If he borrows on the street, whoever looks after bills receivable—purchasers of bills—would know it. There are a good many purchasers of bills always in the street.

Q. Is that the whole extent of notoriety referred to by you?

A. Yes, sir. Of course the clerks in a bank would know it—the officers, directors, and clerks.

Q. Do you wish me to understand that you believe that officers, clerks, and directors in banks make public and give notoriety to the fact of loans being made by the bank?

A. I don't think they publish it in the newspapers. I think they speak about it frequently.

Q. Have you any actual knowledge on the subject; if so, specify to what extent, giving the names of the banks and the officers' names who so publish their affairs?

(Question objected to by Mr. Dayton.)

A. I shall not name any bank. I would not, if a hundred had spoken to me within two hours. I have actual knowledge. I know that it is so; that they do speak of such loans. I heard a bank man say, within forty-eight hours, that he had loaned a certain man two or three hundred thousand dollars. He spoke of it Saturday. I think he loaned it that day.

Q. Do you wish me to understand that you believe that any person present here, except yourself, could, by applying to any bank or its officers, obtain information of their loans?

93 A. I don't think any one would be imprudent enough to ask the question of a bank officer; but if you are in, talking about money matters, I think it is a common thing to say that they have made large loans—sometimes mention parties.

(Question repeated.)

A. I say that I don't think we could; but, as I said, if we are in, I think it is a common thing to mention it. I don't think that any of us would be impudent enough to ask the question.

Q. If we should ask, do you think we could get the information referred to by you?

A. No, I don't think we should, by direct application; it is meddling with other people's business, and is a question we have no right to ask.

Q. If Mr. Hopkins had informed you in June, 1866, that he had borrowed upon his real estate a hundred thousand dollars, from a friend in Cincinnati, and put it in his business, what effect would it have had upon his credit with your house?

A. I think it would have weakened him with us very much because he was very short of money, and owning a large amount of real estate we might have thought his money was in his real estate and not in his business. We thought that accounted for his being short, the fact of his owning so much real estate.

Q. If, as you have already testified, you believe Hopkins to be worth $100,000, and that he owned a large amount of real estate, worth from $100,000 to $200,000, why would the borrowing of $100,000 on his real estate affect his credit?

A. If a man is very short of money, and we believe that his means are in real estate, that will account for his being short; but if we know

that he has raised the money on that real estate, and he is still short, we should think him less responsible, of course.

94 Q. Is that the best explanation you can give in answer to that question?

A. That certainly is a correct one, whether it is the best one or not.

(Question repeated.)

A. In just the way I have stated; we supposed he owned the real estate when he did not.

Q. If Mr. Hopkins had informed you in June, 1866, that he had sold and realized $100,000 in cash from his real estate, and was using the money in his business, how would that have affected his credit?

A. If I had known that he had sold his real estate and had got the money for it, it would certainly have weakened him with me, if he had continued as short of money as he was; because I would have thought that his sale of real estate ought to have made him easy in his finances.

Q. Then do I understand that you believe that the conversion of his real estate into money weakened his credit?

A. Yes, I think it would if he remained as short as he was before.

Q. Apart from any shortness of cash on the part of Hopkins, as alleged by you, would the fact of his realizing from his real estate $100,000 in cash, for use in his business, have affected his credit?

A. No, sir; if he had—(Judge Hilton objected to the witness answering further)—if he had sold his real estate for $100,000, and had come down here and had been flush in his finances, I should have thought the conversion of his real estate into money a good thing for him, instead of being short, as he had been all through the season before he failed.

Q. When did this shortness you refer to first come to your knowledge?

A. I don't remember exactly the time, but I think the whole season before he failed—perhaps the whole year.

95 Q. Then if this loan had been made, and he had not appeared to be short, and the fact of making the loan had come to your knowledge, would his credit have been affected?

A. If I had seen that $100,000—if he had told me that he borrowed $100,000—and that that had given him perfect relief, I should have known that his capital was in real estate, instead of in his business, and that the converting of it into money showed that he was responsible.

Q. When did Hopkins & Co. fail?

A. They failed in some of the last days of 1866, about Christmas. I am not quite sure about the year; I think it was December, 1866.

Q. Then the season of the shortness of money you have referred to was in 1867, instead of 1866, was it not?

A. It was the year before he failed.

Q. What year was that?

A. That was 1867.

Q. Then you don't apply your remarks about the shortness of money to 1866?

A. No; the time I speak of was the year before he failed, 1867. I do not apply it to June, 1866.

Q. Did you ever take any written statement from L. C. Hopkins or L. C. Hopkins & Co., respecting their financial condition?

A. I don't remember having anything in writing from them.

Q. Did you ever enter anything in your reference books respecting the same?

A. I don't remember.

Q. You refer to a mortgage that you took for money lent to some one in Cincinnati, and information coming back to all the creditors; please state what actual knowledge you had of the information coming back through the agencies referred to by you.

A. The people came; the creditors came in and asked us what
96 it meant, if the man was insolvent. The man told me himself that his credit was injured by the mortgage.

Q. How many people came in; who were they?

A. I don't think I could say how many; I think Jaffray, for one.

Q. How many others?

A. I could not say; I kept no record.

Q. Give the name of the man in Cincinnati to whom you loaned the money.

A. Mr. Deland—Charles W.

Q. Was that mortgage for money actually loaned by you?

A. I think it was, sir.

Q. Was it in cash, and if so, a check on what bank?

A. I can't say; I keep four or five bank accounts, and it would be difficult to say on what bank; it may have been on three or four banks.

Q. Was not that mortgage given to secure you for moneys previously owing, and not for cash advanced at that time?

(Objected to by Mr. Dayton.)

A. It was for money loaned, but not all loaned at the time.

Q. How long previous to the giving of the mortgage had the money been loaned?

A. I don't remember.

Q. How much was loaned at the time the mortgage was given?

A. I don't know that; I don't know that any was loaned at the time, the very day.

Q. Was it not given for payments on his accounts previously?

A. I think it was.

H. B. CLAFLIN.

97 HORACE B. CLAFLIN, recalled by defendants, and examined by Mr. DAYTON:

Q. In your former examination, you omitted to state whether the mortgage, which you mentioned, on property in Cincinnati, which your firm had taken as security for a debt, was recorded; please state whether that mortgage was recorded, and how soon after you took it?

(Question objected to by counsel for A. T. Stewart & Co., as leading, irrelevant, and immaterial.)

A. I thought I did say it was recorded. It was recorded immediately there. I will not say it was the same day, but it was recorded within a very few days.

Q. In your testimony, at the last examination, you speak of the effect of Hopkins obtaining the $100,000 on his real estate, in June, 1866, upon the supposition that he was, in the year 1866, short of money. What effect, then, or subsequently, would that mortgage have had, if you had known it, upon his credit with your house, if he was not, at the time of the mortgage, short of money?

(Question objected to by counsel for A. T. Stewart & Co., as reopening the examination, and particularly as improperly stating the previous examination, and as immaterial.)

A. I think it would not have hurt him in 1866, if he had been flush

with money; but when he became short of money, as he did in 1867, I don't think we should have trusted him at all.

HORACE B. CLAFLIN.

Plaintiff's counsel moves to strike out the last sentence in the answer.

Deposition of SALMON C. BAKER, who, being sworn and examined on behalf of defendants, testified as follows:

I am bookkeeper for E. S. Jaffray & Co., of this city.

By Mr. DAYTON:

Can you state, from an examination of the books of E. S. Jaffray & Co., whether or not L. C. Hopkins & Co., of Cincinnati, were, on
98 the 6th and 22d days of June, 1866, indebted to E. S. Jaffray & Co.; and, if so, in what amount?

A. On the 6th of June, he owed us $27,201.88; and on the 22d of June, he owed us $27,459.63.

Cross-examination by Judge HILTON:

Do you know whether or not Hopkins had, previously to that time, owed a larger amount than that to E. S. Jaffray & Co.?

A. I do not.

Q. Do you know when Hopkins' account was first opened on their books?

A. I do not.

Q. Can you state whether the account was not, previous to the date you have mentioned, much larger than you state?

A. I cannot.

Q. How long have you been bookkeeper at E. S. Jaffray & Co.'s?

A. Since May 16, 1869.

Q. Then do I understand that you only know what you have testified to from looking at their books?

A. Yes, sir.

SALMON C. BAKER.

WILLIAM R. MOREHEAD, sworn for defendants, testified as follows:

I was first-assistant bookkeeper for George Bliss & Co., in the year 1866.

Q. Do you know whether L. C. Hopkins & Co. were, on the 6th and 22d of June, 1866, indebted to George Bliss & Co.; and, if so, in what amount?

A. I do. On the 6th of June, it was $16,608.65; on the 22d of June, it was $13,385.18.

99 Cross-examination by Judge HILTON:

Is not your knowledge upon the subject of the indebtedness inquired of derived wholly from the books of George Bliss & Co., and the entries contained therein?

A. Yes, sir.

WILLIAM R. MOREHEAD.

EDWARD LUCKEMEYER, sworn for defendants, testified as follows:

I am one of the partners of the firm of Kutter, Luckemeyer & Co., of this city. The firm of Kutter, Luckemeyer & Co. are creditors of L. C. Hopkins & Co.

Q. When did L. C. Hopkins & Co. commence buying goods of Kutter, Luckemeyer & Co.?

A. I can't give the dates at present, with any certainty. It may have been in 1865 or in 1864. I know positively that we sold him in 1866.

Q. Can you tell about what time in 1866 you sold L. C. Hopkins & Co.?

A. We sold them between January and April, 1866, but nothing in June, 1866.

Q. Are Kutter, Luckemeyer & Co. now creditors of L. C. Hopkins & Co.?

A. Yes, sir.

Q. In what amount?

A. $44,694.45.

Q. Can you say, now, when that account commenced?

A. All sold in one bill, on the 12th day of September, 1867.

Q. Previously to selling the bill, did you make any inquiries of L. C. Hopkins as to his property, or means, or responsibility; or did he say anything to you in reference to his property, means, responsibility, or liabilities?

100 (Question objected to by counsel for A. T. Stewart & Co., as leading, and also as irrelevant and immaterial.

Question withdrawn.)

Q. Did you have any conversation with L. C. Hopkins previous to selling that bill?

A. Yes, sir.

Q. What was it?

(Objected to as irrelevant and immaterial.)

A. I asked him how he stood, and he said that he was all right, not only that he had all the money in his business that he needed, but that he was in possession of $150,000 to $200,000 worth of unincumbered real estate in Cincinnati, whereupon we sold him the goods.

Cross examined by Judge HILTON:

How long had you previously known Mr. Hopkins?

A. I don't know; I should think two or three years—certainly two years previously.

Q. Had you not been in the habit, at times, of selling him goods previously?

A. Yes, sir; my house had.

Q. Did you consider him a man of good credit during the period of your business acquaintance with him?

A. For a certain amount I did. We never sold him so large an amount before.

Q. Did your firm ever place any limit to his credit in your business with him?

A. In attending to our creditors we never place any limit. We placed no limit on his credit, because we do our business ourselves, and check each sale.

Q. Was not Hopkins regarded by your house as a desirable customer?

A. We considered him a fair business risk.

EDWARD LUCKEMEYER.

101 The defendants then offered in evidence the proceedings in bankruptcy against Lewis C. Hopkins, and the deed executed by him in pursuance of the order of the court, and in all respects in conformity with law, to George Maxwell and Isaac M. Jordan, trustees of said L. C. Hopkins, in bankruptcy; also a dead duly executed by said Hopkins, and Maria W., his wife, by which deeds of conveyance all the

title, interest, and estate of said L. C. Hopkins and his wife in said real and leasehold estate in controversy in this case, as well as the entire assets of said Hopkins, passed to said George Maxwell and Isaac M. Jordan, trustees as aforesaid, and which they still hold.

(The printing of said record and deed is omitted by consent.)

The defendants then called ISAAC M. JORDAN, who testified as follows:

I am one of the trustees in bankruptcy of Lewis C. Hopkins. The answer and counter-claim filed in this case by the trustees of said Hopkins was so filed upon application to and by direction of John W. Barrow, Thomas C. M. Paton, and James Doeler, the committee of creditors appointed under the forty-third section of the bankrupt act.

The defendants then called FLAMEN BALL, who testified as follows:

I am the register in bankruptcy to whom was referred the proceedings against L. C. Hopkins, and I am still acting as register in charge of said proceedings.

From April 14, 1868, up to June 2, 1871, thirty-eight creditors have filed with me proof of claims against the estate of L. C. Hopkins, amounting in the aggregate, without interest, to the sum of $581,580.32.

Messrs. A. T. Stewart & Co., of New York, were put down in Hopkins' schedule, as unsecured creditors, to the amount of about $250,000.

102 Messrs. A. T. Stewart & Co. have never filed proof of their claim; nor has A. T. Stewart filed any proof of claim.

The defendants then offered in evidence three mortgages executed to Alexander T. Stewart by Lewis C. Hopkins and wife, on June 22nd, 1866, upon three separate parcels of real estate in Covington, Kentucky. Each of said mortgages expressing, on its face, to be in consideration of $100,000, and given to secure the note for $100,000, set out in the petition, and offered in evidence in this case. All of which mortgages were left for record in Covington, Kenton County, Ky., on July 16, 1868, and thereafter recorded.

(The printing of said mortgages is omitted by consent.)

The defendants then offered in evidence a certified copy of the record and proceeding in the case of A. T. Stewart & Co. against Lewis C. Hopkins, showing that said A. T. Stewart & Co., by their attorneys, brought suit against said Hopkins on January 2, 1868, for the sum of about $18,000, being the amount of merchandise they had sold him in November, 1867, and on the same day caused an attachment to be issued and levied upon his real estate in Covington, Kentucky, as a non-resident, and that on September 26, 1868, they filed an amended and supplemental petition in said case, setting up the note for $100,000 and the three mortgages above offered in evidence, securing the same, and asking a decree for the foreclosure of said mortgages and the sale of said real estate.

(The printing of said record and proceedings is omitted by consent.)

The defendants having rested their defense, the plaintiffs offered the following:

The deposition of WILLIAM LIBBEY, who, being sworn, testified as follows:

103 I am a dry goods merchant, and am a member of the firm of A. T. Stewart & Co., of New York. I have been some ten years connected with that firm. I have had general superintendence of the credits and general management of their business for three years past. I mean

by taking charge of credits, inquiring into the pecuniary condition of persons applying for credit, and deciding upon the delivery of goods to them.

I first became acquainted with L. C. Hopkins in the year 1860 or 1861, when he was of the firm of Cole & Hopkins. Afterwards, in 1862, he began business on his own account, in the general dry goods business, jobbing and retail, at Cincinnati, under the firm name of L. C. Hopkins & Co.

My impressions are that when he began business he had no partner, but afterwards B. F. Turner was his partner. Mr. Hopkins, under that firm name, opened an account with A. T. Stewart & Co. in 1862. That was a general account for the purchase of dry goods. About that time he had dissolved with Cole, and the statement Hopkins made to us then was that he and Cole were worth each one hundred thousand dollars. We had no reason to disbelieve this statement, and we gave him credit upon it.

About a year later we opened a cash account with his firm of L. C. Hopkins & Co. The character of that account was receiving money from him, such as drafts, checks, and remittances by express, which we placed to the credit of his account, and out of it paid his notes as they matured, of which he gave us lists, and also paid out upon his orders.

(Letter produced, dated August 30, 1867.)

This is a letter from L. C. Hopkins & Co., containing a list of their notes maturing, and to be paid by us. They were furnished regularly monthly by him for the same purpose. All of these notes were paid, as directed, out of his cash account.

Q. Look at paper produced, marked Exhibit No. 1, Nov. 9, 1869,
104 and say whether or not that is the usual form of drafts drawn by Hopkins on your firm, in connection with his cash account?

A. That is the usual from of drafts drawn by him at Cincinnati on us, and which were paid by us, in addition to his notes as they matured, out of his cash account.

(Papers produced, marked Exhibits Nos. 2 to 24, Nov. 9, 1869, H. H. R., inclusive.)

These are original letters, received by our firm by mail from L. C. Hopkins & Co. The marks in red ink were made by our clerks; also the letters "G. B. B." indicate that Mr. Butler, who draws the checks for our firm, under power of attorney, has given checks for the amounts opposite to which the letters are placed. Exhibit Nos. 25 to 38, inclusive, are copies of letters sent by us to L. C. Hopkins & Co.

(Counsel for the trustees objects to these letters as evidence.)

The statements in these letters, written by our firm to L. C. Hopkins, were true. These letters represent the transactions between the two houses—the method of transacting business between the two houses, and these transactions are correctly stated.

(This testimony also objected to by the counsel for the trustees.)

Exhibits Nos. 39 to 145, inclusive, are drafts and notes of L. C. Hopkins & Co. paid by us in the regular course of business, out of his cash account. These are but a part of a similar class of notes and orders which we have in our possession. I produce these as showing an illustration of our method of doing business with L. C. Hopkins & Co.

(Counsel for A. T. Stewart & Co. here reads in evidence exhibits produced, from Nos. 1 to 145, inclusive.)

Q. Who generally made the purchases, in the year 1867, for L. C. Hopkins & Co. from your firm?

A. They were made by L. C. Hopkins and B. F. Turner—Turner acting for the firm.

105 Q. What was the character of the purchases, commencing August, 1867, and extending down the balance of that year, in respect to quality and amount?

A. There was about one hundred and forty thousand dollars of goods bought for cash, payable in thirty days—cash goods; about thirty thousand dollars of time goods—goods bought on ninety days.

Q. What constitutes what you call cash goods?

A. Such as prints, bleached and brown goods, muslins, etc.—goods sold usually by parties at cost price, as an inducement for trade. They are necessary for a jobber to have on hand to keep his trade alive.

Q. During this period, state whether or not you were making daily cash payments upon his account.

A. We were, during this entire period, making almost daily cash payments upon his account.

By Judge HILTON:

Mr. Libbey, look at the papers now handed you and say what they are.

A. These are letters from L. C. Hopkins & Co. to A. T. Stewart & Co., enclosing drafts, checks, etc., to be applied on the cash account of L. C. Hopkins & Co. They were received about the time they bear date, and illustrate the character of the correspondence between the two houses.

(Exhibits read in evidence and marked Nos. 146 to 165, inclusive.)

Q. At the time of making these cash and other purchases spoken of, what, if anything, was said or promised in respect of payment therefor, by Mr. Turner or Mr. Hopkins?

A. The amount the firm was owing us at that time being large, and payments not being promptly provided for, it called for an interview with Hopkins and Turner, both of them, at different times, to insist upon payments being made as fast as their bills matured—at the same time they were making large purchases of us, principally of cash goods.

106 They both of them promised us that remittances should come forward immediately, not only to pay up their past due account, but to fully cover the purchases then being made by them. As an illustration, they were, during the month of September, purchasing between thirty and forty thousand dollars' worth of goods; these goods we declined to deliver. Mr. Turner at that time stated that Mr. Hopkins had requested him to say that any purchases that he made of us at that time, during his visit to New York, should be promptly remitted for, and that they wanted a statement of our account, so that they would know about what amount was due by them, and the amount of new purchases being made, so that they could remit us the amount to cover. They positively promised to remit us the proceeds of the sales of these goods then being purchased, in connection with larger amounts which these goods would enable them to realize from the sale of fancy and other goods, which their stock largely consisted of.

Q. Was this special promise made with reference to this particular lot of goods then being purchased, or was it made with reference to any others?

A. The promise was made more than once. That promise was made distinctly with reference to that purchase.

Q. Was it made with reference to any other purchases, and if so, to what extent?

A. It was made with reference to succeeding purchases to the amount of from fifty to sixty thousand dollars. It applied to all goods termed cash goods.

Q. Will you please state the aggregate amount of cash goods so purchased by L. C. Hopkins & Co. from A. T. Stewart & Co. during the months of September, October, and November, 1867?

A. From $100,000 to $105,000; in the neighborhood of $105,000.

Q. About what date did you cease making payments out of the cash account of L. C. Hopkins & Co. in the manner you had been doing for several years?

107 A. It was the last payment authorized by him on the December payments of 1867. The exhibits produced will show what that was.

Q. Please state whether or not there was ever any promise by them to remit their daily cash sales. If so, state what took place in respect thereto.

A. They promised to remit us their entire receipts; that they had no payments to make apart from us, and in connection with their notes maturing and being paid by us; that their sales, from the accommodation which we were rendering them, in connection with the deliveries of cash goods, would be very large, and they would very soon be able to square up their accounts with us, and make everything satisfactory to us by their remittances.

During this period he discounted some of his own paper held by other parties, and drew upon us for the amount, and we paid his drafts. During this period, also, we purchased for his account, in the market, cash goods, which were delivered to him and the bills paid by us. That is, the purchases were made by him and accepted by us, the parties declining to deliver to him—the reason we did not know, but we presume his line of credit with these parties was full. We so understood.

Q. State, from your knowledge of the business of L. C. Hopkins & Co., how far these cash goods were necessary for the carrying on of their business.

A. I understood from Messrs. Hopkins & Turner that their general stock of goods, apart from what are termed cash articles, was very large, and that it was indispensable to them to have a quantity of these cash goods to work off this heavy stock of other merchandise. From my knowledge of business, I knew this was a fact, and I knew that it was indispensable for them to have such goods, and relying implicitly on their integrity and ability to pay, they were delivered.

108 Q. What percentage of profit was there on the sales of these cash goods?

A. There was no percentage of profits, nor profits made by us on the sales of these cash goods; nor did we expect to make any profit on them, as these goods were generally sold in that way.

Q. Had you any reason to doubt the ability or intention of Hopkins to perform the promises you have stated as being made on the purchase of these goods?

A. I had none.

Q. In view of his then large indebtedness to you, would you have parted with or sold these cash goods to him without some special promise of that kind?

A. I would not, because his line of credit with us was very large and liberal, and full.

Q. When did you first become acquainted with Mr. Hopkins' desire to borrow $100,000 from your firm?

A. In the summer of 1866, I think in the month of May or June; Mr. L. C. Hopkins came to my office, corner of Broadway and Chambers street, and stated that he wanted to borrow some money of Mr. Stewart; that he wanted a loan of one hundred thousand dollars. I replied that that was something which Mr. Stewart only could respond to—and improving this opportunity, and supposing that if such a loan was made, it would be important for me to know what Mr. Hopkins' pecuniary condition was, I asked him to make me a statement of his affairs, which he gave me in his own handwriting. These papers I now produce: Exhibit No. 166 is a statement of his business affairs, and 167 is a statement of his personal affairs, both in his handwriting, and delivered by him to me at that time. Both of these statements bear date of June 1st, 1866. The next I knew of the loan was of his being in Mr. Stewart's office, negotiating for it. I knew the loan was made from the fact of a
109 check being drawn to his order for one hundred thousand dollars. That check for one hundred thousand dollars was endorsed by him, and deposited by him with us to the credit of his cash account, on the 7th day of June, 1866. On the 11th and 13th of the same month he drew out upon his drafts over $97,000 of this sum, which we paid and charged to his cash account.

Q. Who allowed the checks, which went to pay this amount, to be drawn by Mr. Butler, as attorney for the firm?

A. I did, as is the usual custom—to authorize all such payments—my initials being necessary before checks are signed; no payments being allowed without such initials.

Q. Did your firm receive, directly or indirectly, any part of these payments, or any benefit therefrom?

A. It did not.

Q. How long previous to this loan had Mr. Hopkins made any statement to you of his affairs?

A. About five months previous to the statement of June 1st—on January 17th, 1866.

Q. What statement did he then make to you?

A. That his surplus in his business was from $15,000 to $20,000, and his real estate entirely free from incumbrance, and in his own name, was $205,000. That his wife was heir to a large property, and then owned real estate in her own name, and that all of her property was apart from her husband's. Also, that his life was insured at that time for $60,000.

Q. Did you take any part in making this loan other than you have stated?

A. I did not.

Q. Which of the firm were then in this country?

A. Alexander T. Stewart, only; the other partners, Fox and Warden, living permanently abroad.

Q. From whom did you learn that this loan had been made?

110 A. From Mr. Stewart himself stating to me that he had done so; and from the receipt of the check for $100,000 with Hopkins' endorsement on it.

Q. To whom did Hopkins deliver that check?

A. The check was delivered by Hopkins to our cashier, who receives all similar checks and drafts, and places them to the credit of their respective accounts.

Q. When did you first see a note of Hopkins for the amount of this loan?

A. Some time during the year 1868—after Hopkins' failure.

Q. Did you ever, and if so, when, authorize any payment to be endorsed on that note, or credited to its account?

A. I never authorized any endorsements of payments to be made upon the note, as it was a matter out of my hands, and in the hands of Mr. Stewart, or Judge Hilton, the confidential attorney of the house.

Q. What number of letters, on an average, are received daily by mail by A. T. Stewart & Co.?

A. From five hundred to eight or nine hundred a day.

Q. In what manner are these opened, assorted, and distributed? By whom?

A. They are opened in my office, under my direction, by persons authorized by me.

Q. How are they distributed?

A. Each letter is numbered; those containing checks and drafts go to the cashier, whose duty it is to enter the receipt to the credit of their respective accounts.

Q. Was Hopkins in New York City in December, 1867?

A. Not to my knowledge.

Q. Had Mr. Turner or Mr. Hopkins given you any reasons to expect Hopkins?

A. They had not.

Q. Did you leave New York any time during that month for Cincinnati?

111 A. I did, on December 31st, arriving in Cincinnati on the morning of January 2nd, 1868, having traveled continuously by railroad.

Q. When did you first see Mr. Hopkins after your arrival there?

A. At his store, on the morning of the 2nd of January.

Q. Did you then make any statement to him respecting any payments made on his account in the month of December, 1867?

(Question objected to by Mr. Dayton.)

A. I did.

Q. State what occurred then, or was said by either of you, respecting any such payments; answer fully.

(Question objected to by Mr. Dayton.)

A. He stated to me that he had remitted some money—$10,000 during the previous week, and also a remittance of about $48,000, to be applied on his note or private account, due to Mr. Stewart. I stated that the first amount of $10,000 had been received the day I left New York, and that I had ordered it to be applied to the credit of his purchases of cash merchandise; and also that when the other amount of $48,000 was received, it would be placed to the credit of the same account, as I had ordered all monies received from him to be credited to his cash purchases. This latter amount was received on the 2d of January, and was credited to the same as I had directed. He replied, "That won't do; that will knock me endways, and upset all my plans." My reply to him was, that I could not help that; that the amounts would be placed to the credit of his cash purchases, and also all other remittances or payments, until his account was in a more satisfactory shape; to which he made no response. I remained there some fifteen or twenty minutes longer, and then left.

By Judge HILTON:

Will you please give us a statement of all monies paid by the
112 firm of A. T. Stewart & Co. from July 1st, 1867, to January 1st, 1868, upon the account and order of L. C. Hopkins & Co.?

A. In reply to that, I present a paper which contains a statement of all payments made by A. T. Stewart & Co. on account of L. C. Hopkins & Co. during that time; and also contains the names of the parties to whom such payments were made. This was made under my special directions, and I have personal knowledge of each item as detailed in this paper. I authorized each of the payments therein specified.

(Paper produced by the witness is read in evidence, in answer to the question, and is marked, W. L., 168, Nov. 25, 1869.)

Q. When was Mr. Hopkins last in the city of New York, prior to his failure in 1868, to your knowledge?

A. In the latter part of August or the first of September, 1867.

Q. Up to the time of his failure, what knowledge had you of his pecuniary condition, other than you have already testified to?

A. I had none other.

Q. What knowledge had you as to the giving of the mortgages by Hopkins, as security for his note, given for the loan of June 6, 1866?

A. At the time I had none. I did not know of any security being given.

Q. How long after?

A. I think it was in December, 1867, that I first heard of the mortgages.

Q. Do you know, or have you ever heard of any agreement having been made by your firm, for not recording the mortgages, or for permitting Hopkins to sell any part of the mortgaged premises, without reference to the mortgages?

A. I have no knowledge whatever of any such agreement, nor I have ever heard of it.

113 Q. In making sales of merchandise to Hopkins, in paying money upon his account and order, and in receiving money from him, prior to his failure in January, 1868, did you have in contemplation, at any time, his insolvency?

A. Never, at any time.

Cross-examined by Mr. DAYTON:

How many separate accounts were kept by A. T. Stewart & Co. with L. C. Hopkins, or L. C. Hopkins & Co.?

A. Two.

Q. Can you state what these accounts were?

A. One was a cash account; the other was a merchandise account.

Q. Will you produce those accounts—the original accounts?

A. I will, and herewith produce them. The book I now produce is ledger A to K, R, of A. T. Stewart & Co. On pages 1170, 1171, 1172, 1173, 1174, and 1175 is the merchandise account of A. T. Stewart & Co. with L. C. Hopkins & Co. for the year 1867. It commences January 2d, 1867, and ends December 26th, 1867. The cash account in the same book commences on page 1176, continuing on pages 1177, 1178, 1879, beginning with the date of January 9th, 1867, and ending December 31st, 1867; it really ended January 4th, 1868.

Q. Are those the only accounts kept by A. T. Stewart & Co. with L. C. Hopkins, or L. C. Hopkins & Co., during the year 1867?

A. These are the only current accounts as far as I know. Those are the only accounts I had access to, or had any knowledge of. As an explanation, there is a private ledger of Mr. Stewart's, to which it was not necessary for me to have access, in conducting the business of the house. I know the contents of all the books in the house, except that one.

114 Q. Who was the bookkeeper who made the entries and kept the account entered in ledger R, A to K, which you have testified about?

A. Mr. Charles E. Williams.

Q. What position does he occupy in the establishment of A. T. Stewart & Co.?

A. He is the principal bookkeeper on that ledger.

Q. How many accounts were kept by A. T. Stewart & Co. with L. C. Hopkins, or L. C. Hopkins & Co., during the year 1866?

A. The same two accounts as in 1867—cash and merchandise accounts.

Q. Will you be good enough to produce those accounts?

A. Yes; the book produced, marked ledger Q, A to K, shows the merchandise account on pages 1150,1151, 1152, 1153, 1154, 1155—the entries commencing January 11th and ending December 31st, 1866. The same ledger, pages 1156, 1157, 1458, 1159, shows the cash account for the same year—the first entry commencing January 3d, 1866, and ending with the last on January 8th, 1867.

Q. By whom was that account kept?

A. By the same gentleman who kept the subsequent one, Mr. Charles E. Williams.

Q. Are those accounts continuous accounts of the business of A. T. Stewart & Co. with L. C. Hopkins & Co., or L. C. Hopkins, from the 1st of January, 1866, to and including the date of the last entry, January 4th, 1868?

A. They are.

Q. Those accounts are all headed on the different pages of the ledgers, and are accounts with L. C. Hopkins & Co., are they not?

A. They are.

Q. When did A. T. Stewart & Co. open an account with L. C. Hopkins & Co.?

A. They opened a merchandise account June, 1862, and a cash account with the same parties in February, 1863.

115 Q. Do you know who constituted the firm of L. C. Hopkins & Co. during the period of those accounts, commencing in June, 1862, and ending January 4th, 1868?

A. Some time during that period B. F. Turner was a partner. I know of no other. My impressions are that he was a partner before and after January, 1867, about a year or a year and a half before. Prior to this partnership I never heard of Hopkins having a partner in that firm.

Q. How long after the 1st of January, 1867, did the firm of L. C. Hopkins & Co. contain any member besides Lewis C. Hopkins?

A. From six to twelve months, as far as I had any knowledge.

Q. Did you not know that the partnership of Hopkins & Turner had been dissolved prior to the 1st of January, 1868?

A. We had no official evidence of it.

Q. Will you state what the merchandise account you have spoken of consists of, and what the cash account you have spoken of consists of?

A. The merchandise account consists of entries made against L. C. Hopkins & Co. for goods bought of A. T. Stewart & Co. on such terms of credit as was agreed upon between the parties; the goods termed cash being on thirty days, and those called time being on ninety days. The merchandise account also consists of credits of moneys received from him on account of due and past due indebtedness for purchases of goods. The cash account consists of moneys received from him and

paid out by us on his account. When I say him, I mean L. C. Hopkins & Co.

Q. Why were two separate accounts kept?

A. To facilitate the payment of notes and drafts of L. C. Hopkins & Co., and ordered by them to be paid by A. T. Stewart & Co.

Q. Was the cash account kept separate from the merchandise account by an agreement between A. T. Stewart & Co. and L. C. Hopkins & Co., or L. C. Hopkins?

116 A. I don't think there was any agreement. It was a matter of our own convenience. The accounts might have been kept together.

Q. Do you mean to say that it was not understood by A. T. Stewart & Co. and by L. C. Hopkins, or by L. C. Hopkins & Co., that the account of moneys received by A. T. Stewart & Co. from L. C. Hopkins & Co., and paid out on drafts or orders of L. C. Hopkins & Co., was to be kept separate from the merchandise account?

A. It was probably known to both parties that such an account was kept, but there was no specific agreement.

Q. Was not that the understanding?

A. It was the understanding that there was two separate accounts.

(Mr. Dayton reads in evidence the entries on the pages in the two ledgers testified to by the witness, copies of which are to be prepared and produced at next meeting.)

Q. Look at the papers now shown to you, and say what they are.

A. They are the accounts of A. T. Stewart & Co. with L. C. Hopkins & Co. for the years 1866 and 1867, copied from the books of A. T. Stewart & Co. under my direction. One of these papers contains the merchandise account, commencing January 11th, 1866, and ending December 26th, 1866. The cash account commencing January 3d, 1866, and ending December 31st, in that year; but there is a continuation of the cash account, running to January 8, 1867.

(Paper marked Exhibit No. 170, December 6, 1869. H. H. Rice.)

The other paper produced contains the merchandise and cash accounts of L. C. Hopkins & Co. for 1867; the merchandise account commencing January 2nd, 1867, and ending December 31st, 1867. The cash account commencing January 9th, 1867, and ending January 4th,

117 1868. There is an entry to the debit of the account for an error under date of March 19, 1868, for $812.37.

(Paper marked Exhibit 171, Dec. 6, 1869, H. H. Rice.)

Q. In whose handwriting are these copies?

A. In that of a clerk, a copyist, in the store. They were compared by Mr. Williams, our bookkeeper.

Q. Look at the paper produced, and say what it is.

A. This is a letter from A. T. Stewart & Co. to L. C. Hopkins.

(Paper marked Exhibit No. 172, Dec. 6, 1869, H. H. Rice.)

It is a letter written by Judge Hilton, and signed by Mr. Stewart.

Q. Was there not a letter received by A. T. Stewart & Co. from L. C. Hopkins of the date of the 9th of November, 1867, enclosing a remittance of $10,000, or another letter of the date of November 9th, 1867, from L. C. Hopkins & Co. to A. T. Stewart & Co. enclosing a remittance of $10,000, besides the letter of the date of November 9th, 1867, which is marked Exhibit No. 154?

A. I don't remember of the receipt of any other letter of the date of November 9th, 1867.

Q. Did A. T. Stewart & Co. answer the letter of L. C. Hopkins & Co.

of the date of the 9th of November, 1867, which is marked Exhibit No. 154?

A. I presume it was, in the regular course of business.

Q. Is there anything on the paper itself, Exhibit 154, which indicates whether or not an answer to it has been written?

A. Nothing that I can detect.

Q. Did A. T. Stewart & Co. receive any letter from L. C. Hopkins, or L. C. Hopkins & Co., of the date of the 20th of December, 1867?

A. I don't know.

Q. Can you, and will you ascertain whether there is any such letter, and, if there is, produce it?

A. I will.

118 A. At the time you went to Cincinnati, at the latter end of December, 1867, did you have with you the note for $100,000, of the date of June 6th, 1866, made by L. C. Hopkins to A. T. Stewart & Co.?

A. I had not, and had never seen it.

Q. Did you have any papers with you with reference to the business of A. T. Stewart & Co. with L. C. Hopkins & Co.?

A. I had some memorandums of account, and some mortgages—ten mortgages made by L. C. Hopkins and wife to A. T. Stewart, for $100,000 each, to secure the payment of the note referred to.

Q. What did you do with those mortgages?

A. I had them recorded.

Q. Did you not put stamps on those mortgages at Cincinnati before you took them to be recorded?

A. No; I did not.

Q. Were they stamped before you took them to have them recorded?

A. They were not.

Q. Where did you take those papers to have them recorded?

A. Those at Cincinnati I took to the clerk's office there, and those in Kentucky I sent over there to be recorded.

In compliance with the request of Mr. Dayton, at the last meeting, Mr. Libbey produces a copy of a letter dated November 13th, 1867, written by A. T. Stewart & Co., per Fox, to L. C. Hopkins & Co., at its date.

(Paper marked Exhibit 173, Dec. 7, 1869, H. H. Rice.)

Witness also finds in special letter book of A. T. Stewart & Co., of same date, a letter written by J. M. Hopkins, bookkeeper of the firm, to L. C. Hopkins.

(Letter produced and marked Exhibit 174, December 7, 1869, H. H. Rice.)

By Mr. DAYTON:

119 Did A. T. Stewart & Co. receive from L. C. Hopkins, or L. C. Hopkins & Co., a letter dated Cincinnati, December 20th, 1867?

A. I don't know.

Q. Have you searched for such a letter, and can you say whether you received such a letter or not?

A. I have searched for it, but have not been able to find it.

Q. Will you read the copy-letter, which I now produce, and say whether you recollect or not the receipt of such a letter from L. C. Hopkins?

(Witness reads.)

A. I do not.

Q. Mr. Libbey, you have stated that the letter of the date of November 13th, 1867, was written by J. M. Hopkins, bookkeeper of the firm;

were not all the letters in the correspondence between A. T. Stewart & Co. and L. C. Hopkins & Co., from A. T. Stewart & Co. to L. C. Hopkins & Co., written by a clerk or bookkeeper of the house of A. T. Stewart & Co.?

A. No; with the exception of the letter written by Judge Hilton and signed by Mr. Stewart, dated May 4th, 1867—with that exception and other trifling ones—they were written by bookkeepers. The current business of receiving moneys and acknowledging the receipt of moneys was done by bookkeepers. Specialties were done by members of the firm, or by parties authorized to do it.

Q. Look at the paper, which I now produce, and say in whose handwriting it is.

A. It is in the handwriting of J. M. Hopkins, bookkeeper of the firm.

(Paper marked Exhibit 175, December 7th, 1869, H. H. Rice.)

Q. Look at that paper and say in whose handwriting that is.

A. It appears to be in the handwriting of the same party, except the last two lines.

120 (Paper marked Exhibit 176, December 7th, 1869, H. H. Rice.)

Q. Did A. T. Stewart & Co. receive a letter from L. C. Hopkins of the date of December 28th, 1867?

A. I think we received one from him December 31st, the day I left for Cincinnati, enclosing a remittance of $10,000, and that letter contained a request to apply this remittance on his private account. I have searched for this letter and cannot find it.

Q. Did A. T. Stewart & Co. receive a letter from L. C. Hopkins dated Cincinnati, December 30th, 1867?

A. There was one received in my absence, of that date, which I now produce.

(Paper marked Exhibit 177, December 7th, 1869, H. H. Rice.)

Q. In your examination yesterday you stated that you did not put stamps on the mortgages before you took them to have them recorded, and that they were not stamped before you took them to have them recorded; were stamps put on these mortgages at the clerk's office at which they were to be recorded after they were taken thither, or at any other place, or at any other time?

A. Not to my knowledge.

Q. Did you, whilst in Cincinnati at that time, apply to Mr. John Shillito for a loan of $1,000, as you stated, to pay for stamps on these mortgages?

(Question objected to by Judge Hilton as immaterial, and answered under objection.)

A. I drew upon Mr. John Shillito, for money for my necessary expenses, while I was there; but I don't remember that I stated to him that it was for stamps. I had some other matters requiring money expenditures while there.

Q. In the cash account of A. T. Stewart & Co. with L. C. Hopkins & Co. for the year 1866, you debit L. C. Hopkins & Co., under date
121 of 13th of June, 1866, with one sum of $95,259.80; can you state the items which constitute that sum, and give us the correspondence relating to the same?

A. I will prepare a statement from the books, and give you all the correspondence we can find, touching the subject.

Q. The item in the cash account of A. T. Stewart & Co. with L. C. Hopkins of $100,000, credited on the 7th of June, 1866—how was that money received by A. T. Stewart & Co., and what did it proceed from?

A. It was received in a check of A. T. Stewart & Co. from L. C. Hopkins, the proceeds of a loan made to him of that amount.

Q. Was there any written evidence of that loan, or any security given for it?

A. I believe there was, but as I did not negotiate the loan, I cannot state, definitely, in regard to it.

Q. Please state the items of the charge in the cash account under date of June 13th, 1867, of $42,398.41; also, the particulars of the credit in the merchandise account, under date of June 13th, 1867, of $27,064.65.

A. I will prepare a statement from our books.

Direct examination resumed.

By Judge HILTON:

Look at this paper and say in whose handwriting it is; and if you recollect the time of its reception, state.

A. It is a letter by L. C. Hopkins to A. T. Stewart, and received about the time of its date.

(Paper marked Exhibit 178, December 7, 1869, H. H. Rice.)

Q. Did you ever direct or authorize the writing to Mr. L. C. Hopkins of the letters in the handwriting of J. M. Hopkins, referred to in your cross-examination?

(Question objected to.)

A. I did not.

122 Q. When, to your best recollection, did you first learn of their having been written?

A. It was some time after L. C. Hopkins' failure.

Q. When did you, if ever, have notice of a dissolution of the copartnership between L. C. Hopkins and B. F. Turner, under the firm of L. C. Hopkins & Co.?

A. I don't remember that we ever had such a notice.

Cross-examination resumed.

By Mr. DAYTON:

What is J. M. Hopkins' name?

A. John M. Hopkins.

Q. When did he first come into the employ of A. T. Stewart & Co.?

A. I think it was in 1861, or 1862, and he is here yet.

Q. In what capacity has he been employed?

A. As general book-keeper in connection with the business of the firm.

Q. Does he not also attend to other business of the firm?

A. Yes, he buys exchange and gold.

Redirect examination by Judge HILTON:

Please look at your letter-book of 1867, where a letter of the kind of that of J. M. Hopkins, produced by the defendants, and marked Exhibit 175 and 176, should be found and copied, in the course of your business, and state if you find any such letter?

A. I do not find any such letter.

Mr. Libbey states that he desires to make an explanation of a statement made by him at his examination on November 15th, 1869, wherein he answered that "his firm did not receive, directly or indirectly, any part of these payments, or any benefit therefrom"; alluding to the payments of about $97,000 on the 13th of June, 1866. Part of those

123 payments were made to A. T. Stewart & Co. in drafts from L. C.

Hopkins & C., sent from Cincinnati, dated June 9th, 1866, and which I now produce.

(Marked Exhibits 179 and 180.)

These were enclosed in letters from L. C. Hopkins & Co. which I now produce.

(Letters marked Exhibits 181 and 182.)

My answer in reply to a previous question, stating that we did not receive any benefit, referred to any payments made on account of the note. We received no payments on account from L. C. Hopkins & Co. for which we did not give proper consideration.

Redirect examination resumed.

By Judge HILTON:

To what account were those two drafts, marked Exhibits 179 and 180, applied?

A. They were applied upon L. C. Hopkins & Co.'s merchandise indebtedness to A. T. Stewart & Co.

Q. State whether it was then due or not?

A. It was past due at that time.

Q. In whose handwriting are Exhibits 179 and 180?

A. In L. C. Hopkins'.

Q. Had you any knowledge or understanding, prior to their receipt, of L. C. Hopkins' intention to send them?

A. I had none.

Q. At the time of the deposit of the $100,000 by L. C. Hopkins with your firm, was there or not any understanding that any part was to be returned to or retained by your firm?

(Question objected to.)

A. There was neither any promise, expectation, nor understanding in regard thereto.

Q. Look at check produced, marked Exhibit 183, and say what it is.

A. It is a check drawn by A. T. Stewart & Co., dated June 6, 1866, for $100,000, to the order of and endorsed by L. C. Hopkins & Co., and deposited in bank, and paid and canceled.

124 Q. On the 13th day of June, 1866, had L. C. Hopkins & Co., to the credit of their cash account, any moneys other than those derived from the loan of $100,000 in the check marked Exhibit 183?

A. They had—the accounts will show the amount; the balance appears to have been about $5,000.

Q. On your examination of November 15th, I asked you whether you ever authorized any payment to be endorsed on L. C. Hopkins' note, or credited to its account—I find you answered in regard to endorsements of payments, but I find you did not answer whether you ever authorized any credits to its account. Please answer as to credits?

(Question objected to by Mr. Dayton.)

A. I never authorized any credits in connection with the account or note.

Q. Upon what terms were those goods sold to L. C. Hopkins & Co. prior to June 9th, 1866, to which Exhibits 179 and 180, and the money therein specified, were applied in payment? Were those terms usual, or otherwise?

A. They were the regular terms of the house, and according to the bills thereof delivered to him.

Q. How long did you remain in Cincinnati, upon your visit in January, 1867?

A. One day.

Q. Did Mr. Hopkins or Mr. Turner give you any information while there respecting the pecuniary condition of L. C. Hopkins & Co.?

A. They did not.

Q. Have you given, as far as you can recollect, the whole conversation had with Hopkins respecting your intention not to apply his payments on account of his note?

(Question objected to on the ground that the witness having been examined on the part of the plaintiffs on that subject, and the defendants not having cross-examined him upon it, it is not competent for
125 plaintiffs on resuming the direct examination of the witness to again examine him upon that subject.)

A. I told him positively that we would not apply his payments on that note. This was the whole conversation, or about the sum of it. I don't remember of his saying anything that I have not detailed.

Q. You have stated that your firm kept a cash account with L. C. Hopkins & Co., and that both parties understood it was so kept; please state whether or not you mean by that answer that there was any arrangement or agreement in respect to keeping such cash account had with L. C. Hopkins & Co.?

A. There was no arrangement or agreement in regard to it. We kept it so for our own convenience.

Q. Look at the bundle of letters produced and say what they are?

A. These bundles, together with those from L. C. Hopkins & Co. (already in evidence), contain all the letters received from L. C. Hopkins & Co. by A. T. Stewart & Co. during the years 1866 and 1867—at least, they are all that we can find, and I believe they are all.

(Counsel for A. T. Stewart & Co. tender to counsel for defendants for inspection the bundles referred to.)

The witness desires to make a further explanation in regard to an answer at his last examination respecting the correspondence between A. T. Stewart & Co. and L. C. Hopkins & Co., and say that all formal matters of business were replied to by the clerks or bookkeepers, and all special matters by either a member of the firm or by a party delegated to do it.

Cross-examination resumed.

By Mr. DAYTON:

Will you state again, if you please, at what time the cash account of A. T. Stewart & Co. with L. C. Hopkins & Co. was opened?

A. It was opened February 21st, 1863.

126 Q. At the time the cash account with L. C. Hopkins & Co. was opened you were not a member of the firm of A. T. Stewart & Co., were you?

A. I was not, but I had charge of their office business and credits.

Q. Do you know whether, previously to the opening of that cash account, L. C. Hopkins & Co. had a cash account with any other firm in this city?

A. I do not; but I have an impression that they had one at Jaffray's, though I have no knowledge of it.

Q. Was there any negotiation, correspondence, or conversation with reference to the opening of that cash account?

A. I have no knowledge of any correspondence or negotiation.

Q. Mr. Libbey, you were not present, were you, when the $100,000 note was given?

A. I was not.

Q. Then you can't say, can you, what arrangement was made between

A. T. Stewart & Co. and L. C. Hopkins in reference to that transaction?

A. Not of my personal knowledge.

Q. On the first of January, 1866, was there any sum due from L. C. Hopkins & Co. to A. T. Stewart & Co. on either merchandise or cash account?

A. I can't tell without looking at the books.

Q. Will you look at the books and give me a statement of the account?

A. I will. I find on the first of January, 1866, the indebtedness of L. C. Hopkins & Co. to A. T. Stewart & Co., on merchandise account, was $154,137.01; and there stood to the credit of his cash account on the same day $23,563.70.

Mr. Dayton puts in evidence two papers, marked Exhibits 184 and 185, December 15, 1869.

127 Mr. Dayton also reads in evidence, on behalf of the defendants, the exhibits marked 170 and 171.

Mr. Hilton reads in evidence two original letters from L. C. Hopkins & Co. to A. T. Stewart & Co.—one dated June 10th, 1867, and the other dated June 17th, 1867—marked Exhibits 186 and 187, December 15, 1869.

The letter of June 10th, enclosing Exhibits 82 and 83.

Also, seven drafts of L. C. Hopkins & Co., each dated June 9th, 1866, and marked Exhibits 188 to 194, inclusive, paid by A. T. Stewart & Co. June 13, 1866, on account of L. C. Hopkins & Co., by their order.

Also, a voucher for $550, marked Exhibit 195, paid same day by A. T. Stewart & Co.

Direct examination of Mr. Libbey resumed.

By Judge HILTON:

Mr. Libbey being recalled, testifies that the above statement is correct.

WILLIAM LIBBEY.

The following exhibits are attached to and made part of the deposition of William Libbey. We have printed in full with all memoranda on same: 1, 2, 3, 4, 5, 6, 11, 21, 22, 24, 29, 30, 31, 32, 38, 39, 40, 41, 42, 43, 44, 59, 60, 61, 62, 63, 64, 65, 66, 67, 69, 70, 71, 73, 75, 76, 77, 82, 83, 86, 88, 98, 112, 128, 139, 141, 142, 144, 145, 147, 148, 149, 150, 151, 152, 153, 154, 157, 158, 159, 160, 161, 162, 163, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 183, 184, 185, 187, 193, 194, 195, 196.

The other exhibits referred to in Libbey's deposition are omitted by consent.

The letters of J. M. H. appear on a portion of the exhibits not printed as well as those printed.

128 The deposition of ALEXANDER T. STEWART, who, being duly sworn, deposeth and saith:

I am one of the firm of A. T. Stewart & Co., and have been such over twenty years past. My partners are Francis Warden, George Fox, and William Libbey. Warden and Fox have for many years past resided permanently abroad. Mr. Libbey conducts the wholesale business in this country, taking charge of the accounts, credits, correspondence, and general affairs—all the business being under my general control and management.

Q. Are you acquainted with Lewis C. Hopkins; if so, how long a time have you known him?

A. I have known him for upwards of ten years past.

Q. Did he ever make any application to you for a loan of money; if so, when and for what amount?

A. He did, in 1866, for a loan of $100,000.

Q. State what was said at the time of said application, and all that occurred between you with respect thereto?

A. He stated he was about opening his new store in Cincinnati, and wanted a loan of $100,000 to make him easy, and to enable him to extend his business commensurate with his new undertaking—offering to give as security a mortgage on his real estate, and a transfer of his life policies. I assented, and agreed to make the loan.

Q. What subsequently took place in respect to consummating the agreement to make the loan?

A. I ordered a check to be drawn, which I signed and passed to Judge Hilton to complete the transaction—check for $100,000 of the firm—on the Merchant's National Bank.

Q. How long after you agreed to make the loan did this take place, and where was the loan consummated, and when?

A. A few days after; it took place in my office on June 6th, 1866.

129 Q. What, if any, other terms were there to the making of this loan?

A. None other.

Q. Who was present at its making?

A. Judge Hilton and L. C. Hopkins.

Q. Any one else?

A. None other.

Q. Was there any agreement or understanding, expressed or implied, as to what should be done by Hopkins, or any one else, with the money thus loaned?

A. None.

Q. Was there any agreement by which it was agreed that the mortgages should be withheld from record?

A. None.

Q. Did Judge Henry Hilton hear all the agreement that was made with Hopkins respecting such loan?

(Question objected to by Mr. Dayton.)

A. Yes.

Q. What knowledge had you of the pecuniary responsibility of Hopkins during his business dealings with your firm; I mean, from whom was your knowledge acquired, and its character?

A. From himself, principally.

Q. What did he tell you about it?

(Objected to.)

A. When he commenced business, after his former partner, Cole, left him, about the year 1862, Hopkins stated to me that he was worth over $250,000. This, and the general report, that he was a successful merchant.

Q. Did you ever direct or specially authorize any correspondence with Hopkins, except your letter of May 4th, 1867, marked Exhibit 172?

A. None.

Q. Did you ever authorize any other payment or endorsement of payment on the note in that letter referred to?

A. None.

130 Q. When did you first hear that Hopkins proposed to make other payments than that referred to in the letter, upon the note?

A. I don't remember.

Cross-examination:

At the time you agreed to loan the money you have mentioned. to L. C. Hopkins, was L. C. Hopkins & Co. indebted to A. T. Stewart & Co.?

A. I have no knowledge, but suppose they were.

Q. Can you state or prepare for us a statement of the amount of the indebtedness of L. C. Hopkins & Co. to A. T. Stewart & Co. at the time of the application for the loan, and also at the time the of the loan was made?

A. I cannot. I have nothing to do with the accounts.

Q. Did you not know, at the time you agreed to loan this money to L. C. Hopkins, that L. C. Hopkins & Co. were largely indebted to other houses and persons besides A. T. Stewart & Co.?

A. No, sir.

Q. Did you not know, at that time, that he was dealing largely with other houses and establishments besides the house of A. T. Stewart & Co.?

A. No, sir.

Q. State what information you had as to the property, and the trade, and the business transactions and dealings, and extent of the business of L. C. Hopkins or L. C. Hopkins & Co.

A. My information of the property was principally from himself. Of the extent of his business and dealings with others, I had no knowledge. Indeed, I might say the same with ourselves. I had that undoubted confidence in his integrity and energy, and capacity for business, that I made no enquiry. And I may add, that, in relation to this loan, I did it as a personal friend, without any reservation or agreement, ex-
131 cept as I have stated, to aid him in his business and carrying it on, in proportion to the store he had taken—to made him easy in his business.

Q. I desire Mr. Stewart to take notice that my question asks for information which he had, not for knowledge, as to the property, trade, and businesss transactions and dealings and extent of the business of L. C. Hopkins or L. C. Hopkins & Co. Please answer upon that point—information.

A. I sought for no information. The general report was, that he did a fair business. I did not know the extent of his dealings with other houses. I had not any information except what I stated, from general report.

Q. You mention, Mr. Stewart, general report. From whom did such reports come?

A. I cannot state.

Q. Can you name any one who gave you the information that Hopkins was doing a fair business?

A. I don't remember any particular person.

Q. What was done in the interval between the time you agreed to make the loan and the time the loan was actually made?

A. In respect to what?

Q. In respect to the loan of this money, and this transaction?

A. Nothing; that is, done by me, or by anybody to my knowledge.

Q. Can you give the time at which L. C. Hopkins made the application to you for the loan?

A. It was about June 6, 1866—previous to that, a very short time—may have been two days, or only one—a very short time.

A. I have known him for upwards of ten years past.

Q. Did he ever make any application to you for a loan of money; if so, when and for what amount?

A. He did, in 1866, for a loan of $100,000.

Q. State what was said at the time of said application, and all that occurred between you with respect thereto?

A. He stated he was about opening his new store in Cincinnati, and wanted a loan of $100,000 to make him easy, and to enable him to extend his business commensurate with his new undertaking—offering to give as security a mortgage on his real estate, and a transfer of his life policies. I assented, and agreed to make the loan.

Q. What subsequently took place in respect to consummating the agreement to make the loan?

A. I ordered a check to be drawn, which I signed and passed to Judge Hilton to complete the transaction—check for $100,000 of the firm—on the Merchant's National Bank.

Q. How long after you agreed to make the loan did this take place, and where was the loan consummated, and when?

A. A few days after; it took place in my office on June 6th, 1866.

129 Q. What, if any, other terms were there to the making of this loan?

A. None other.

Q. Who was present at its making?

A. Judge Hilton and L. C. Hopkins.

Q. Any one else?

A. None other.

Q. Was there any agreement or understanding, expressed or implied, as to what should be done by Hopkins, or any one else, with the money thus loaned?

A. None.

Q. Was there any agreement by which it was agreed that the mortgages should be withheld from record?

A. None.

Q. Did Judge Henry Hilton hear all the agreement that was made with Hopkins respecting such loan?

(Question objected to by Mr. Dayton.)

A. Yes.

Q. What knowledge had you of the pecuniary responsibility of Hopkins during his business dealings with your firm; I mean, from whom was your knowledge acquired, and its character?

A. From himself, principally.

Q. What did he tell you about it?

(Objected to.)

A. When he commenced business, after his former partner, Cole, left him, about the year 1862, Hopkins stated to me that he was worth over $250,000. This, and the general report, that he was a successful merchant.

Q. Did you ever direct or specially authorize any correspondence with Hopkins, except your letter of May 4th, 1867, marked Exhibit 172?

A. None.

Q. Did you ever authorize any other payment or endorsement of payment on the note in that letter referred to?

A. None.

130 Q. When did you first hear that Hopkins proposed to make other payments than that referred to in the letter, upon the note?

A. I don't remember.

Cross-examination:

At the time you agreed to loan the money you have mentioned. to L. C. Hopkins, was L. C. Hopkins & Co. indebted to A. T. Stewart & Co.?

A. I have no knowledge, but suppose they were.

Q. Can you state or prepare for us a statement of the amount of the indebtedness of L. C. Hopkins & Co. to A. T. Stewart & Co. at the time of the application for the loan, and also at the time the of the loan was made?

A. I cannot. I have nothing to do with the accounts.

Q. Did you not know, at the time you agreed to loan this money to L. C. Hopkins, that L. C. Hopkins & Co. were largely indebted to other houses and persons besides A. T. Stewart & Co.?

A. No, sir.

Q. Did you not know, at that time, that he was dealing largely with other houses and establishments besides the house of A. T. Stewart & Co.?

A. No, sir.

Q. State what information you had as to the property, and the trade, and the business transactions and dealings, and extent of the business of L. C. Hopkins or L. C. Hopkins & Co.

A. My information of the property was principally from himself. Of the extent of his business and dealings with others, I had no knowledge. Indeed, I might say the same with ourselves. I had that undoubted confidence in his integrity and energy, and capacity for business, that I made no enquiry. And I may add, that, in relation to this loan, I did it as a personal friend, without any reservation or agreement, ex-
131 cept as I have stated, to aid him in his business and carrying it on, in proportion to the store he had taken—to made him easy in his business.

Q. I desire Mr. Stewart to take notice that my question asks for information which he had, not for knowledge, as to the property, trade, and businesss transactions and dealings and extent of the business of L. C. Hopkins or L. C. Hopkins & Co. Please answer upon that point—information.

A. I sought for no information. The general report was, that he did a fair business. I did not know the extent of his dealings with other houses. I had not any information except what I stated, from general report.

Q. You mention, Mr. Stewart, general report. From whom did such reports come?

A. I cannot state.

Q. Can you name any one who gave you the information that Hopkins was doing a fair business?

A. I don't remember any particular person.

Q. What was done in the interval between the time you agreed to make the loan and the time the loan was actually made?

A. In respect to what?

Q. In respect to the loan of this money, and this transaction?

A. Nothing; that is, done by me, or by anybody to my knowledge.

Q. Can you give the time at which L. C. Hopkins made the application to you for the loan?

A. It was about June 6, 1866—previous to that, a very short time—may have been two days, or only one—a very short time.

Q. Can you not fix the date of the application for the loan more precisely?

A. No, sir.

Q. You have stated that he offered to give you security; what was the conversation on that subject?

132 A. Only that he would give a mortgage on his real estate and a transfer of his life policies.

Q. My question calls for the conversation.

A. The conversation was in a very few words, nearly as I have already stated.

Q. What did you say?

A. That I would make the loan.

Q. What did you say with reference to the security?

A. I was going to say I didn't say anything. He did the talking; that is, Mr. Hopkins.

Q. Did you not give directions as to the security which was to be given?

A. Not that I recollect.

Q. Can you say positively that you did not say anything in regard to the security?

A. What am I to understand by that? I said nothing. I assented to what was said by L. C. Hopkins at the time this note was signed, that he would prepare the mortgages and the transfer of the life policies and send them on after his return home.

Q. Was the note signed at the time of the first negotiation for the loan?

A. No.

Q. My inquiry as to the security expressly referred to the time of the first negotiation for the loan.

A. I didn't so understand it. I will state the conversation at the time of the application as briefly as I can. That he was about to open his new store, which was very much larger than the one he occupied, and that he desired to be easy in his financial matters, as he expected to largely increase his business, and wanted a loan of $100,000, for which he would give a mortgage or mortgages on his real estate, and also transfer his life policies. I said I would make the loan.

Q. Had you ever seen the real estate?

A. No, sir.

133 Q. What knowledge had you in regard to the real estate?

A. I hadn't any special knowledge; my confidence in him was such that I hardly deemed it necessary to have the security.

Q. Did Mr. Hopkins say what the real estate, upon which he proposed to give this security, consisted of?

A. I don't recollect.

Q. Did he say in what place or places the real estate was located?

A. I think he stated in Cincinnati, principally; I understood Cincinnati.

Q. State all that he said in regard to the real estate.

A. I think I have stated.

Q. You did not inquire, and he did not say, anything as to the condition or value of the real estate?

A. I did not inquire. I don't recollect, because that didn't trouble me. That didn't enter into my—I was going to say—calculations of the risk that I ran in making the loan.

Q. Was anything said as to whether the property was improved prop-

erty, whether the property had any buildings on it, and what those buildings were?

A. I don't recollect any statement of the value or of the description.

Q. What was said about a policy of insurance on the life of Mr. Hopkins?

A. Nothing further than that he had life policies.

Q. Nothing was said as to the terms or amounts of these policies, or the companies in which the insurance had been effected?

A. Nothing that I recollect.

Q. Who first spoke of a policy of insurance on his life?

A. Himself.

Q. What did he say?

134 A. What I have already stated.

Q. Can you give his language?

A. That he would assign or transfer his life policies as part security for the loan of $100,000.

Q. What did you say?

A. Nothing.

Q. How many times did Hopkins call to see you with regard to the loan.

A. Only once in regard to the negotiation. The second time he called it was consummated, as I have stated.

Q. Did you between the time of the application for this loan and the time you gave the check make any inquiries, or direct any inquiries to be made, as to the pecuniary standing of Hopkins, or the value of the property which he had offered as security?

A. No, sir.

Q. Did you tell Hopkins at the time that he applied for the loan that you would let him have the money?

A. Yes.

Q. Why did you not let him have the money at that time?

A. I was too much occupied at the time.

Q. Was any one present at the time the application was made but yourself and Hopkins?

A. Not any.

Q. And you had no interview with Hopkins between that time and the time you gave the check?

A. None.

Q. Who was present at the time you gave the check?

A. Judge Hilton, Mr. Hopkins, and myself.

Q. State particularly what conversation took place at that time.

A. The conversation was principally between Mr. Hopkins and Judge Hilton; Hopkins stating to the judge what I had agreed to do—loan him $100,000—for the security of which he would forward mort-

135 gages on his real estate on his return home, and the transfer of his life policies. I sent for a check, signed the check, and handed it to Judge Hilton, for $100,000.

Have you stated all that took place, and all the conversation that was had with reference to that loan?

A. All of which I recollect.

Q. In the course of the negotiation, or at the time you gave the check, was nothing said as to the time of payments, or for how long the loan was to run?

A. Nothing that I remember.

Q. Was nothing said as to any amount due A. T. Stewart & Co. at that time?

A. Nothing.

Q. Did you take any receipt or acknowledgment from L. C. Hopkins for this money?

A. Only a note.

Q. What was said respecting that note?

A. Nothing.

Q. How did Hopkins come to give the note?

A. As an evidence of the receipt of the money.

Q. Who asked or who proposed any evidence of the receipt of the money?

A. Judge Hilton.

Q. Did he propose a note?

A. He presented a note which Mr. Hopkins signed.

Q. How many clerks or bookkeepers in the employ of A. T. Stewart & Co. write letters for the house?

A. I don't know.

Q. Can you name any?

A. Mr DeBrot, Mr. Cooper, and others.

Q. Can you name any during the years 1866, 1867, and 1868?

A. I must refer you to Mr. Libbey; I attend to the foreign correspondence, and he attends to all the other—the home correspondence.

ALEXANDER T. STEWART.

136 The deposition of HENRY HILTON, who, being sworn, deposeth and says:

I am forty years of age and upwards, and, by profession, a practicing lawyer, and have been such for many years past. I know all the parties to this action; have known L. C. Hopkins at least seven years, I think; and have known Mr. Stewart about twenty years. For many years past, I have been his counsel and professional adviser, spending a part of each week-day with him, in his office, at his wholesale store in this city. Our relations are and have been intimate—quite so. I recollect being in his office on the afternoon of June 6th, 1866, when Mr. Hopkins came in, and, after exchanging salutations, sat down and began talking in a friendly manner to both of us. Allow me here to say that Mr. Stewart and I, together, used one writing table between us; he one side and I the other, so that when we are in the office we can converse across this table, which is somewhere about four feet wide. I recollect that while Mr. Hopkins was talking, Mr. Stewart said to me, in his usual moderate tone of voice, substantially, and I think almost these words: "I have agreed to loan Mr. Hopkins one hundred thousand dollars." Whether he requested me to attend to it in words or not, I don't recollect; but whether he did or not was immaterial, as in all such cases I would, in the usual course of our business dealings, take the matter in hand myself. I sent down, by one of the attending boys, a ticket memorandum to the cashier for a check to be drawn by him to Hopkins' order, for the amount stated. While the boy was gone for the check, I recollect Mr. Hopkins expressing himself as being grateful for Mr. Stewart's kindness in making the loan, telling me also that he was to give, as security, a mortgage upon his real estate, and an assignment of his life policies, amounting to about $60,000. I am under the impression that this part of the conversation with Hopkins was led by
137 my inquiring as to what were to be the terms of the loan; Hopkins answering me, and Mr. Stewart, in his usual way, expressing his approval in looking at me, instead of by words. The check was brought

up by the boy. I drew the promissory note now produced and marked Exhibit March 2d, 1870. Mr. Hopkins then told me that as soon as he returned to Cincinnati he would have the mortgage drawn, executed by himself and wife, and send it on to me with the policies of insurance assigned.

The note, in respect to its terms, as to when payable, interest, etc., was drawn in accordance with the understanding as then told me by Mr. Hopkins, Mr. Stewart being present and approving. The quarterly payment of interest on the note I think I suggested myself. I handed the check to Mr. Stewart to sign, and the note to Mr. Hopkins to sign. They were both signed upon the same table and about the same time. Mr. Stewart handed me the check when signed, and I handed it over to Mr. Hopkins, taking for it the note referred to. I recollect sending down stairs to the counting room of A. T. Stewart & Co. for a $50 revenue stamp to put on the note, and having it brought to me, and I put it on the note, and Hopkins canceling it at the time, as appears by the note. In such matters it is usual for Mr. Stewart to leave to me the making of the papers to conform to the law. It did not occur to me at the time that a larger stamp was required. I put the stamp on in good faith, and supposed it was all that was necessary under the revenue law. I intended at the time to stamp it sufficiently. The whole business of making this loan, so far as I had occasion to see it, I don't think occupied half an hour from the time Mr. Hopkins came in until he went out of the office with the check in his possession. Knowing the friendly feelings of Mr. Stewart towards Mr. Hopkins, I left with Hopkins the preparing of the securities, telling him, however, to send them on as soon as he could, and to have them properly drawn. The mortgages were to cover all the real estate owned by Hopkins, and I think
138 he went over it, telling me what it was. There were no restrictions whatever as to what he should do with the money, or requiring us to withhold the mortgages from record; there was no agreement upon either point. I placed the note in an envelope and put it in a tin trunk of A. T Stewart & Co.'s, containing his own and the firm's valuable papers, and of which I retained the key and control. This trunk and its contents are solely under my charge, and have been for many years past, and I don't think it has been opened half a dozen times by anybody else. When I am absent from the city I leave the key of it generally with Mr. Stewart. I recollect, after this transaction, while I was absent on a pleasure trip, these mortgages and policies came to my address by express, and when I returned I was informed they had been received and placed in this trunk. I participated in the confidence and friendship of Mr. Stewart towards Mr. Hopkins, and being very busy I gave no particular thought about the matter, not looking at the papers for some time, and then only looked at the assignment of the life policies. I recollect I found they were all in one, and I preferred they should be separate, so that each policy would have an assignment attached. I recollect either sending or giving to Mr. Hopkins a from of an assignment to attach to each policy. He afterwards sent me separate assignments from Cincinnati. A long time after, and in the year 1868, and having occasion to look at these papers, I discovered that the note had been insufficiently stamped. I applied to Alexander Spaulding, the then collector of internal revenue in the eighth district of New York, and in which Mr. Stewart resides, to add the proper stamps, and to remit the penalty in such cases. Upon representation to him of the facts, he took the matter under consideration, and afterwards, in my presence, the additional $50 stamp was placed upon

the note, and he thereupon wrote across it, stamped for insufficiency, and penalty remitted, and signing it as therein appears. The
139 only payment endorsed upon this note is the payment of May the 4th, 1867, written by me, and the letter acknowledging which, marked Exhibit 172, also written by me and signed by Mr. Stewart, acknowledging the receipt of $25,000 on account. This note has always remained in my possession, under my immediate control, in the tin box referred to, from the time of its execution up to the present, except during a short period, when it was sent to and remained with our lawyers in Cincinnati. I have never been requested or directed to make any other endorsement upon the note.

Cross-examination by Mr. DAYTON:

Do you know in what way that $25,000 endorsed upon the note was paid?

A. My recollection is, that payment came in a letter addressed to A. T. Stewart, individually, enclosing a draft signed by L. C. Hopkins & Co., upon A. T. Stewart & Co. for $25,000, as stated in the Exhibit 172, acknowledging the receipt.

Q. Did you ever see that letter?

A. Yes; I think I did.

Q. What was done with the life insurance policies?

A. I have had possession of them ever since.

Q. Are they still alive?

A. I don't know really; I don't know whether the premium has ever been paid upon them or not; I never inquired, because I supposed the mortgages on the real estate were sufficient security for the loan, and besides, I supposed it was for his interest to keep the premium paid, as he had already paid largely upon them.

Q. How long after the note was taken did you receive the policies of insurance and the mortgages?

A. I can't give the precise time, but I recollect it was very shortly after; it was so short that I did not notice there was any non-fulfillment of his promise to send them immediately after his arrival in Cincinnati.

140 Q. When you received those mortgages, was there any U. S. internal revenue stamp upon them?

A. I never saw any revenue stamp on them to my recollection.

Q. Was there on those mortgages any certificate that they had been recorded?

A. There was not when I first saw them to my recollection; indeed I am certain there was not when I first saw them.

Q. How long did those mortgages remain in your hands?

A. Until some time in December, 1867.

Q. During all that time, were those mortgages without stamps and unrecorded?

A. I considered the stamp upon the note was equivalent to stamping the mortgages. They were not recorded during all that time, and I have always felt that I was to blame for it.

Q. You are quite confident that the first stamp which was put upon the note was put upon it, and Mr. Hopkins canceled it, at the time the note was executed?

A. I am as confident of both those facts as I am that I live.

Q. You say that those mortgages remained under your control until some time in December, 1867; what was then done with them?

A. I think there were ten mortgages, each for $100,000, to secure this

note, on different pieces of property, some in Ohio, and some in Covington, Kentucky. On the last day of December, 1867, Mr. William Libbey was then going to Cincinnati on business, and I gave them to him to put upon record.

Q. What conversation took place between you and Mr. Libbey at the time you gave him those mortgages?

141 A. All the conversation that took place between us in regard to those mortgages was in my professional capacity, as their lawyer, and I don't understand that I would be permitted to answer the question.

Q. Are you able to state what has become of the letter from L. C. Hopkins enclosing the $25,000 endorsed on the note?

A. Yes; it has been read in evidence in this examination, and is marked Exhibit 178.

Q. Was the additional $50 stamp placed on the note on the day of the date of the collector's certificate?

A. It was placed on the note, I think, at the time the collector wrote across it, as appears upon it. I don't recollect the date, but I assume he put the right date on it.

Q. Did you attend to that at the request of any member of the firm of A. T. Stewart & Co.?

A. There was no special request made; I attended to it as their lawyer, having the matter in charge. They furnished me with the stamp.

Q. Which one of the partners of the firm, if either, delivered you the stamp?

A. Neither delivered it to me, but the stamp was procured from the stamps on hand in the store belonging to the firm of A. T. Stewart & Co., or to Mr. Stewart personally. Both Mr. Stewart and Mr. Libbey knew I meant to make the application; I recollect mentioning it to them.

Q. What did you say to Mr. Stewart about it?

A. I don't recollect the language used. I have a faint recollection of saying to him, casually, that I had applied, or intended to apply, to Collector Paulding to put on the stamp and have the penalty remitted, or words to that effect.

Q. Can you say whether this was said before or after you had the additional stamp put on?

A. My impression is that it was after I made the application, but before the stamp was put on the note by the collector.

Q. What did Mr. Stewart say?

142 A. I don't recollect of his saying anything. I think I only mentioned the circumstance, as I said before, in a casual way.

Q. Was Mr. Libbey present?

A. No; not to my recollection.

Q. When did you speak about this additional stamp to Mr. Libbey?

A. My impression is that it was after it was put on the note, and I mentioned to him the circumstance of the penalty having been remitted.

Q. Did you mention to Mr. Stewart or to Mr. Libbey any reason or necessity for an additional stamp on the note?

A. I don't recollect any such conversation, and yet I think I must have mentioned something of the kind to them, or one of them, and yet I may not have done so. In matters of business falling under my charge, as their lawyer and adviser, I do what I consider necessary

without consulting with them. And they understand that I will do so.

Q. What was the reason for putting that additional stamp on that note?

A. Because I thought it had been improperly omitted by me at the time the note was delivered, the note being for a loan to be secured by mortgages.

Q. When did you first come to that opinion?

A. In the latter part of 1867, or the fore part of 1868.

Q. How long after you came to that opinion was it that you first applied to the collector?

A. My impression is that it was some time after.

Q. How many interviews did you have with Mr. Spaulding, the collector, with reference to the additional stamp, and remitting the penalty?

A. My first interview with him was at his office, on Broadway, corner of 22nd street, when I stated to him the circumstances of the case,
143 and made the application. He was to take the matter into consideration, and let me know the result. The next time I saw him on the subject he informed me, in substance, that he had considered the matter, and thought it a proper case for remitting the penalty. At the last interview the note was stamped, and he wrote across the stamp, as there appears.

Q. What were the circumstances of the case which you say you stated to Mr. Spaulding?

A. My best recollection of that is this: I stated, in substance, to him, that this note was given to A. T. Stewart & Co. for a loan of $100,000, to be secured by mortgages; that the maker, Hopkins, lived in Cincinnati, was to have the mortgages prepared and sent on. That I drew the note; was present at the transaction, and gave Hopkins the check, acting as the lawyer for A. T. Stewart & Co.; that, through my mistake, I had omitted to stamp the note sufficiently to make it a valid instrument in connection with the mortgages; that A. T. Stewart & Co. left such matters with me to attend to, and that the omission was my fault; that I intended to stamp the note sufficiently, and I was to blame for the mistake, and ought to pay any penalty imposed. I represented to him that it was not a case of an attempt to evade the revenue law, but an accidental omission on my part, acting as a lawyer for others. That is about the substance of all I said to him on that subject.

Q. Did you not tell him that the mortgages had not been recorded?

A. No; I think not.

Q. Did you say anything to him in reference to the recording of the mortgages?

A. No; I think not.

Q. Did you not say to him that an additional stamp on the mortgages was necessary to enable the mortgagees to record the mortgage?

144 A. No; I have given you the substance of all I recollect of saying to him on the subject.

Q. At the second interview, what conversation took place?

A. I met Mr. Spaulding, I think it was on the sidewalk, in front of A. T. Stewart & Co.'s wholesale store, corner of Broadway and Chambers streets. After a few casual remarks I asked him whether he had come to a conclusion respecting my application. He answered that he had; that he considered it a proper case for remitting the penalty. I think I then asked him if he wouldn't step into A. T. Stewart & Co.'s store, where the note was, and put on the extra stamp and cancel it.

He assented; we went in together; I got the note out of the tin box referred to, and the stamp, and it was then and there affixed and canceled, as it now appears. That is the substance of the last interview on the subject, to my best recollection.

Q. Was it not the reason, in your own mind, for having that additional stamp put on that note, that the mortgages could not be recorded unless either the mortgages were stamped or the note had on it such a stamp, in respect to amount, as the law required on mortgages?

A. I don't think I reasoned in respect to the recording of the mortgages at all. I considered the note required an additional stamp to make it a valid obligation in connection with the mortgages.

Q. Why in connection with the mortgages?

A. Because, as I understand the revenue laws, they require a stamp of one dollar on a thousand, in such cases.

Q. Did you then, and do you now, understand that to be the law where it is not proposed to enforce the mortgages?

A. That question never before occurred to me, and I never intended in my connection with this matter to omit stamping the note for any such reason.

145 Q. Can you say that you did not cause the additional stamp to be placed on that note in order to make the mortgages effective, for the purpose of enforcing them?

A. I say positively that I intended, on the 6th day of June, 1866, when that note was signed, to put upon it a stamp sufficient to make it a valid obligation as a note secured by mortgage or mortgages.

(Question repeated.)

A. After having heard that question read, and having read it several times myself, I do not sufficiently understand it to answer it in any other way.

Q. Who paid for the original stamp which was put on that note?

A. I really do not know; it was procured at the store of A. T. Stewart & Co.

Q. Was anything said whatever at the time the note was executed as to the stamp?

A. Nothing especial, to my recollection, beyond sending for the stamp and getting it. I must have sent for the stamp; I recollect that. I have every reason to believe it came from the counting-room of A. T. Stewart & Co., as I sent there for it. It was brought to me by one of their clerks or boys, and I don't recollect anything special being said respecting it.

HENRY HILTON.

146 *Exhibits to testimony of William Libbey.*

EXHIBIT No. 1.

CINCINNATI, *Dec. 20th*, 1867.

Messrs. A. T. STEWART & Co., *New York:*

Pay to the order of E. S. Jaffray & Co. thirty-one hundred six 43-100 dollars.

$3,106 43-100.

L. C. HOPKINS & CO.

EXHIBIT No. 2.

CINCINNATI, *Aug. 30th*, 1867.

Messrs. A. T. STEWART & Co., *New York:*

GENTS: We send herewith list of notes maturing in Sept., which you will please meet as they fall due:

1539.	Thompson, Langdon & Co., May 4, 4 months, due Sept. 7th	$682 45
1520.	April 14, H. B. Claflin & Co., 5 months, due Sept. 17th.	5,000 00
1521.	April 14, H. B. Claflin & Co., 5 months, due Sept. 17th.	5,000 00
1522.	April 14, H. B. Claflin & Co., 5 months, due Sept. 17th.	5,000 00
1523.	April 14, H. B. Claflin & Co., 5 months, due Sept. 17th.	5,000 00
1524.	April 14, H. B. Claflin & Co., 5 months, due Sept. 17th.	5,000 00
1526.	April 14, H. B. Claflin & Co., 5 months, due Sept. 17th.	5,429 55
1553.	May 17, Wilmerdings & Mount, 4 months, due Sept. 20th	3,645 57
1546.	March 19, Paton & Co., 6 months, due Sept. 22nd	2,508 46
1532.	March 21, Mills & Gibb, 6 months, due Sept. 24th	673 15
1514.	March 21, H. B. Claflin & Co., 6 months, due Sept. 24th.	6,000 00
1515.	March 21, H. B. Claflin & Co., 6 months, due Sept. 24th.	5,400 29
	June 28, H. B. Claflin & Co., 90 days, due Sept. 29th	4,478 45
		53,817 92

L. C. HOPKINS & CO.
TAYLER.

147 EXHIBIT No. 3.

CINCINNATI, *Sept.* 27, 1867.

Messrs. A. T. STEWART & Co., *New York:*

GENTLEMEN: We will thank you to send us cash statement of acc't up to and including the second of October, as there is a slight discrepancy in our acc'ts, and we desire that they may agree.

Yours, very truly,

L. C. HOPKINS & CO.

Explain, cash acc't, or acc't made up as cash, Oct. 2, at same time advise discrepancy, etc.

EXHIBIT No. 4.

CINCINNATI, *Oct.* 1, 1867.

Messrs. A. T. STEWART & Co., *New York:*

GENTS: We enclose list of our notes maturing in Oct., payable at Met. Nat. Bank, New York, which you will please meet as they fall due, and oblige,

Yours, truly,

L. C. HOPKINS & CO.
TAYLER.

Received.—J. M. H.

EXHIBIT No. 5.

CINCINNATI, *Oct. 26th*, 1867.

Messrs. A. T. STEWART & Co., *New York:*

GENTLEMEN: Herewith please find drafts as follows:

1267. Wm. F. Spencer & Co., of Richmond, Ind., on Southwark Nat. Bank of Philadelphia, for..... $302 03
5731. First Nat. Bank of Cin., on Fourth Nat. Bank of N. Y., for..... 20,000 00
148 Amounting to twenty thousand three hundred and two 03-100 dollars, which am't please place to credit on cash acc't, and advise.

Please charge all our net bills to our cash acc't, allowing us all the discount to which we are entitled, and send us a statement of the acc't as cash acc't to Oct. 1st. Send also statement of open acc't time bills.

Yours, truly,

L. C. HOPKINS & CO.,
Per RUTHERFORD.

Attended to, Nov. 2, 1867.—J. M. H.

EXHIBIT No. 6.

CINCINNATI, *Oct.* 1, 1867.

	July 3rd, H. B. Claflin & Co., 3 months, due Oct. 6th.	$4,478 43
1550.	April 6th, E. S. Jaffray & Co., 6 months, due Oct. 9th.	5,000 00
1551.	April 6th, E. S. Jaffray & Co., 6 months, due Oct. 9th.	5,000 00
1552.	April 6th, E. S. Jaffray & Co., 6 months, due Oct. 9th.	5,217 14
	August 9th, H. B. Claflin & Co., 60 days, due Oct. 11th.	16,957 31
	July 10th, H. B. Claflin & Co., 3 months, due Oct. 13th.	4,478 42
1547.	April 13th, Paton & Co., 6 months, due Oct. 16th....	3,133 11
	July 17th, H. B. Claflin & Co., 3 months, due Oct. 20th.	4,478 55
1554.	May 18th, H B Claflin & Co., 5 months, due Oct. 21st.	5,000 00
1555.	May 18th, H. B. Claflin & Co., 5 months, due Oct. 21st.	5,000 00
1556.	May 18th, H. B. Claflin & Co., 5 months, due Oct. 21st.	5,000 00
1557.	May 18th, H. B. Claflin & Co., 5 months, due Oct. 21st.	5,000 00
1558.	May 18th, H. B Claflin & Co., 5 months, due Oct. 21st.	5,000 00
1559.	May 18th, H. B. Claflin & Co., 5 months, due Oct. 21st.	5,000 00
1560.	May 18th, H. B. Claflin & Co., 5 months, due Oct. 21st.	7,504 17
1570.	June 22nd, Tracy, Irwin & Co., 4 months, due Oct. 25th.	1,619 52
1527.	April 24th, H. B. Claflin & Co., 6 months, due Oct. 27th.	6,000 00
1528.	April 24th, H. B. Claflin & Co., 6 months, due Oct. 27th.	6,740 53

EXHIBIT No. 11.

CINCINNATI, *July* 26, 1867.

Messrs. A. T. STEWART & Co., *New York:*

GENTLEMEN: You will please erase form the list of notes forwarded to you on the 19th inst. the following described notes, as they have been prepaid, namely:

149 1529. Feb'y 13th, Geo. Bliss & Co., 6 months, due Aug. 16th..... $4,265 51
1508. Feb'y 15th, H. B. Claflin & Co., 6 months, due Aug. 18th 5,000 00

1509. Feb'y 15th, H. B. Claflin & Co., 6 months, due Aug. 18th 3,246 69

Amounting to $12,512 20

Very truly, yours,

L. C. HOPKINS & CO.,
Per RUTHERFORD.

EXHIBIT No. 21.

CINCINNATI, *Nov. 6th*, 1867.

Messrs. A. T. STEWAR & Co., *New York:*

GENTLEMEN: The following is a list of the notes due in November, present inst., which notes please pay as they fall due, and charge to our cash acc't:

28. August 18th, Paton & Co., 3 months, due Nov. 21st, for $2,659 08
1563. May 20th, D. Valentine & Co., 6 months, due Nov. 23, for 3,681 20
1562. May 21, H. B. Claflin & Co., 6 months, due Nov. 24, for 5,832 89
1561. May 21, H. B. Claflin & Co., 6 months, due Nov. 24, for 5,000 00
1573. July 23, Sutton, Smith & Co., 4 months, due Nov. 26, for 3,963 37
1572. July 24, Hoyt, Sprague & Co., 4 months, due Nov. 27, for 6,990 20

Amounting to $28,126 74

All payable at Metropolitan National Bank, New York.

Very respectfully,

L. C. HOPKINS & CO.,
Per A.

EXHIBIT No. 22.

CINCINNATI, *Dec. 10th*, 1867.

Messrs. A. T. STEWART & Co., *New York:*

GENTLEMEN: We have drawn upon you to-day, favor of Messrs. E. S. Jaffray & Co., for thirty-one hundred six 43-100 dollars, on settlement of note No. 81, due Dec. 30th. Please erase the same from your list.

Am't of note $3,116.83.

Very respectfully,

L. C. HOPKINS & CO.

Higgins and Williams.

150 EXHIBIT No. 24.

CINCINNATI, *Nov. 30th*, 1867.

Messrs. A. T. STEWART & Co., *New York:*

GENTLEMEN: Below we send list of bills payable for December, which please pay at maturity, and charge our cash acc't.

Yours, truly,

L. C. HOPKINS & CO.

Due Dec. 3,	note No.	1567,	Paton & Co		$2,570 00
" " 5,	" "	1564,	E. S. Jaffray & Co		5,000 00
" " 5,	" "	1565,	"		5,000 98
" " 5,	" "	1566,	"		4,013 92
" " 13,	" "	——,	H. B. Claflin & Co		3,699 14
" " 19,	" "	——,	"		3,699 15
" " 25,	" "	——,	"		3,399 12
" " 25,	" "	29,	Paton & Co		926 18
" " 30,	" "	81,	E. S. Jaffray & Co		3,116 83
					$31,725 32

Will forward remittance Monday.

EXHIBIT No. 29.

NEW YORK, *Oct. 29th*, 1857.

Messrs. L. C. HOPKINS & Co., *Cincinnati, O.:*

DEAR SIRS: We have paid your notes, as per memorandum in margin, and charged amount of same ($12,740.23) to your cash acc't.

Very respectfully,

A. T. STEWART & CO.
BRUEN.

We enclose (canceled):

1 note for	$6,000 00,	due Oct. 24–27, 1867.
1 " "	6,740 23,	" " " "
	$12,740 23	

151 EXHIBIT No. 30.

NEW YORK, *Oct. 28th*, 1867.

Messrs. L. C. HOPKINS & Co., *Cincinnati:*

GENTS: Accept our thanks for your favor of 25th, just received, enclosing checks for $523.35, and requesting that the proceeds be credited to your cash account.

We take pleasure in informing you that we will comply with your wishes.

We are, very respectfully, yours,

A. T. STEWART & CO.,
Per FOX.

We enclose your note (canceled) for $1,619.52, dated June 22nd, and payable four months after date.

EXHIBIT No. 31.

NEW YORK, *Oct.* 23, 1867.

Messrs. L. C. HOPKINS & Co., *Cincinnati, O.:*

GENTS: We have paid your notes, as per memorandum in margin, and charged amount of same to your cash account.

We enclose notes, canceled.

Very respectfully,

A. T. STEWART & CO.,
BRUEN.

6 notes, each $5,000.00 due Oct. 18–21	$30,000 00
1 none " " "	7,504 17
	$37,504 17

EXHIBIT No. 32.

NEW YORK, *Oct. 22nd*, 1867.

Messrs. L. C. HOPKINS & Co., *Cincinnati, O.:*

GENTS: Accept our thanks for your favor of 19th, just re-
152 ceived, enclosing drafts for $30,216.50, and requesting that the proceeds be credited to your cash account. We take pleasure in informing you that we will comply with your wishes.

We are, very respectfully, yours,

A. T. STEWART & CO.,
Per FOX.

We enclose (canceled) your note for $4,478.55, due Oct. 17–20, 1867, which we have paid.

EXHIBIT No. 38.

NEW YORK, *January 7th*, 1868.

Messrs. L. C. HOPKINS & Co., *Cincinnati, O.:*

GENTS: We have paid your notes, as per memorandum in the margin, and charged amount of same ($4,625.30) to your cash acc't.

Very respectfully,

A. T. STEWART & CO.
BRUEN.

Note for $3,699.12, due December 25th, 1867.
" 926.18, " " " "

EXHIBIT No. 39.

$15,000.] NEW YORK, 18*th July*, 1867.

At sight, pay the order of H. B. Claflin & Co., fifteen thousand dollars, value received, and charge the same to account of.

L. C. HOPKINS & CO.

To Messrs. A. T. STEWART & Co., *New York.*

EXHIBIT No. 40.

$31,492.23.] NEW YORK, *July 17th*, 1867.

153 At sight, pay to the order of H. B. Claflin & Co., thirty-one thousand four hundred ninety-two 23-100 dollars, value received, and charge the same to account of

L. C. HOPKINS & CO.

To Messrs. A. T. STEWART & Co., *New York.*
J. M. H.

EXHIBIT No. 41.

$19,640.25.] NEW YORK, *Aug.* 12, 1867.

At sight, pay to the order of H. B. Claflin & Co. nineteen thousand

six hundred forty 25-100 dollars, value received, and charge the same to count of—

L. C. HOPKINS & CO.

To A. T. STEWART & Co., *City.*

EXHIBIT No. 42.

$29,478.46.] NEW YORK, *Aug.* 8, 1867.

At sight, pay to the order of H. B. Claflin & Co. twenty-nine thousand four hundred seventy-eight 46-100 dollars, value received, and charge the same to account of—

L. C. HOPKINS & CO.

To Messrs. STEWART & Co., *City.*

EXHIBIT No. 43.

No. 276.] CINCINNATI, *Sept.* 24, 1867.

To Messrs. A. T. STEWART & Co., *New York:*

Pay to the order of Kutter, Luckemeyer & Co. ten thousand dollars.

$10,000.

L. C. HOPKINS & CO.,
By GEO. V. RUTHERFORD,
Att'y.

EXHIBIT No. 44.

No. 278.] CINCINNATI, *Sept.* 25, 1867.

Messrs. A. T. STEWART & Co., *New York:*

154 Pay to the order of Sprague, Colburn & Co. twenty thousand three hundred eighty-two 92-100 dollars.

$20,382.92.

L. C. HOPKINS & CO.,
P'r GEO. V. RUTHERFORD,
Att'y.

EXHIBIT No. 59.

No. 314.] CINCINNATI, *Nov.* 21, 1867.

Messrs. A. T. STEWART & Co., *New York:*

Pay to the order of D. Valentine & Co. twenty-one hundred seventy-five and 38-100 dollars.

$2,175 38-100.

L. C. HOPKINS & CO.

EXHIBIT No. 60.

No. 312.] CINCINNATI, *Nov.* 21*st*, 1867.

Messrs. A. T. STEWART & Co., *New York:*

Pay to the order of Cooper, Vail & Co. eight hundred forty-three and 89-100 dollars.

$843.89.

L. C. HOPKINS & CO.

EXHIBIT No. 61.

No. 320.] CINCINNATI, *Nov. 21st*, 1867.

Messrs. A. T. STEWART & Co., *New York:*

Pay to the order of Jno. S. Barry & Co. eleven hundred sixty-four and 61-100 dollars.

$1,164 61-100.

L. C. HOPKINS & CO.

EXHIBIT No. 62.

No. 317.] CINCINNATI, *Nov.* 21, 1867.

Messrs. A. T. STEWART & Co., *New York:*

Pay to the order of Geo. A. Weeks & Co. fourteen hundred sixteen and 32-100 dollars.

$1,416 32-100.

L. C. HOPKINS & CO.

155 EXHIBIT No. 63.

No. 311.] CINCINNATI, *Nov.* 21, 1867.

Messrs. A. T. STEWART & Co., *New York:*

Pay to the order of Paton & Co. five hundred and twenty-five dollars.

$525.00.

L. C. HOPKINS & CO.

EXHIBIT No. 64.

No. 316.] CINCINNATI, *Nov.* 21, 1867.

Messrs. A. T. STEWART & Co., *New York:*

Pay to the order of Wm. J. Peake & Co. fourteen hundred twenty and 16-100 dollars.

$1,420 16-100.

L. C. HOPKINS & CO.

EXHIBIT No. 65.

No. 323 1-2.] CINCINNATI, *Nov.* 26, 1867.

Messrs. A. T. STEWART & Co., *New York :*

Pay to the order of Equitable Life Assurance Society two hundred and ninety-four 60-100 dollars.

$294 60-100.

L. C. HOPKINS & CO.

EXHIBIT No. 66.

No. 139.] CINCINNATI, *Dec.* 27, 1866.

Messrs. A. T. STEWART & Co., *New York:*

Pay to the order of W. C. Beardsley, treasurer, three hundred dollars.

$300.00.

L. C. HOPKINS & CO.

EXHIBIT No. 67.

$10,000.] NEW YORK, *July 24th*, 1867.

Sight, without grace, please pay to the order of ourselves ten thousand dollars, value received, and charge to the account of—

L. C. HOPKINS & CO.

To A. T. STEWART & Co., *New York.*

156 EXHIBIT No. 69.

$10,000.00.] NEW YORK, *Aug.* 12, 1867.

At sight, please pay to the order of A. T. Stewart & Co. ten thousand dollars, value received, and charge to the account of—

L. C. HOPKINS & CO.

To A. T. STEWART & Co., *New York.*

(Endorsed:) Rec'd A. T. Stewart & Co., per Geo. B. Butler.

EXHIBIT No. 70.

$960.00.] NEW YORK, *Aug. 14th*, 1867.

Pay to the order of W. C. Beardsley, treasurer, nine hundred and sixty dollars, value received, and charge the same to the account of—

L. C. HOPKINS & CO.

To A. T. STEWART & Co.,
New York City.

EXHIBIT No. 71.

$600.00.] NEW YORK, *Aug. 15th*, 1867.

At sight, please pay to the order of A. T. Stewart & Co. six hundred dollars, value received, and charge to the account of—

L. C. HOPKINS & CO.

To A. T. STEWART & Co., *New York.*

EXHIBIT No. 73.

No. 270.] CINCINNATI, *Sept. 3rd*, 1867.

Messrs. A. T. STEWART & Co., *New York:*

Pay to the order of Messrs. A. T. Stewart & Co. three hundred and three 72-100 dollars.

$303.72.

L. C. HOPKINS & CO.,
By GEO. V. RUTHERFORD, *Att'y.*

EXHIBIT No. 75.

$10,000.00.] NEW YORK, *Sept. 9th*, 1867.

157 Sight, without grace, please pay to the order of ourselves ten thousand dollars, value received, and charge to the account of—

L. C. HOPKINS & CO.

To A. T. STEWART & Co., *New York.*

EXHIBIT No. 76.

No. 225.] CINCINNATI, *May 21st*, 1867.

Messrs. A. T. STEWART & Co., *New York:*

Pay to the order of Samuel H. White, secretary, eight hundred dollars.

$800.00.

L. C. HOPKINS & CO.

EXHIBIT No. 77.

No. 226.] CINCINNATI, *May 21st*, 1867.

Messrs. A. T. STEWART & Co., *New York:*

Pay to the order of yourselves one hundred eighty-nine 03-100 dollars.

$189.03.

L. C. HOPKINS & CO.

EXHIBIT No. 82.

No. 235.] CINCINNATI, *June* 10, 1867.

Messrs. A. T. STEWART & Co., *New York:*

Pay to the order of Messrs. A. T. Stewart & Co., fifteen thousand three hundred thirty-three 76-100 dollars.

$15,333.76.

L. C. HOPKINS & CO.

EXHIBIT No. 83.

No. 234.] CINCINNATI, *June 10th*, 1867.

Messrs. A. T. STEWART & Co., *New York:*

Pay to the order of A. T. Stewart & Co. twenty-seven thousand and sixty-four 65-100 dollars.

$27,064.65.

L. C. HOPKINS & CO.

158 EXHIBIT No. 86.

No. 248.] CINCINNATI, *June 28th*, 1867.

Messrs. A. T. STEWART & Co., *New York:*

Pay to the order of Messrs. A. T. Stewart & Co., three hundred and sixty-two 74-100 dollars.

$362.74.

L. C. HOPKINS & CO.

EXHIBIT No. 88.

No. 251.] CINCINNATI, *July* 6, 1867.

Messrs. A. T. STEWART & Co., *New York:*

Pay to the order of Messrs. A. T. Stewart & Co. twenty-five thousand two hundred and sixty-seven 38-100 dollars.

$25,267.38.

L. C. HOPKINS & CO.

EXHIBIT No. 98.

No. 223.] CINCINNATI, *May 13th*, 1867.

Messrs. A. T. STEWART & Co., *New York:*

Pay to the order of yourselves eighteen thousand three and 28-100 dollars.

$18,003.28.

L. C. HOPKINS & CO.

EXHIBIT No. 112.

No. 202.] CINCINNATI, *April* 18*th*, 1867.

Messrs. A. T. STEWART & Co., *New York:*

Pay to the order of yourselves forty-six thousand two hundred fifty-two and 45-100 dollars.

$46,252.45.

L. C. HOPKINS & CO.

EXHIBIT No. 128.

No. 164.] CINCINNATI, *January* 19, 1867.

Messrs. A. T. STEWART & Co., *New York:*

Pay to the order of A. T. Stewart & Co. fifty-six thousand eight hundred thirty-two 95-100 dollars.

$56,832.95.

L. C. HOPKINS & CO.

159 EXHIBIT No. 139.

No. 152.] CINCINNATI, *January* 3, 1867.

Messrs. A. T. STEWART & Co., *New York:*

Pay to the order of A. T. Stewart & Co. seventy hundred and forty-six 79-100 dollars.

$7,046.79.

L. C. HOPKINS & CO.

EXHIBIT No. 141.

No. 309.] CINCINNATI, *Nov.* 21, 1867.

Messrs. A. T. STEWART & Co., *New York:*

Pay to the order of H. B. Claflin & Co., nine hundred thirty-seven 76-100 dollars.

$937.76.

L. C. HOPKINS & CO.

EXHIBIT No. 142.

No. 277.] CINCINNATI, *Sept.* 25*th*, 1867.

Messrs. A. T. STEWART & Co., *New York:*

Pay to the order of H. B. Claflin & Co. forty-three hundred forty-four 09-100 dollars.

$4,344.09.

L. C. HOPKINS & CO.,
By GEO. V. RUTHERFORD, *Att'y.*

EXHIBIT No. 144.

$200.00.] NEW YORK, *February* 23, 1867.

Sight, without grace, please pay to the order of B. F. Turner two hundred dollars, value received, and charge to the account of—

L. C. HOPKINS & CO.

To A. T. STEWART & Co., *New York.*

160 EXHIBIT No. 145.

CINCINNATI, *May* 2, 1867.

Messrs. A. T. STEWART & Co., *New York:*

Pay to the order of A. T. Stewart, esq., twenty-five thousand dollars. $25,000.

L. C. HOPKINS & CO.

EXHIBIT No. 147.

CINCINNATI, *Nov. 26th*, 1867.

Messrs. A. T. STEWART & Co., *New York:*

GENTS: We enclose, for our cash acc't, No. 6326, Champaign National Bank, Urbana, O., on Ninth National Bank, New York, for $113.16. Please acknowledge, and oblige,

Yours truly,

L. C. HOPKINS CO.
TAYLER.

EXHIBIT No. 148.

CINCINNATI, *Nov. 25th*, 1867.

Messrs. A. T. STEWART & Co., *New York:*

GENTS: We enclose, for our cash account, draft No. 2710, Central National Bank, Danville, Ky., on Ninth National Bank, New York, for $214.02.

Yours truly,

L. C. HOPKINS & CO.
TAYLER.

Also, National Exchange Bank, Auburn, No. 9139, on National Park Bank, for $50.00.

$214 02	L. C. H. & CO.
50 00	T.
$264 02	

161 EXHIBIT No. 149.

CINCINNATI, *Nov.* 21, 1867.

Messrs. A. T. STEWART & Co., *New York:*

GENTLEMEN: Herewith please find three checks, as follows:

No.	T. T. Babbitt & Co., Dayton, O., on E. C. Cowden & Co., 327 B'dway, N. Y., for	$86 50
" 12235.	John Colhoun & Co., bankers, St. Jos., Mo., on Fourth National Bank, N. Y., for	50 00
" 13261.	Merchants' National Bank, Cleveland, O., on Third National Bank, N. Y., for	38 50
	Amounting to	$175 00

Please place same to credit our cash acc't and advise.

Very truly, &c.,

L. C. HOPKINS & CO.,
Per R.

EXHIBIT No. 150.

CINCINNATI, *Nov. 19th*, 1867.

Messrs. A. T. STEWART & Co., *New York:*

GENTLEMEN: Herewith please find check No. 1173, bonds, Hoagland & Co., on Winslow, Lanier & Co., New York, for three hundred dollars. Please place same to credit our cash acc't and advise.

$300.00.

Very truly,

L. C. HOPKINS & CO.,
Per RUTHERFORD.

162 EXHIBIT No. 151.

CINCINNATI, *Nov.* 16, 1867.

Messrs. A. T. STEWART & Co., *New York City:*

GENTLEMEN: Herewith please find No. 14889, Bank of the Ohio Valley, of Cincinnati, on American Exchange National Bank, of New York, for $10,000.00 (ten thousand dollars). Please place same to credit our cash account and advise.

$10,000.00.

Very respectfully,

L. C. HOPKINS & CO.,
Per RUTHERFORD.

EXHIBIT No. 152.

CINCINNATI, *Nov. 14th*, 1867.

Messrs. A. T. STEWART & Co., *New York:*

GENTS: Herewith please find 4 checks, as follows:

No. 14819, Bank Ohio Valley, on American Exchange National Bank, New York, for	$5,000 00
" 6448, First National Bank, Cincinnati, on Central National Bank, New York, for	10,000 00
" 11552, First National Bank, Newark, O., on Fourth National Bank, New York, for	57 00
" 5836, First National Bank, Elyria, O., on Central National Bank, New York, for	12 00
Amounting to	$15,069 00

Fifteen thousand fifty-nine dollars. Please place same to credit our cash acc't.

$15,069.00.

Very respectfully,

L. C. HOPKINS & CO.,
Per RUTHERFORD.

163 EXHIBIT No. 153.

CINCINNATI, *Nov. 12th*, 1867.

Messrs. A. T. STEWART & Co., *New York:*

GENTLEMEN: Herewith please find two checks, as follows:

No. 1108, General Geo. W. Balloch, Ch'f D. O., Washington, D. C., on Assistant Tr. U. S., New York, for	$383 09
" 3636, Citizens' Bank of Louisiana, N. C., on Bank of America, New York, for	266 11
Amounting to	$655 14

Six hundred fifty-five $\frac{14}{100}$ dollars. Please place same to credit our cash acc't and advise.

$655.14.

Very respectful'y,

L. C. HOPKINS & CO.,
Per RUTHERFORD.

EXHIBIT No. 154.

CINCINNATI, *Nov.* 9, 1867.

Messrs. A. T. STEWART & Co., *New York:*

GENTLEMEN: Herewith please find three checks, as follows:

No. 6247, First National Bank, Cincinnati, on Ocean National Bank, New York, for	$10,000 00
" 14690, Bank Ohio Valley, Cincinnati, on American Ex. Nat. Bank, New York, for	10,000 00
" 217, Minot & Co., Concord, N. H., on A. E. & C. E. Tilton, 95 Liberty st., N. Y., for	50 00
Amounting to	$20,050 00

Twenty thousand fifty dollars, which amount please place to credit our cash acc't and advise.

Very truly,

L. C. HOPKINS & CO.,
Per R.

164 EXHIBIT No. 157.

CINCINNATI, *Nov.* 1, 1867.

Messrs. A. T. STEWART & Co., *New York:*

GENTLEMEN: Herewith please find checks, as follows:

No. 7617, First National Bank, of Bryan, O., on Fourth National Bank, New York, for	$118 00
" City National Bank, of Cedar Rapids, Iowa, on Third National Bank, N. Y., for	24 00
" 53557, M. P. Ayers & Co., bankers, Jacksonville, Ill., on Am. Ex. Nat. B'k, N. Y., for	34 79
" 14443, Bank of the Ohio Valley, Cincinnati, on American Ex. Nat. Bank, N. Y., for	15,660 31
" 5901, First National Bank of Cincinnati, on Fourth National Bank, New York, for	40,000 00
Amounting to	$55,837 10

Fifty-five thousand eight hundred thirty-seven $\frac{10}{100}$ dollars. Please place same to credit our cash acc't and advise.

Very respectfully, yours,

L. C. HOPKINS & CO.,
Per R.

EXHIBIT No. 158.

CINCINNATI, *Dec. 3rd*, 1867.

Messrs. A. T. STEWART & Co., *New York:*

GENTLEMEN: We enclose for our cash acc't No. 15318, Bank of Ohio

Valley, on American Exchange National Bank, New York, for fifteen thousand dollars.

$15,000.00.

Yours truly,

L. C. HOPKINS & CO.,
TAYLER.

165 EXHIBIT No. 159.

CINCINNATI, *Dec. 4th*, 1867.

Messrs. A. T. STEWART & Co., *New York :*

GENTLEMEN : Herewith find two checks, as follows :

No. 5029, assistant treasurer U. S., Washington, on assistant treasurer, New York, for	$347 25
" 7114, First National Bank, Cincinnati, on Central National Bank, New York, for	5,000 00
Amounting to	$5,347 25

Fifty-three hundred forty-seven $\frac{25}{100}$ dollars. Please place same to credit our cash acc't and advise.

$5,347.25.

Yours, &c.,

L. C. HOPKINS & CO.,
Per RUTHERFORD.

EXHIBIT No. 160.

CINCINNATI, *Dec. 5th*, 1867.

Messrs. A. T. STEWART & Co., *New York :*

GENTLEMEN : Herewith please find check No. 15388, Bank of the Ohio Valley, Cincinnati, on American Exchange National Bank, New York, for forty-nine hundred dollars.

Please place same to credit our cash acc't and advise.

$4,900.00.

Very truly, &c.,

L. C. HOPKINS & CO.,
Per RUTHERFORD.

166 EXHIBIT No. 161.

CINCINNATI, *Dec. 6th*, 1867.

Messrs. A. T. STEWART & Co., *New York :*

GENTLEMEN : Enclosed herewith we hand you check, First National Bank, Cincinnati, on Ocean National Bank, New York, for fifty-one hundred dollars.

Please place same to credit of our cash acc't and advise.

Yours truly,

L. C. HOPKINS & CO.,
MURRAY.

EXHIBIT No. 162.

CINCINNATI, *Dec.* 7, 1867.

Messrs. A. T. STEWART & Co., *New York:*

GENTLEMEN: Herewith find checks as follows:

No. 15460. Bank of Ohio Valley, Cincinnati, on American Exchange Nat. Bank, N. Y., for	$5,000 00
" 1306. Bonds, Hoagland & Co., Peru, Indiana, on Winslow, Lanier & Co., N. Y., for	300 00
Amounting to	$5,300 00

Five thousand three hundred dollars.

Please place same to credit our cash acc't and advise.

$5,000.00.

Very respectfully,

L. C. HOPKINS & CO.,
Per RUTHERFORD.

EXHIBIT No. 163.

CINCINNATI, *Dec.* 9, 1867.

Messrs. A. T. STEWART & Co., *New York:*

GENTLEMEN: Herewith please find check No. 7261, First National Bank of Cincinnati, on Ocean National Bank, New York, for fifty-five hundred dollars.

Please place same to credit our cash acc't, and advise.

Very respectfully, yours,

L. C. HOPKINS & CO.,
Per RUTHERFORD.

$5,500.00.

167 EXHIBIT No. 166.

June 1, 1866.

LIABILITIES.

Bills payable	$97,500
Open acc't in New York	210,500
Due depositors here, say	28,000
Amounting to	$336,000

ASSETS.

Cash at home	$5,000
Cash at A. J. Gole's	5,000
July bills, say	40,000
Wholesale bills, say	25,000
Amounting to	$75,000
Leaving for merchandise, say	261,000
	$336,000

EXHIBIT No. 167.

Estimate of L. C. Hopkins' personal assets outside of firm of L. C. Hopkins & Co.

Bills receivable (good)		$41,121
Various stocks		2,750
Various real estate	$197,709	
Covered by incumbrance	35,000	
		$162 709
		$206,580

JUNE 1, 1866.

168 EXHIBIT No. 168.

Payments by A. T. Stewart & Co. for account of L. C. Hopkins & Co., July, 1867, to January, 1868.

1867, July	—.	Draft,	own order	$5,361 21	
" "	—.		Mrs. H. Mann	75 00	
" "	5.		Arnold, C. & Co	178 96	
" "	6.		Jordan, M. & Co	25 50	
" "	9.		Davis, R. & Co	715 76	
" "	12.		W. C. Langley & Co	1,706 66	
" "	16.		J. & H. Auchinclose	546 25	
" "	18.		H. Pratt & Sons	138 56	
" "	17.		Benkhardt & Co	535 35	
" "			Thompson, L. & Co	1,421 75	
" "			M. Seligman & Co	99 80	
" "			Wallace & F	204 78	
" "			H. B. Claflin & Co	31,492 23	
" "			F. B. Strouse	72 08	
" "	19.		H. B. Claflin & Co	15,000 00	
" "	20.		Benkhardt & Co	20 73	
" "			G. Bliss & Co	29,459 17	
" "	22.		Spotts & Hawk	3,000 00	
" "	24.		Lew, Harriman & Co.	2,332 19	
" "			Woodward, L. & Co	1,917 77	
" "			Own order	10,000 00	
" "			G. M. Carlton & Co	12 00	
" "		Note,	Arnold, C. & Co	600 24	
" "	31.		Thompson, L. & Co	753 20	
" "	18.	Drafts,	A. & E. Wollach	117 33	
					$104,786 52
" Aug.	2.		Arnold, C. & Co	152 49	
" "	8.		H. B. Claflin & Co	29,478 46	
" "	12.		L. C. Hopkins	10,000 05	
" "	13.		H. B. Claflin & Co	$19,640 25	
" "		Note,	Paton & Co	2,634 23	
" "	15.	Draft,	L. C. Hopkins	600 00	
" "	16.	Note,	Mills & Gibb	2,139 84	
" "			E. S. Jaffray & Co	11,804 18	
" "	17.	Draft,	W. C. Beardsley, tr	960 00	
" "	21.		Hoyt, Spragues & Co.	8,372 41	
" "			Wheeler, Wilson & Co.	12 00	

1867,	Aug.	23.	Note,	Thompson, L. & Co...	444 35	
"	"	24.		Kutter, L. & Co	1,371 86	
"	"		Draft,	J. & H. Auchinclose..	627 00	
						$88,237 07
169	1867,	Sept.	4.	Draft, Tracy, J. & Co .	$107 01	
	"	"		J. Pratt & Son..	57 60	
1867,	Sept.	6.	Draft,	R. & A. Andrews	165 00	
"	"			Noel, L. & A	303 27	
"	"		Note,	Thompson, L. & Co....	682 45	
"	"	7.	Draft,	E. S. Jaffray & Co	90 00	
"	"	9.		L. C. Hopkins.....	10,000 00	
"	"			J. S. Parry & Co	1,968 20	
"	"	12.		L. C. Hopkins	1,000 00	
"	"	14.		"	8,000 00	
"	"	16.	Notes,	H. B. Claflin & Co	30,429 55	
"	"		Draft,	Lake, McC. & Co.....	470 00	
"	"	17.		Spotts & Hawk	655 81	
"	"	19.	Note,	Wilmerdings & M.....	3,645 57	
"	"	20.		Paton & Co	2,508 46	
"	"	21.	Draft,	McCune, S. & C	190 22	
"	"	23.	Note,	Mills & Gibb	673 15	
"	"			H. B. Claflin & Co	11,400 29	
"	"	25.	Draft,	Paton & Co	340 00	
"	"	26.		Kutter, L. & Co	10,000 00	
"	"	27.	Note,	H. B. Claflin & Co	4,478 45	
"	"		Draft,	Wallace & F.....	612 10	
"	"	28.		H. B. Claflin & Co	4,344 09	
"	"			Mrs. Dr. C. M. Smith..	25 00	
"	"	30.		Lathrop, L. & Co	14,050 36	
"	"			W. C. Langley & Co ..	781 40	
"	"			Cooper, Vail & Co	3,560 48	
"	"			A. & D. Sorchan.....	3,605 25	
"	"			Sprague, C. & C	20,382 92	
"	"			J. M. Billings & Co ...	2,313 80	
						$136,840 43
"	Oct.	1.	Drafts	E. D. Pratt.....	156 80	
"	"			W. A. Drowne & Co ..	1,245 09	
"	"			J. Lebby, jr., & Co....	48 45	
"	"			W. J. Peake & Co	586 00	
"	"	5.	Note,	H. B. Claflin & Co.....	4,478 43	
"	"		Draft,	Jo. Lee & Co.	4,673 14	
"	"	8.		D. Valentine & Co	47 35	
"	"			Ball, Black & Co	107 00	
"	"		Notes,	E. S. Jaffray & Co....	15,217 14	
	1867,	Sept.		Drafts, E. D. Pratt....	410 12	
170	1867,	Oct.	9.	Paton & Co.	$1,183 78	
	"	"		B. F. Turner....	100 00	
1867,	Oct.	10.	Notes,	H. B. Claflin & Co.....	16,957 31	
"	"			H. B. Claflin & Co.....	4,478 42	
"	"	14.	Draft,	West, B. & Cary.....	16 90	
					$49,705 93	
						$329,864 02
"	"	16.	Check returned not good.....		125 00	
"	"	15.	Notes,	Paton & Co.....	3,133 11	
"	"	18.	Notes,	Claflin	4,478 55	

1867, Oct.	19.	Drafts, Paton & Co	442 50		
" "		Wicks, J. & Co.	226 20		
" "		Notes, Claflin	37,504 17		
" "	21.	Drafts, Sutton, Smith & Co.	372 00		
" "		Wallace & Fitch	290 76		
" "		Arnold, C. & Co.	1,133 02		
" "		Cooper, V. & Co	776 58		
" "	25.	Note, Tracy, J. & Co	1,619 52		
" "	25.	Claflin	12,740 53		
" "	26.	Draft, W. A. Perry	50 00		
				$112,597 87	
" Nov.	4.	Drafts, E. D. Pratt	600 00		
" "	9.	S. S. McKay	75 00		
" "	15.	Mrs. E. W. Rutherford.	200 00		
" "	15.	Paid Warner, kid gloves	1,772 84		
" "	18.	Draft, J. S. Barry & Co	2,598 20		
" "		Mrs. A. S. Tenny	50 00		
" "	21.	Note, Paton & Co	2,659 08		
" "	22.	D. Valentine & Co	3,681 20		
" "		Claflin	10,832 89		
" "		Draft, E. D. Pratt	500 00		
" "	23.	H. B. Claflin & Co	937 76		
" "		W. J. Peake & Co	1,420 16		
" "		Wicks, J. & Co.	1,416 32		
" "		Wallace & Fitch	21 40		
" "		Paton & Co	525 00		
" "		Butler, P. & Co.	391 15		
" "		J. M. & J. B. Plumb & Co	130 34		
" "		Note, Sutton, S. & Co.	3,963 37		
" "	25.	Draft, Cooper, V. & Co	843 89		
" "		J. S. Barry & Co.	1,164 61		
1867, Nov.		D. Valentine & Co	2,175 38		
171 1867, Nov.	25.	D—— & Thompson	27 50		
1867, Nov.	29.	Field & Craighead	16 00		
" "		B. Westerman & Co.	5 20		
" "		Equitable Life Ins. Co.	294 60		
" "		E. D. Pratt	400 00		
" "	30.	S. S. Bryant	400 00		
" "		Kutter, L. & Co.	198 48		
" "		O. Ditson & Co.	126 00		
				$37,426 37	
" Dec.	2.	Note, Paton & Co.	2,570 98		
" "		Paid Warner & Co., bill	821 56		
" "	4.	Notes, E. S. Jaffray & Co.	14,013 92		
" "	12.	H. B. Claflin & Co	3,699 14		
" "		Draft, Summer, W. W.	100 00		
" "	13.	J. Haldsworth & Co.	4 11		
" "		S. E. Morse, jr., & Co.	7 00		
" "	18.	T. R. Littsler, tr	18 00		
" "		Note, H. B. Claflin & Co.	3,699 15		
" "	20.	Draft, E. S. Allien	176 00		
" "	23.	E. S. Jaffray & Co.	3,106 43		
" "		Note, Paton & Co.	926 18		

1867, Dec.	H. B. Claflin & Co	3,699 12	
			$32,841 59
			$512,729 85
July	. Amount drawn from cash acc't and appropiated to merchandise acc't..		25,875 77
			$538,605 62

EXHIBIT No. 169.

There is no Exhibit 169, owing to an error in numbering them.

H. H. R., *N. P.*

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EXHIBIT No. 170.

DR. L. C. HOPKINS & CO., CINCINNATI, O. CR.

1866.				1866.			
Jan.	11.	To m'd'se, 3-90	$93 75	Feb.	9.	By m'd'se, 3-90	$90 50
	12.	do. net	972 61	M'ch	6.	do. 3-90, Dec. 30	90 00
	24.	do. 3-90	8,591 29		9.	do. 3-90, M'ch 5	8,940 25
	25.	do. 3-90	2,088 13		15.	do. net cash	11,315 69
		do. net	300 25				
	26.	do. 3-90	260 33				
	27.	do. 3-90	1,196 22				
		do. 3-90	671 30				
	29.	do. 3-90	688 73				
		do. net	117 25				
	30.	do. 3 90	234 40				
	31.	do. 3-90	1,403 24				
Feb.	1.	do. 3-90	234 25				
		do. net	252 00				
		do. 3-90	1,363 60				
	3.	do. 3-90	2,275 99				
		do. net	2,036 35				
		do. net	803 90				
	5.	do. net	555 77				
		do. net	678 87				
		do. 3-90	3,285 44				
	6.	do. 3-90	538 43				
		do. net	566 90				
		do. 3-90	414 40				
		do. net	224 40				
	7.	do. net	580 90				
		do. net	271 35				
		do. 3-90	851 76				
		do. net	461 97				
	8.	do. net	1,148 97				
		do. 3-90	243 63				
		do. 3-90	907 50				
		do. 3-90	4 50				
	9.	do. 3-90	633 53				
		do. net	1,068 92				
	10.	do. net	1,078 95				
	17.	do. 3-90	234 56				
M'ch	13.	do. 3-90	25 19				
	15.	To cash acc't	11,315 59				
		Forward	$48,673 25			Forward	$20,436 34

1866.			
173		To amount forward	$48,673 25
	M'ch 19.	To m'd'se, 3-90	330 84
M'ch	19.	To m'd'se, net	702 35
		do. 3-90	994 82
	20.	do. 3-90	437 45
		do. net	448 60
		do. net	1,671 86
		do. net	2,928 01
	21.	do. net	533 33
		do. 3-90	232 33
		do. 3-90	683 01
		do. net	763 92
		do. net	369 92
		do. 3-90	374 25
		do. 3-90	104 32
		do. 3-90	347 32
	24.	do. net	473 80

1866.	By amount forward	$20,436 34

EXHIBIT No. 170—Continued.

DR. L. C. HOPKINS & CO., CINCINNATI, O. CR.

1866.			
		To m'd'se, net	523 93
	28.	Discount (ins't)	536 41
		Cash account	8,403 84
	30.	To m'dise, net	903 69
Apr'l	6.	do. 3-90	376 87
		do. 3-90	718 13
		do. net	718 13
		do. net	4,339.51
		do. net	1,331 67
		do. 3-90	645 61
		do. 3-90	696 61
		do. 3-90	407 54
	7.	do. 3-90	71 54
		do. net	307 55
		do. 3-90	1,105 79
		do. 3-90	694 44
	9.	do. 3-90	18 44
		do. net	456 65
	10.	do. 3-90	303 30
	18.	do. 3-90	105 75
		do. net (error)	286 82
	26.	do. 3-90	508 82
	28.	Interest 72 dy's on $1,390.11	19 46
		Forward	$82,28 69

1866.			
174		To am't forward	$82,728 69
	May 9.	To m'd'se, 3-90	37 30
May	10.	To m'd'se, 3-90	365 30
		do. 3-90	766 03
		do. 3-90	22 50
		do. 3-90	1,239 02
		do. 3-90	616 35
	11.	do. net	54 25
		do. 3-90	686 69
		do. 3-90	689 43
		do. net	287 92
		do. net	893 58
		do. net	832 16
		do. 3-90	82 64
		do. 3-90	457 06
		do. 3-90	127 05
		do. 3-90	348 05
	14.	do. net	284 59
	16.	Int. 11 days on $7,580.01	16 22
	17.	Int. 59 days on $7,580.01	86 95
	18.	Int 71 days on $1,068.92, and 70 d'ys on $1,078.95	29 43
	23.	To m'd'se, 3-90	265 50
		do. net	209 25
	24.	do. 3-90	474 25
		do. 3-90	351 50
		do. 3-90	2,900 46
		do. 3 90	386 46
		do. 3-90	332 46
	25.	do. 3-90	332 50
		do. 3-90	106 50
		do. 3-90	107 10
		do. 3-90	515 56
	29.	do. 3-90	588 56
June	6.	do. 3-90	667 35
	7.	do. net	901 40
		do. 3-90	254 38
		do. net	18 25
	13.	Int. 54 days on $8,315.22, 7 p'r c	87 31
	22.	To m'd'se, net	768 95
		Forward	79,816 87

175		To amount forward	$99,816 87
	June 23.	To m'd'se, net	4,549 86
June	23.	To m'd'se, net	303 77
		do. net	166 50
		do. net	3,642 61
		do. 3-90	517 85
	25.	do. net	1,079 95

1866.			
		Forward	$20,436 34
1866.			
		By am't forward	20,436 34
Ap'l	10.	By m'd's, net	3 80
	30.	do. 3-90	1 00
	28.	By cash	1,390 11
May	4.	do.	19 46
	16.	do.	7,580 01
	23.	By er. bill Ap. 18	286 82
	21.	By cash	2,147 87
June	11.	By m'dise, 3-90, June 6	514 40
	13.	By cash	8,315 72
	19.	do.	87 31
	29.	do.	7,335 27
		Forward	$48,118 11

		By amount forward	$48,118 11
July	9.	By cash	3,545 63
	18.	do.	15,136 89
		By discount	35 32
	24.	By m'd'se, net, June 25	147 30
Aug.	4.	By cash	5,485 72
	16.	do.	8,927 45

EXHIBIT No. 170—Continued.

Dr. L. C. HOPKINS & CO., CINCINNATI, O. Cr.

1866.			
		To m'd'se, 3-90	2,971 32
		do. net	381 12
		do. 3-90	232 12
	26.	do. 3-90	1,742 43
		do. net	105 25
	29.	To interest	851 28
July	6.	To m'd'se, 3-90	1,296 28
Aug.	3.	do. 3-90	1,317 22
		do. 3-90	2,037 06
		do. net	4,190 42
	6.	do. 3-90	1,343 42
		do. net	358 26
	7.	do. 3-90	8,542 40
		do. 3 90	1,231 25
		do. net	494 55
	8.	do. 3-90	35 64
		do. 3-90	1,613 90
		do. 3-90	13,858 25
	9.	do. net	821 56
		do. 3-90	6,370 56
	10.	do. 3-90	593 67
		do. 3-90	693 26
		do. 3-90	244 26
		do. 3-90	6,588 98
		do. 3-90	838 27
		do. 3-90	1,651 35
	11.	do. net	81 50
		do. 3-90	194 08
		do. 3-90	2,271 64
		do. net	411 75
	13.	do. 3-90	799 42
		do. 3-90	643 66
			$174,881 90

1866.			
		By discount	12 80
	29.	By m'd'se, 3-90, Aug. 11	110 16
	31.	By cash	11,735 04
Sept.	9.	By m'd'se, 3-90, Aug. 30	515 48
	12.	By m'd'se, 3-90, Aug. 27	73 55
	13.	By cash	6,358 04
		do.	91 27
	19.	do.	11 11
	21.	By m'd'se, 3-90, Sept. 4	2 40
		By m'd'se, net, Sept. 5	1 05
		By m'd'se, 3-90, Aug. 13	71 72
		By m'd'se, 3-90, Sept. 15	1 08
		By m'd'se, net	160 43
	24.	By cash	5,686 73
		By discount	28 43
	25.	do.	1,940 00
		do.	6 46
		By m'd'se, 3-90, Sept. 15	96
	29.	By m'd'se, 3-90, Aug. 3	37 50
			$108,240 63

1866.			
176		To amount forward	$174,881 90
	Aug. 13.	To m'dise 3-90	739 58
Aug.	14.	To m'dise, 3-90	2,153 95
	15.	do. 3-90	2,751 98
		do. 3-90	368 75
		do. 3-90	189 17
		do. 3-90	359 00
		do. 3-90	133 83
	16.	do. 3-90	209 81
	17.	do. 3-90	515 80
		do. 3-90	501 60
		do. 3-90	649 89
	18.	do. 3-90	313 21
		do. 3-90	570 90
		do. 3-90	1,251 29
		do. 3-90	256 55
		do. 3-90	2,192 71
	20.	do. 3-90	708 71
		do. 3-90	580 25
		do. 3-90	4,895 25
		do. 3-90	812 91
	21.	do. 3-90	511 57
	22.	do. 3-90	565 32
	27.	do. 3-90	648 42
	28.	do. 3 90	192 42
	31.	Interest, 40 d'ys, $11,735.06, at 7 per cent	91 27
	30.	To m'dise, 3-99	332 96
Sep.	1.	do. 3 90	1,152 80
		do. 3-90	922 67
	3.	do. net	917 08
		do. 3-90	1,798 79
		do. 3-90	2,290 58
		do. net	330 37
	4.	do. 3 90	662 50
		do. 3-90	599 29
		do. 3-90	1,334 30
		do. net	561 25
		do. 3-90	3,855 78
		do. 3-90	1,160 35
			$212,963 38

1806.			
		By amount forward	$108,240 63
Oct.	9.	By cash	12,066 22
		By disc't, 41 days, 12 per cent.	164 90
	10.	By m'dise, 3-90, Sept. 19	1 24
	13.	By m'dise, 3-90, September 29.	6 50
	17.	By cash	7,572 97
	19.	By m'dise, 3-90, September 3	5 15
	25.	By m'dise, 3-90, October 6	17 50
Nov.	19.	By m'dise, 3-90, October 23	1 10
	17.	By cash	1,857 25
	27.	By m'd'se ,3-90, November 9.	17 33
			$129,950 79

EXHIBIT No. 170—Continued.

DR. L. C. HOPKINS & CO., CINCINNATI, O. CR.

1866.			
177		By amount forward	$212,963 38
	Sept. 5.	To m'dise, net	132 35
Sept.	6.	To m'dise, 3-90	411 00
	1.	do. 3-90	288 75
	13.	To int., 9 d'ys, on $6,358.04, at 7 per cent	11 11
	14.	To m'dise, 3-90	118 12
	15.	do. 3-90	2,619 16
		do. net	1,243 73
		do. 3-90	2,679 57
	17.	do. net	1,438 45
		do. 3-90	5,992 37
		do. net	1,746 03
		do. 3-90	1,851 62
	18.	do. 3-90	905 99
		do. 3-90	315 44
		do. net	483 43
		do. 3-90	150 88
	19.	do. 3-90	433 37
		do. 3-90	1,165 35
		do. 3-90	811 20
		do. 3-90	65 20
		do. 3-90	782 63
		do. net	570 50
		do. 3-90	2,972 77
	20.	do. net	162 45
		do. 3-90	1,412 91
		do. 3-90	642 52
		do. net	785 41
		do. 3-90	1,340 25
		do. 3-90	1,954 69
	1	do. 3-90	3,633 50
		do. 3-90	45 50
		do. 3-90	489 05
		do. net	789 52
	22.	do. 3-90	509 40
		do. net	400 84
		do. 3-90	145 66
		do. 3-90	122 84
		do. 3-90	605 50
			$253,191 74

1866.			
178		To am't forward	$253,191 74
	Sept. 24.	To m'd'se, 3-90	600 74
Sept.	24.	To m'd'se, 3-90	725 63
	25.	do. 3-90	814 15
	26.	do. 3-90	611 15
	28.	do. 3-90	1,696 07
	29.	do. 3-90	727 25
		do. 3-90	106 25
		do. 3-90	1,827 96
Oct.	2.	do. 3-90	348 96
	6.	do. 3-90	710 54
		do. net	119 50
	9.	do. 3-90	2,819 25
	13.	do. 3-90	375 25
		do. 3-90	873 63
		do. net	229 85
		do. 3-90	1,058 85
	16.	do. 3-90	327 92
		do. net	558 94
	17.	do. net	836 01
	22.	do. net	232 45
		do. 3-90	381 75
	23.	do. 3-90	156 75
		do. 3-90	2,499 70
	29.	do. 3-90	229 50
Nov.	6.	do. 3-90	529 28
	8.	do. 3-90	2,452 33
		do. net	662 39
		do. 3-90	639 21
		do. 3-90	1,009 50
	9.	do. net	804 38
		do. net	127 38
		do. 3-90	299 38
		do. 3-90	1,150 30
		do. net	494 40

1866.			
		To amount forward	$129,950 79
			$129,950 79

1866.			
		By amount forward	$129,950 79
Dec.	11.	By cash	2,337 07
	17.	By m'dise, 3-90, Dec. 5	42
	26.	By cash	5,270 27

EXHIBIT No. 170—Continued.

DR. L. C. HOPKINS & CO., CINCINNATI, O. CR.

1866.				1866.	
		To m'd'se, 3-90	942 50		
		do. 3-90	4,140 37		
		do. 3-90	3,816 63		
	10.	do. 3-90	250 25		
			$289,374 41		$137,558 55
179		To amount forward	$289,374 41		By amount forward $137,558 55
	Nov. 10.	To m'dse, 3-90	543 70	Dec. 31.	By balance 174,739 75
Nov.	10.	To m'dse net	248 90		
		do. 3-90	256 66		
		do. 3-90	3,642 43		
	13.	do. 3-90	149 00		
	19.	do. 3-90	450 25		
	21.	do. 3-90	250 25		
	28.	do. 3-90	2,260 00		
	30.	do. net	901 14		
Dec.	3.	do. 3-90	237 75		
	4.	do. 3-90	291 12		
		do. net	2,880 79		
		do. 3-90	237 50		
		do. net	1,033 20		
		do. 3-90	561 14		
	5.	do. 3-90	376 50		
		do. 3-90	951 32		
		do. net	162 25		
		do. 3-90	345 50		
		do. net	527 28		
		do. 3-90	471 50		
		do. 3-90	54 28		
	6.	do. 3.90	68 68		
		do. 3-90	66 00		
		do. 3-90	116 20		
		do. 3-90	138 00		
		do. 3-90	450 32		
		do. 3-90	515 05		
		do. 3.90	314 97		
		do. 3-90	844 21		
	7.	do. net	693 25		
		do. net	287 74		
	13.	(as Dec. 4) To m'dse, net	76		
	26.	To m'dse, 3-90	2,596 25		
			$312,298 30		$312,298 30
1867.				1867.	
Jan.	1.	To balance	$174,739 75	Jan. 5.	By cash 1,296 00
Ap'l	22.	To int. 45 days, $56,064.59, 7 per c	402 95		do. 7,046 79
July	13.	Ledger R	600 00	23.	do. 56,832 95
		1867.	$175,742 70	1866.	$65,175 74
180		July 13. To am't forward	$175,742 70	Jan. 23.	By am't forward $65,175 74
					By ins't 17 days on $56,832.95 187 86
				Feb. 22.	By m'dse, 3-90 5,495 000
				Apr'l 20.	By cash 46,252 45
				27.	do. 27 23
				May 15.	do. 18,003 28
				Ju'e 13.	do. 15,333 76
				July 9.	do. 25,267 38
			$175,742 70		$175,742 70

181 DR. L. C. HOPKINS & CO., CINCINNATI, O. CR.

1866.		Cash.		1866.	
Jan.	3.	To cash	$4,229 06	Jan. —.	By cash $100,000 00
	4.	do.	23,101 87	4.	do. 1,101 29
	5.	do.	8,555 85	6.	do. 343 33
	6.	do.	6,516 65		By bal. led'r P 23,563 70
	8.	do.	275 00	11.	By cash 20,000 00
		do.	10 71	13.	do. 1,500 00
	9.	do.	13,638 89	15.	do. 175 00
	10.	do.	5,976 05	17.	do. 994 58
	11.	do.	1,229 39	18.	do. 20,000 00
	12.	do.	18 65	19.	do. 537 57
	13.	do.	63,477 90	24.	do. 500 00

EXHIBIT No. 170.—Continued.

DR. L. C. HOPKINS & CO., CINCINNATI, O. CR.

1866.	Cash.			1866.		
	To cash	4,800 92		25.	By cash	25,047 00
15.	do.	557 11		27.	do.	200 00
16.	do.	2,035 22		29.	do.	1,412 33
18.	do.	7,487 60		31.	do.	12,500 00
22.	do.	1,458 72		Feb. 1.	do.	30,000 00
24.	do.	2,952 08		3.	do.	220 00
25.	do.	29 37		9.	Bills R. due Mch. 3, 1866	613 67
30.	do.	1,200 00				
31.	do.	56,141 21		12.	By cash	25,070 00
Feb. 1.	do.	1,745 12		15.	do.	10,000 00
3.	do.	4,163 45			do.	35
5.	do.	1,119 24		17.	do.	219 60
6.	do.	13,881 03				
7.	do.	1,420 38				
8.	do.	35				
10.	do.	1,024 95				
	do.	22,326 99				
13.	do.	842 50				
15.	do.	272 83				
	do.	5 00				
16.	do.	3,742 95				
	To balance	19,761 38				
		$273,998 42				$273,998 42
Feb. 28,	To cash	$25,326 77		Feb. 19.	By bal.	$19,147 71
March 3.	do.	10,694 98		Feb. 19,	By bal. due March 3	613 67
5.	do.	798 46				$19,761 38
6.	do.	42,204 81		19.	By cash	150 00
7.	do.	1,800 44		23.	do.	16,000 00
					do.	62,000 00
		$80,825 46				$97,911 38
182 1866.	Cash.			1866.		
Mar. 7.	To am't forward	$80,825 46		Feb. 23.	By am't forward	$97,911 38
Mar. 9.	To cash	159 76		Mar. 1.	By cash	10,000 00
8.	do.	5,000 00		6.	do.	25 00
10.	do.	25,398 81		8.	do.	12,000 00
	do.	1,996 82		9.	do.	5,000 00
12.	do.	4,547 72				
13.	do.	1,462 09				
	To balance	5,545 72				
		$124,936 38				$124,936 38
Mar. 14.	To cash	$10,930 63		Mar. 13.	By bal. as ren'd	5,545 72
	do.	1,552 57		14.	By cash	11,500 00
16.	do.	51 00		15.	By m'dise (as Mar. 8)	11,315 59
19.	do.	10,000 00		17.	By cash	3,000 00
	do.	16 55		22.	do.	50 00
	do.	6,930 04		26.	do.	74 00
27.	do.	5 00		28.	By m'dse acc't	8,403 84
29.	do.	5,000 00			By cash	184 00
30.	do.	151 44		29.	do.	6,000 00
Ap'l 2.	do.	115 34			do.	95 52
3.	do.	5,000 00		15.	By m'dise (as Mar. 28)	30
	do.	807 33		30.	By cash	1,500 00
4.	do.	285 30		Ap'l 3.	do.	6,000 00
5.	do.	3,090 06		7.	do.	35 00
	do.	78 85		9.	do.	16,050 00
	do.	8 00		10.	do.	3,200 00
6.	do.	75 00		13.	do.	6,000 00
9.	do.	10,484 31		18.	do.	219 80
10.	do.	1,354 56		27.	do.	400 00
14.	do.	3,527 50		28.	do.	12,000 00
	do.	3,297 08		May 2.	do.	6,000 00
16.	do	150 00		4.	do.	66 00
17.	do.	12,500 00		5.	do.	35 00
	do. gold	514 83		7.	do.	12,545 00
18.	do.	90 74		8.	do.	2,500 00
23.	do.	22 76		11.	do.	8,985 65
28.	do.	2,811 26		15.	do.	35 00
30.	do.	6,869 91		16.	do.	10,183 95
13.	Cash Cr	50		17.	do.	300 00
May 2.		325 00		21.	do.	5,072 00
		$86,045 56				$137,397 37

Exhibit No. 170—Continued.

Dr. L. C. HOPKINS & CO., CINCINNATI, O. Cr.

183	1866. Cash.			1866.	
	May 2. To am't forward	$86,645 56		May 21. By am't forward	$137,397 37
May 3.	To cash	3,570 04		22. By cash	179 13
4.	do.	216 75		do.	1,843 72
5.	do.	3,813 32		23. do.	6,000 00
7.	do.	1,690 02		26. do.	5,000 00
	do.	10,513 71		28. do.	2,000 00
9.	do.	3,172 25		29. do.	3,000 00
10.	do.	820 50		31. do.	4,000 00
11.	do.	1,644 80			
12.	do.	9,764 33			
14.	do.	56 29			
16.	do.	7,580 01			
17.	do.	2,135 80			
18.	do.	109 60			
21.	do.	2,147 87			
	do.	2,418 09			
22.	do.	881 47			
	do.	62 60			
23.	do.	6,000 00			
	do.	64 18			
28.	do.	2,463 30			
	do.	386 46			
29.	do.	3,824 32			
30.	do.	2,619 97			
	do.	479 31			
31.	do.	833 93			
	Balance	6,105 74			
		$159,420 22			$159,420 22
June 2.	To cash	491 85		June 1. By bal. as ren'd	6,105 74
	do.	38 20		By cash	556 16
5.	do.	500 00		7. do.	100,000 00
7.	do.	100 00		9. do.	35 00
11.	do.	1,833 51		11. do.	30 00
13.	do.	95,259 80		13. do.	1,191 02
16.	do.	923 50		18. do.	100 00
19.	do.	87 31		19. do.	100 00
18.	do.	250 00		23. do.	61 13
20.	do.	88 96		25. do.	10,100 00
	do.	250 00		26. do.	445 44
		$99,823 13			$118,724 49
	1866. Cash.			1866.	
184	June 20. To am't forward	$99,823 13		June 26. By am't forward	$118,724 49
	June 21. Cash	1,232 98		27. Cash	10,000 00
June 27.	Cash	1,800 00			
28.	do	48 10			
29.	do.	22,589 64			
	Balance	3,230 64			
		$128,724 49			$128,724 49
July 2.	To cash	40 00		June 30. By bal. as ren'd	$3,230 64
5.	do.	640 00		July 2. cash	10,842 38
9.	do.	4,398 28		9. do.	1,199 43
10.	do.	7,582 31		10. do.	724 55
18.	do.	15,136 89		11. do.	20,000 00
19.	do.	3,451 72		12. do.	9,000 00
21.	do.	77 00		13. do.	7,000 00
	do.	1,252 76		14. do.	60 00
25.	do.	100 00		17. do.	1,674 00
30.	do.	225 00		19. do.	10,000 00
31.	do.	517 12		23. do.	11,000 00
Aug. 2.	do.	18,512 29		24. do.	163 35
	do.	50 00		28. do.	107 25
4.	do.	27,506 74		30. do.	12,000 00
7.	do.	5,890 75		31. do.	75 00
8.	do.	11,577 12		Aug. 2. do.	7,015 00
	do.	50 00		4. do.	5,000 00
6.	do.	24 23		6. do.	2,000 00
	do.	50 00		7. do.	80 00
10.	do.	1,830 00		8. do.	3,000 00
16.	do.	1,676 30		16. do.	10,000 00
	do.	8,927 45		24. do.	44 27
17.	do.	1,125 80		27. do.	75 00
18.	do.	11 50		28. do.	3,000 00
20.	do.	210 00		31. do.	12,000 00
22.	do.	30 00		Sep. 4. do.	90 00
23.	do.	456 00		5. do.	25 00
25.	do.	150 00		10. do.	4,088 71

Exhibit No. 170—Continued.

Dr. L. C. HOPKINS & CO., CINCINNATI, O. Cr.

1866.	Cash.			1866.			
28.	To cash		355 85	11.	By cash		50 00
29.	do.		5,128 41	13.	do.		5,500 00
31.	do.		11,735 04				
Sept. 3.	do.		190 00				
			$128,907 86				$139,044 58
	1866. Cash.			1866.			
185	Sep. 3.	To am't forward	$128,907 86	Sep. 13.	To am't forward		$139,044 58
	10.	Cash	443 63				
Sep. 11.	Cash		407 29				
13.	do.		6,481 01				
	Balance		2,804 79				
			$139,044 58				$139,044 58
Sep. 14.	To cash		$1,933 09	Sep. 14.	By bal. as ren'd		$2,804 79
15.	do.		613 91		To cash		10,000 00
	do.	gold	1,191 27	21.	do.		4,667 50
17.	do.		529 63	25.	do.		6,000 00
19.	do.		11 11	26.	do.		44 00
20.	do.		150 00	29.	do.		10,020 00
21.	do.		100 00	Oct. 3.	do.		500 00
22.	do.		3,692 81	6.	do.		15,959 15
24.	do.		6,921 88	9.	do.		755 60
25.	do.		5,785 68	11.	do.		40 00
26.	do.		518 61	15.	do.		8,728 63
28.	do.		300 00	16.	do.		10,000 00
Oct. 4.	do.		11,082 54	17.	do.		652 35
6.	do.		100 00	22.	do.		4,935 10
	do.		903 19	24.	do.		900 00
9.	do.		12,096 22	25.	do.		20,000 00
10.	do.		1,068 89	26.	do.		150 00
11.	do.		2,360 00	27.	do.		2,001 00
13.	do.		158 45	Nov. 1.	do.		85 00
15.	do.		908 00	5.	do.		356 09
16.	do.		2,019 06	6.	do.		2,030 00
17.	do.		9,224 53				
20.	do.		159 57				
22.	do.		7,210 86				
27.	do.		758 57				
Nov. 3.	do.		25,372 79				
	Balance		5,458 55				
			$100,629 21				$100,629 21
Nov. 9.	To cash		$12,453 83	Nov. 6.	By bal. as ren'd		$5,458 55
10.	do.		1,128 19	7.	Cash		10,876 92
12.	do.		14,751 55	9.	do.		75 00
	do.	gold	369 40		do.		14,373 89
17.	do.		1,857 25	10.	do.		324 15
			$30,560 22				$31,108 50
	1866. Cash.			1866.			
186	Nov. 17.	To am't forward	30,560 22	Nov. 10.	By am't forward		$31,108 50
	19.	To cash	8,242 50	12.	By cash		11,250 00
Nov. 22.	To cash		299 02	13.	do.		535 00
23.	do.		28 08	15.	do.		1,122 40
26.	do.		854 23	16.	do.		2,453 00
27.	do.		294 60	17.	do.		533 80
Dec. 1.	do.		250 00	19.	do.		362 60
3.	do.		1,540 00	21.	do.		1,399 50
	do.		3,612 41	23.	do.		61 20
6.	do.		3,863 06	27.	do.		378 00
7.	do.		18,235 46	28.	do.		20,450 00
8.	do.		33,752 16	30.	do.		128 55
11.	do.		2,540 61		do.		20,055 00
12.	do.		101 50	Dec. 3.	do.		30 00
14.	Balance		12,174 91	6.	do.		140 14
				7.	do.		3,217 50
					do.		10,050 00
				8.	do.		498 57
				11.	do.		3,000 00
				4	c.		9,575 0
			$116,348 76				$116,348 76
Dec. 15.	To cash		1,412 50	Dec. 14.	By bal. as ren'd		12,174 91
17.	do.		22 37	15.	By cash		2,072 50
18.	do.		250 00	17.	do.		10,000 00
19.	do.		4,434 11	22.	do.		1,930 00
20.	do.		95 00	24.	do.		10,000 00
22.	do.		1,775 44		do.		290 00

Exhibit No. 170—Continued.

L. C. HOPKINS & CO., CINCINNATI, O.

Dr.			Cr.			
1866.	Cash.			1866.		
24.	To cash	800 00		31.	By cash	10,874 96
	do.	4,083 86				
26.	do.	5,871 40				
27.	do.	488 24				
28.	Linn & Westerman, J.	498 57				
31.	To cash	952 01				
	Balance	26,658 87				
		$47,342 37				$47,342 37
1867.				1867.		
Jan. 2.	To cash	653 08		Jan. 2.	By balance	26 658 87
3.	do.	88 48		5.	By cash	457 67
4.	do.	300 00		7.	do.	1,550 25
5.	do.	8,342 79		8.	do.	2,929 30
		$9,384 35				$31,596 09
187 1867.	Cash.			1867.		
Jan. 5.	To am't forward	$9,384 35		Jan. 8.	To am't forward	$31,596 09
Jan. 7.	To cash	496 88				
	do.	892 50				
8.	do.	120 00				
	do.	631 95				
	do.	40 00				
	Bal. led'r R	20,030 41				
		$31,596 09				$31,596 09

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Exhibit No. 171.

L. C. HOPKINS & CO., CINCINNATI, O.

Dr.				Cr.		
1867.				1867.		
Jan. 2.	To m'd'se, 3-90		$18 00	Jan. 8.	By cash	$120 00
3.	do.	net	120 00			
4.	do.	net	1,185 93			
5.	do.	net	367 08			
	do.	net	334 50			
18.	do.	net	392 47			
21.	do.	net	22 08			
29.	do.	1-30	429 06			
Feb. 2.	do.	1-30	965 66			
4.	do.	1-30	1,096 64			
5.	do.	3-90	1,939 59			
	do.	3-90	163 63			
	do.	1-30	91 96			
6.	do.	3-90	714 83			
7.	do.	3-90	1,986 00			
	do.	3-90	974 57			
	do.	1-30	208 05			
	do.	1-30	363 92			
8.	do.	3-90	340 42			
9.	do.	1-30	953 46			
	do.	3-90	1,220 50			
	do.	1-30	94 00			
	do.	3-90	327 00			
	do.	1-30	335 25			
	do.	3-90	318 63			
11.	do.	3-90	768 68			
	do.	1-30	334 00			
	do.	1-30	414 00			
12.	do.	3-90	171 00			
13.	do.	3-90	1,159 05			
	do.	3-90	1,147 69			
	do.	3-90	333 10			
	do.	1-30	634 87			
	do.	1-30	2,022 90			
14.	do.	3-90	807 88			
	do.	3-90	580 00			
	do.	1-30	294 17			
	do.	1-30	1,184 89			
	do.	3-90	814 60			
			$25,630 06			$120 00
189 1867.				1867.		
Feb. 14.	To am't forward		$25,630 06	Jan. 8.	By am't forward	$120 00
Feb. 15.	To m'd'se, 1-30		329 07			
Feb. 16.	To m'd'se, 3-90		1,318 51			
	do.	3-90	465 45			

Exhibit No. 171—Continued.

Dr. L. C. HOPKINS & CO., CINCINNATI, O. Cr.

1867.			
Feb. 16.	To m'd'se,	3-90	154 72
	do.	3-90	1,385 02
18.	do.	3-90	624 01
	do.	3-90	402 76
19.	do.	3-90	304 55
20.	do.	1-30	162 68
	do.	3-90	300 00
	do.	3-90	614 83
	do.	1-30	374 58
	do.	1-30	402 79
21.	do.	3-90	260 84
	do.	1-30	603 31
	do.	3-90	104 51
22.	do.	3-90	435 00
	do.	3-90	1,240 14
23.	do.	1-30	365 50
	do.	3-90	1,889 40
26.	do.	1-30	332 00
Mar. 1.	do.	3-90	20 00
5.	do.	1-30	470 68
6.	do.	net	34 50
19.	do.	1-30	736 00
	do.	1-30	3,600 48
	do.	1-30	357 63
	do.	1-30	1,613 97
20.	do.	3-90	1,202 29
	do.	3-90	1,076 18
	do.	3-90	1,424 25
21.	do.	3-90	1,447 77
	do.	1-30	85 83
	do.	1-30	1,180 00
	do.	1-30	1,446 76
	do.	1-30	393 00
	do.	3-90	390 55
	do.		1,482 20
			$54,661 82

1867.			
			$120 00

1867.			
190	Mar. 21.	To am't forward	$54,661 82
		To m'd'se, 3-90	15 00
Mar. 21.	do.	3-90	168 75
22.	do.	1-30	229 50
	do.	1-30	18 45
	do.	3-90	525 76
	do.	30	87 50
23.	do.	1-30	333 25
27.	do.	1-30	164 64
	do.	1-30	665 50
Ap'l 4.	do.	3-90	508 23
5.	do.	1-30	2,688 61
	do.	1-30	331 95
	do.	3-90	308 20
	do.	3-90	764 00
	do.	1-30	2,970 25
	do.	3-90	612 82
6.	do.	1-30	394 46
	do.	3-90	464 00
	do.	3-90	184 66
	do.	1-30	3,236 44
	do.	3-90	538 50
	do.	1-30	869 82
	do.	1-30	468 77
8.	do.	3-90	698 00
	do.	1-30	796 09
10.	do.	1-30	325 75
	do.	1-30	673 50
11.	do.	1-30	401 43
12.	do.	3-90	234 00
13.	do.	1-30	81 90
18.	do.	1-30	296 80
	do.	1-30	294 33
22.	do.	1-30	515 78
	do.	3-90	1,191 70
23.	do.	1-30	4,737 67
	do.	1-30	732 16
	do.	3-90	1,547 11
	do.	3-90	1,676 41
			$85,413 51

1867.			
Jan. 8.	By am't forward		$120 00
Mar. 22.	By m'd'se, 1-30, Mar. 19		367 46
22.	By m'd'se, 1-30, Mar. 19		1,823 61
Ap'l 26.	By m'd'se, 3-90, April 5		48 81
May 15.	By cash		94 50
23.	do.		189 03
June 13.	do.		27 064 65
21.	By m'd'se, 3-90, May 20		5 50
July 2.	By cash		362 74
			$30,016 30

EXHIBIT No. 171—Continued.

DR. L. C. HOPKINS & CO., CINCINNATI, O. CR.

	1867.		
191		To am't forward	$85,413 51
	Ap'l 23.	To m'd'se, 3-90	1,186 01
	Ap'l 23.	To m'd'se, 3-90	149 66
	24.	do. 3-90	1,225 27
		do. 1-30	1,134 26
		do. 1-30	399 09
		do. 3-90	3,781 37
		do. 3-90	2,123 90
		do. 3-90	332 00
		do. 1-30	2,556 41
	25.	do. 1-30	374 75
		do. 3-90	83 25
		do. 1-30	1,327 86
		do. 3-90	331 12
	26.	do. 3-90	171 25
		do. 1-30	267 52
		do. 1-30	416 33
		do. 3-90	245 00
	27.	do. 1-30	381 82
	May 1.	do. 1-30	291 20
	3.	do. 1-30	513 55
		do. 1-30	223 16
	16.	do. 3-90	473 00
	17.	Int. 54 days on $18,003.28	189 03
		To m'd'se, 1-30	686 12
		do. 1-30	360 93
	18.	do. 1-30	2,220 98
		do. 1-30	2,516 90
		do. 3-90	2,489 00
	20.	do.	1,044 00
		do.	3,121 50
		do.	3,138 84
		do. 1-30	4,605 47
	21.	do. 1-30	295 93
		do. 3-90	1,151 83
		do. 3-90	1,077 65
		do. 30	204 63
		do. 3-90	1,421 33
		do. 3-90	1,968 80
			$129,794 23
	1867		
192	May 21.	To am't forward	$129,794 23
		To m'd'se, 1-30	350 48
		do. 1-30	432 77
		do. 3-90	502 23
	22.	do. 3-90	391 25
		do. 3-90	1,235 87
	23.	do. 3-90	124 50
		do. 3-90	344 56
		do. 1-30	382 39
		do. 3-90	2 50
	24.	do. 3-90	100 18
	25.	do. 1-30	164 13
	28.	do. 3-90	560 00
		do. 1-30	389 11
	Ju'e, 1.	do. 3-90	151 50
		do. 1-30	192 94
	11.	do. 3-90	1,105 63
		do. 1-30	356 48
		do. 1-30	1,482 20
	12.	do. 3-90	1,222 28
		do. 1-30	140 00
		do. 1-30	1,607 12
		do. 3-90	1,094 06
	13.	do. 1-30	447 54
		do. 1-30	210 49
	14.	do. 3-90	1,568 38
		do. 3-90	374 75
		do. 3-90	4,104 42
	15.	do. 1-30	935 12
		do. 3-90	2,336 43
		do. 3-90	532 27
	27.	Ins't 44 days on $42,398.41, at 7 per cent	362 74
	28.	To m'd'se, 3-90	579 48
		do. 1-30	1,597 90
	29.	do. 3-90	360 45
		do. 30	184 00
		do. 1-30	933 21

1867.		
July 2.	By am't forward	$30,016 30
13.	Bal. Ledger Q as Cash, March 24, $600.00. Int. to date, 111 days, $12.95	612 95
16.	By discount	19 65
	By cash	245 65
		$30,894 55
1867.		
July 6.	By am't forward	$30.894 55
Aug. 22.	By discount	8 00

EXHIBIT No. 171—Continued.

DR. L. C. HOPKINS & CO., CINCINNATI, O. CR.

	1867.			1867.	
	To m'd'se, 3-90		1,258 97		
July 1.	do.	3-90	99 00		
			$158,011 56		$30,902 55
	1867.			1867.	
193	July 1. To am't forward		$158,011 56	Aug. 22. By am't forward	30,902 55
	July 1. To m'd'se, 1-30		1,919 52		
July 1.	To m'd'se, 3-90		1,829 85		
	do.	3-90	341 38		
	do.	3-90	657 93		
2.	do.	3-90	276 95		
	do.	1-30	272 67		
	do.	1-30	276 89		
3.	do.	3-90	17 25		
9.	In'st 50 days on $25,267.38, at 7 per cent		265 30		
19.	To m'd'se, 3-90		1,217 40		
20.	do.	1-30	2,780 40		
	do.	1-30	1,783 99		
	do.	1-30	901 89		
	do.	1-30	876 20		
	do.	1-30	4,489 53		
	do.	1-30	4,993 13		
22.	do.	1-30	1,506 57		
	do.	1-30	1,186 63		
	do.	1-30	333 55		
23.	do.	1-30	675 41		
	do.	3-90	94 50		
	do.	1-30	1,413 92		
24.	do.	1-30	505 07		
	do.	1-30	2,083 64		
	do.	1-30	5,824 89		
25.	do.	1-30	751 73		
	do.	1-30	952 48		
26.	do.	1-30	923 71		
Aug. 1.	do.	1-30	6 49		
8.	do.	1-30	4,138 93		
12.	do.	1-30	432 69		
14.	do.	1-30	3,394 34		
	do.	3-90	799 01		
	do.	1-30	959 46		
	do.	1-30	3,444 77		
	do.	3-90	14 92		
52.	do.	3-90	2,552 25		
	do.	1-30	7,757 00		
			$220,663 70		$30,902 55
	1867.			1867.	
194	Aug. 15. To am't forward		$220,663 70	Aug. 13. To am't forward	$30,902 55
	To m'dise, 1-30		1,410 49	Sept. 17. By m'dise 1-30 September 14.	38 72
16.	do.	1-30	2,151 70		
	do.	1-30	678 27		
	do.	1-30	681 62		
17.	do.	3-90	112 50		
	do.	1-30	747 46		
	do.	1-30	2,923 57		
19.	do.	1-30	766 64		
20.	do.	1-30	278 86		
	do.	3-90	976 66		
	do.	1-30	2,883 29		
21.	do.	1-30	635 71		
23.	do.	3-90	45 73		
26.	do.	1-30	939 80		
Sept. 7.	do.	1-30	10,084 03		
	do.	1-30	1,553 91		
	do.	1-30	1,948 61		
10.	do.	1-30	1,540 92		
12.	do.	3-90	1,316 26		
	do.	1-30	47 15		
	do.	1-30	1,365 81		
	do.	1-30	314 39		
14.	do.	1-30	458 57		
	do.	1-30	542 54		
	do.	1-30	7,154 09		
	do.	1-30	813 59		
	do.	1-30	2,323 20		
	do.	1-30	3,939 03		
	do.	1-30	3,893 10		
	do.	1-30	1,022 42		
	do,	1-30	3,413 44		

Exhibit No. 171—Continued.

L. C. HOPKINS & CO., CINCINNATI, O.

Dr.

	1867.		
	To m'd'se, 1-30		992 67
	16. do.	1-30	3,942 03
	do.	1-30	3,895 84
	do.	3-90	8,623 65
	do.	3-90	5,939 32
	do.	1-30	1,007 05
	do.		1,021 57
			$303,053 19
195	1867.		
	Sep. 16. To am't forward		$303,053 19
	17. To m'dise, 1-30		667 86
Sep.	17. To m'dise, 1-30		251 09
	do.	1-30	1,052 71
	18. do.	1-30	1,440 28
	do.	1-30	462 06
	do.	3-90	612 85
	19. do.	1-30	316 48
	20. do.	3-90	833 00
	do.	1-30	476 27
	do.	3-90	167 31
	21. do.	1-30	466 28
	23. do.	1-30	178 65
	27. do.	1-30	203 19
	28. do.	1-30	471 95
	do.	1-30	473 69
	30. do.	1-30	871 07
Oct.	1. do.	1-30	3,708 20
	2. do.	1-30	1,298 33
	4. do.	1-30	556 05
	5. do.	1-30	1,579 44
	do.	1-30	641 16
	Sep. 14—1-30		1,233 99
	To md'se, 3-90		590 97
	9. do.	3-90	565 85
	10. do.	1-30	465 01
	12. do.	3-90	500 58
	16. do.	1-30	807 56
	21. do.	1-30	565 47
	do.	3-90	263 29
	22. do.	3-90	3,450 25
	23. do.	1-30	554 50
	24. do.	3-90	483 37
	do.	3-90	456 25
	do.	3-90	491 95
	do.	1-30	757 04
	do.	1-30	865 67
	do.	1-30	70 12
	do.	1-30	1,814 84
			$333,717 82
196	1867.		
	Oct. 24. To am't forward		$333,717 82
	25. To m'dse, 3-90		1,007 70
Oct.	25. To m'dise, 1-30		316 44
	do.	3-90	706 50
	do.	3-90	162 00
	do.	1-30	571 90
	28. do.	3-90	390 45
	31. Int. 32. d'ys, 7 per c. on $191,738.55		1,176 69
			$338,049 50
Oct.	20. To bal. as ren'd		$114,192 99
Nov.	4. Int. 14 d'ys 7 per c. on $84,399.48		226 60
Oct.	31-30. To m'd'se, 4-30		479 85
	do.	4.30	477 58
Nov.	2—Oct. 24. To m'd'se, 1-30		872 47
	5. To m'd'se, 3-90		1,162 65
	6. do.	1-30	430 91
	do.	1-30	1,903 48
	do.	1-30	3,604 22
	do.	1-30	1,121 12
	do.	1-30	2,911 77
	do.	1-30	2,975 08
	do.	1-30	2,698 10
	do.	1-30	1,801 19

Cr.

1867.		
		$30,941 27
1867.		
Sept. 17. By am't forward		$30,941 27
		$30,941 27
1867.		
Sept. 17. By am't forward		$30,941 27
Oct. 29. Cash acc't per advice dated Oct. 6, 1867, rec'd Oct. 29		192,915 24
Balance		114,192 99
		$338,049 50
Nov. 4. By cash acc't		$84,626 08
8. By m'dise, 1-30, Oct. 23		2 16
Dec. 6. By m'd'se, 3-90		3,794 75
17. do. 4 mo		8,824 35
31. Cash acc't		60,315 98

EXHIBIT No. 171—Continued.

DR. L. C. HOPKINS & CO., CINCINNATI, O. CR.

1867.				1867	
	To m'd'se, 1-30	257 00			
	do. 1-30	2,705 00			
7.	do. 3-90	324 29			
	do. 1-30	2,474 51			
	do. 1-30	559 22			
	do. 3-90	774 62			
	do. 1-30	1,018 47			
	do. 3-90	320 05			
	do. 1-30	620 63			
8.	do. 3-90	2,171 21			
	do. 3-90	1,048 38			
9.	do. 3-90	1,073 99			
11.	do. 1-30	293 49			
21.	do. 4-30	240 10			
Dec. 26.	By discount	205 90			
	Cash acc't	8,618 45			
		$157,563 32			$157,563 32
197 1867.	Cash acc't.		1867.		
Jan. 9.	To cash	$40 54	Jan. 9.	By bal. led'r Q	$20,030 41
Jan. 10.	To cash	638 50	10.	By cash	50 00
11.	do.	58 35	12.	do.	1,912 34
	do.	4 65	14.	do.	390 46
14.	do.	1,000 00	17.	do.	30,088 42
17.	do.	90 00	21.	do.	5,000 00
18.	do.	12 00			
19.	do.	2,956 19			
	Balance	52,671 40			
		$57,471 63			$57,471 63
Jan. 22.	To cash	$164 90	1867. Jan. 21.	By bal. as ren'd	$52,671 40
21.	do.	26 68	23.	By cash	13,160 15
23.	do.	56,832 95	30.	do.	5,000 00
	do.	706 36	31.	do.	1,000 00
24.	do.	1,431 16	Feb. 2.	do.	5,000 00
28.	do.	125 00	4.	do.	5,000 00
31.	do.	54 90	7.	do.	365 01
Feb. 4.	do.	1,274 22		do.	118 13
6.	do.	11,670 24	12.	do.	6,341 00
7.	do.	860 00	13.	do.	473 96
9.	do.	1,168 45		do.	5,000 00
11.	do.	908 15		do.	28 35
14.	do.	62 60	14.	do.	30 00
15.	do.	387 50	16.	do.	84 59
16.	do.	4,975 71	18.	do.	5,000 00
18.	do.	50 56	21.	do.	47 64
21.	do.	32 50		do.	2,125 00
23.	do.	200 00	23.	do.	5,000 00
	do.	3,136 81	25.	do.	5,000 00
26.	do.	5 00	27.	do.	4,148 90
Mar. 2.	do.	36,484 09	Mar. 1.	do.	5,000 00
4.	do.	610 00	2.	do	515 57
5.	do.	1,604 49	6.	do.	5,000 00
8.	do.	358 75	7.	do.	600 00
13.	do.	16 80	8.	do.	1,189 30
18.	do.	8,224 38	9.	do.	5,000 00
19.	do.	1,687 34	12.	do.	657 01
20.	do.	18,519 18	14.	do.	7,000 00
	do.	128 00	16.	do.	20,000 00
		$151,706 72			$160,556 01
198 1867.	Cash acc't.		1867.		
	M'ch 20. To am't forward	$151,706 72	M'ch 16.	To am't forward	$160,556 01
M'ch 21.	Cash	946 01	22.	Cash	5,000 00
22.	do.	17,070 53	23.	do.	5,000 00
23.	do.	2,252 27	25.	do.	5,100 00
27.	do.	800 58	28.	do.	1,087 50
	do.	44 27	Ap'l 2.	do.	884 76
	do.	48 61	4.	do.	20,000 00
30.	do.	672 38	9.	do.	8,300 00
Ap'l 1.	do.	414 97	11.	do.	217 50
3.	do.	50 00	12.	do.	1,000 00
	do.	288 97	19.	do.	224 96
5.	do.	552 12	20.	do.	30,090 00
	do.	12 00	22.	do.	100 00
10.	do.	83 33	23.	do.	10,125 00
13.	do.	100 00	26.	do.	15,979 33
11.	do.	3,835 37	29.	do.	10,072 75

EXHIBIT No. 171—Continued.

L. C. HOPKINS & CO., CINCINNATI, O.

Dr.				Cr.			
1867.				1867.			
	15.	Cash	78 75	May	4.	Cash	10,638 25
	19.	do.	630 13		7.	do.	10,062 00
	20.	do.	47,092 44		9.	do.	10,100 00
	22.	do.	368 55		13.	do.	11,510 77
	23.	do.	166 73		15.	do.	10,463 00
	24.	do.	500 00		20.	do.	10,000 00
	26.	do.	18,200 66		23.	do.	11,957 38
	27.	do.	27 23		27.	do.	10,000 00
	29.	do.	1,254 58	J'ne	1.	do.	18,655 50
May	1.	do.	679 31		4.	do.	6,196 38
	3.	do.	1,362 26		6.	do.	831 47
	4.	do.	1,209 54		7.	do.	578 02
		do.	25,000 00		11.	do.	526 08
	6.	do.	449 43		12.	do.	276 70
	7.	do.	1,287 61		13.	do.	30,073 10
	8.	do.	6,230 19				
		do.	100 00				
	10.	do.	7,274 21				
	11.	do.	2,026 68				
	13.	do.	15,999 45				
	14.	do.	440 00				
	15.	do.	23,704 16				
	16.	do.	572 95				
			$333,532 99				$415,606 45

199 Cash acc't.

1867.				1867.			
May	16.	To am't forward	333,532 99	June	13.	By am't forward	$415,606 45
		To cash	208 35				
	17.	do.	3,059 14				
	20.	do.	100 00				
	23.	do.	189 03				
	24.	do.	800 00				
	25.	do.	200 00				
	27.	do.	16 00				
J'ne	1.	do.	700 00				
	3.	do.	3,613 80				
	4.	do.	938 53				
	7.	do.	4,964 19				
	8.	do.	1,811 05				
	10.	do.	755 48				
	11.	do.	800 00				
	13.	do.	42,398 41				
		Balance	21,519 48				
			$415,606 45				$415,606 45
June	14.	To cash	$14,873 68	June	13.	Balance as ren'd	$21,519 48
	15.	do.	55 50		14.	Cash	46 80
	20.	do.	714 76		15.	do.	100 00
	22.	do.	9,158 87		17.	do.	896 34
	24.	do.	1,658 25		18.	do.	227 76
		do.	304 44		20.	do.	189 27
	25.	do.	486 97		22.	do.	3,772 50
	26.	do.	303 14			do.	133 93
	29.	do.	214 90		25.	do.	533 25
July	2.	do.	5,798 95		27.	do.	20,000 00
	5.	do.	178 96		28.	do.	90 00
	6.	do.	25 50		29.	do.	10,000 00
	9.	do.	25,983 14	July	1.	do.	100 00
	12.	do.	1,706 66		3.	do.	5,407 11
	16.	do.	245 65		8.	do.	3,119 10
		do.	546 25		9.	do.	618 56
	18.	do.	117 33		12.	do.	300 00
		do.	138 56		16.	do.	47,000 00
	17.	do.	33,825 99			do.	353 90
	19.	do.	15,000 00		17.	do.	378 07
	20.	do.	29,479 90			do.	5,361 21
			$140,817 40				$120,147 28

200 Cash acc't.

1867.				1867.			
July	20.	To am't forward	$140,817 40	July	17.	By am't forward	$120,147 28
	22.	To cash	2,000 00		19.	By cash	100 00
	24.	do.	14,249 96			do.	25 77
		do.	12 00			do.	15,000 00
	26.	do.	600 24		23.	do.	10,000 00
	31.	do.	753 20			do.	300 00
Aug.	2.	do.	152 49		24.	do.	408 80
	8.	do.	29,478 46			do.	67 90
	12.	do.	10,000 00		29.	do.	300 00
	13.	do.	22,274 48	Aug.	3.	do.	318 22

Exhibit No. 171—Continued.

Dr. L. C. HOPKINS & CO., CINCINNATI, O. Cr.

1867.				1867.			
	15.	To cash	600 00		6.	By cash	20,000 00
	16.	do.	13,944 02		7.	do.	20,000 00
	17.	do.	960 00			do.	200 00
		Balance	108 47		8.	do.	5,000 00
					9.	do.	5,556 78
					10.	do.	4,510 47
						do.	10,000 00
					13.	do.	10,000 00
					14.	do.	599 60
					16.	do.	8,000 00
					19.	do.	415 90
						do.	5,000 00
			$235,950 72				$235,950 72
Aug.	21.	To cash	$8,372 41	Aug.	19.	By bal. as ren'd	$108 47
		do.	12 00		20.	By cash	82 47
	23.	do.	444 35		22.	do.	345 25
	24.	do.	1,371 86			do.	40 89
		do.	627 00		23.	do.	90 20
Sep.	4.	do.	164 61		24.	do.	396 51
	5.	do.	303 27		26.	do.	650 00
	6.	do.	1,150 72		27.	do.	430 00
	7.	do.	90 00		30.	do.	68 22
	9.	do.	11,968 20		31.	do.	137 96
	12.	do.	1,000 00	Sep.	2.	do.	1,181 25
	14.	do.	8,000 00			do.	30,000 00
	16.	do.	30,429 55		4.	do.	720 67
		do.	470 00		5.	do.	303 27
	17.	do.	655 81			do.	15,000 00
	19.	do.	3,645 57		7.	do.	500 00
			$68,705 35				$50,125 16

201 1867. Cash acc't.

Sep.	19.	To am't forward	$68,705 35	1867. Sep.	7.	By am't forward	$50,125 16
	20.	To cash	2,508 46		9.	By cash	1,100 00
	21.	do.	190 22		12.	do.	6,000 00
	23.	do.	12,073 44			do.	7,000 00
	25.	do.	340 00			do.	710 61
	26.	do.	10,000 00		13.	do.	1,538 55
	27.	do.	4,478 45			do.	8,000 00
		do.	612 10		14.	do.	5,000 00
	28.	do.	4,344 09		16.	do.	7,500 00
		do.	25 00		17.	do.	500 00
	30.	do.	44,694 21			do.	964 32
Oct.	1.	Balance	4 32			do.	5,000 00
					19.	do.	35 00
					20.	do.	54 00
					21.	do.	1,000 00
						do.	14,000 00
					23.	do.	300 00
					25.	do.	2,338 65
						do.	812 37
					26.	do.	300 00
						do.	20,000 00
					27.	do.	300 00
					28.	do.	396 98
					30.	do.	10,000 00
				Oct.	1.	do.	5,000 00
			$147,975 64				$147,975 64
Oct.	1.	To cash	$2,036 34	Oct.	1.	By balance	$4 32
	5.	do.	4,478 43		7.	By cash	50,413 73
	7.	do.	4,673 14		10.	do.	275 00
	8.	do.	154 35		12.	do.	66 68
		do.	15,217 14		14.	do.	150 00
		do.	410 12		16.	do.	30,345 00
	9.	do.	1,183 78		22.	do.	30,216 50
		do.	100 00		24.	do.	350 33
	10.	do.	16,957 31		26.	do.	1,848 75
	11.	do.	4,478 42		28.	do.	523 35
	14.	do.	16 90		29.	do.	20,302 03
	16.	do.	125 00				
	15.	do.	3,133 11				
			$52,964 04				$134,495 69

EXHIBIT No. 171—Continued.

DR. L. C. HOPKINS & CO., CINCINNATI, O. CR.

	1867.	Cash acc't.			1867.		
	Oct.	15. To am't forward...	$52,964 04		Oct.	29. By am't forward.....	$134,495 69
		18. Cash	4,478 55			Balance.....	171,017 42
		19. do.	668 70				
		do.	37,504 17				
		21. do.	2,572 36				
		24. do.	1,619 52				
		26. do.	50 00				
		25. do.	12,740 53				
		29. M'dise acc't as cash, Oct. 29	192,915 24				
			$305,513 11				$305,513 11
	Oct.	29. To bal. as cash th's day.	$171,017 42		Nov.	2. By cash	$898 74
	Nov.	4. M'dise acc't as cash, November 4, 1867	84,626 08			4. do.	55,837 10
		4 Cash	600 00			6. do.	118 13
		9. do.	75 00			8. do.	811 45
		15. do.	200 00			7. do.	161 07
		do.	1,772 84			12. do.	20,050 00
		18. do.	2,648 20			14. do.	655 14
		20. do.	2,659 08			16. do.	15,069 00
		22. do.	14,514 09			19. do.	10,000 00
		do.	500 00			21. do.	300 00
		23. do.	525 00			20. do.	272 00
		do.	391 15			23. do.	175 00
		do.	130 34			27. do.	264 02
		do.	3,795 64			29. do.	113 16
		25. do.	8,174 75		Dec.	3 do.	83 24
		29. do.	21 20			6. do.	15,000 00
		do.	694 60			do.	5,347 25
		30 do.	724 48			7. do.	4,900 00
	Dec.	2. do.	3,392 54			9. do.	5,100 00
		4. do.	14,013 92			10. do.	5,300 00
		12. do.	3,799 14			11. do.	5,500 00
		13. do.	11 11			16. do.	405 00
		18. do.	3,799 14			19. do.	60 00
		do.	18 00			20. do.	64 18
						26. M'd'se account as cash, Dec. 19.....	8,618 45
		21. do.	176 00			24. By cash.....	303 19
		23. do.	7,731 73			30. do.	118 13
		31. M'd'se acc't.....	60,315 98			Balance.....	230,703 19
			$386,227 44				$386,227 44
203	1868.	Cash acc't.			1868.		
	Jan.	1. To balance.....	$230,703 19		Jan.	4. By cash as Dec. 31, $10,000; Jan'y 2, $48,025.50.....	$58,025 50
	M'ch	19. To error in cr. f. cash, Sep. 25, '67.....	112 37			Balance.....	173,490 06
			$231,515 56				$231,515 56
		To balance	$173,490 06				

204 EXHIBIT No. 172.

NEW YORK, *May 4th*, 1862.

L. C. HOPKINS, Esq., *Cincinnati, O.:*

DEAR SIR: We take pleasure in acknowledging receipt of your favor of 2nd inst., covering your check on us for $25,000, which, as you requested, we have applied in part payment of your note for $100,000, held by us.

Very truly, yours,

ALEX. T. STEWART & CO.

EXHIBIT No. 173.

NEW YORK, *Nov. 13th*, 1867.

Messrs. L. C. HOPKINS & Co., *Cincinnati:*

GENTS: Accept our thanks for your favor of 9th, just received, en-

closing checks for $20,050.00, and requesting that the proceeds be credited to your cash account. We take pleasure in informing you that we will comply with your wishes.

Respectfully, yours,

A. T. STEWART & CO.,
Per FOX.

EXHIBIT No. 174.

NEW YORK, *Nov. 13th*, 1867.

Mr. L. C. HOPKINS, *Cincinnati:*

DEAR SIR: We have to acknowledge receipt of your favor of 9th inst., and also the remittance of $10,000, to which it refers, and have placed the amount to credit as requested.

Very truly, yours,

A. T. STEWART & CO.,
Per J. M. HOPKINS.

EXHIBIT No. 175.

NEW YORK, *Dec.* 23, 1867.

Mr. L. C. HOPKINS, *Cincinnati:*

DEAR SIR: We are in receipt of your favor of 20th inst., covering remittance for private acc't to amount of $17,000 83-100, which is
205 at your credit, and enclosed we hand statement of accounts to January 1st next, as requested, balance remaining at your debit of $58,025 51-100, which we trust you will find entirely correct.

Very truly, yours,

A. T. STEWART & CO.,
Per J. M. HOPKINS.

EXHIBIT No. 176.

Messrs. L. C. Hopkins & Co., with A. T. Stewart & Co., Dr.

1866, June 7.	Loan	$100,000 00
1867, May 4.	Interest to date, 10 months and 27 days, at 7 per cent	6,358 31
		106,358 31
1867, May 4.	Credit by cash	25,000 00
		81,358 31
" Nov. 12.	Interest to date, 6 months and 8 days at 7 per cent	2,974 10
		84,332 41
" Nov. 12.	Credit by cash	10,000 00
		74,332 41
" Dec. 23.	Interest to date, 1 month and 11 days, at 7 per cent	592 58
		74,924 99
" Dec. 23.	Credit by cash	17,000 83
		57,924 16
	Interesst to January 1, 1868, 9 days, at 7 per cent	101 35
	Balance due A. T. S. & Co., January, 1868	$58,025 51

E. E.
NEW YORK, *Dec.* 23, 1867.

206 EXHIBIT No. 177.

CINCINNATI, *Dec.* 30, 1867.

Messrs. A. T. STEWART & Co., *New York City:*

GENTLEMEN: Enclosed please find forty-eight thousand twenty-five and 51-100 dollars, as follows:

Draft No. 7948, First Nat. Bank, Cincinnati, upon Ocean Nat. Bank, N. Y., for	$23,000 00
" " 7949, same upon Fourth Nat. Bank, New York.	25,000 00
Currency	25 50
	$48,025 50

This is to be applied in payment of balance due on my individual loan or note, and is payment in full. Please return all the mortgages and life policy assignments, immediately, by Merchants' Union Express, canceled.

Yours, truly,

L. C. HOPKINS.

EXHIBIT No. 178.

CINCINNATI, *May* 2, 1867.

A. T. STEWART, Esq., *New York:*

MY DEAR SIR: Enclosed please find draft upon yourselves for twenty-five thousand dollars, to be applied towards paying my note for $100,000. Please endorse the same on the back and send a duplicate receipt to me.

With many thanks for your uniform kindness,

Yours, very truly,

L. C. HOPKINS.

EXHIBIT No. 179.

No. 12.] CINCINNATI, *June 9th*, 1866.

Messrs. A. T. STEWART & Co., *New York:*

Pay to the order of yourselves, eight thousand three hundred fifteen and 72-100 dollars.

$8,315.72.

L. C. HOPKINS & CO.

207 EXHIBIT No. 180.

No. 11.] CINCINNATI, *June* 9, 1866.

Messrs. A. T. STEWART & Co., *New York:*

Pay to the order of yourselves, seventy thousand dollars.

$70,000.00.

L. C. HOPKINS & CO.

EXHIBIT No. 183.

No. 5395.] NEW YORK, *June* 6, 1866.

Cashier Merchants' National Bank, New York, pay to L. C. Hopkins & Co., or order, one hundred thousand dollars, in current funds.

$100,000.

ALEX. T. STEWART & CO.

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EXHIBIT No. 184.

Detailed statement of payments by A. T. Stewart & Co., for account of L. C. Hopkins & Co. Cincinnati, O.

1866.		Nos.		Firm names, etc.	Amounts.	
Jan.	3	Draft	.....	J. & H. Auchincloss	$327 75	
		"	.....	Geo. P. Frick	515 16	
		"	.....	C. F. A. Henrichs	354 47	
		"	.....	Berry, Shaer & Co	3,031 68	
	4	Note	1315	Haggarty & Co	2,845 98	
		"	1317	Wilmerdings & Mount	7,940 66	
		"	1318	Townsend, Monhant & Co	6,157 62	
		"	1319	Townsend, Monhant & Co	6,157 61	
	5	"	1328	E. O. Tufts & Co	8,555 85	
	6	"	1333	Lord & Tayler	4,625 76	
		"	1363	Geo. A. Wicks & Co	1,690 89	
	8	Draft	.....	Mrs. S. Moulton	200 00	
		"	.....	W. L. Mason	275 00	
		"	.....	Baldwin, Laundon & Co	10 71	
	9	Note	1261	E. S. Jaffray & Co	2,066 03	
		"	1359	Geo. Bliss & Co	6,000 00	
		"	1360	Geo. Bliss & Co	5,572 86	
	10	"	1253	H. B. Claflin & Co	1,484 19	
		"	1258	Sutton, Smith & Co	4,491 86	
	11	"	1264	Geo. A. Wicks & Co	1,113 43	
		Draft	.....	Berry, Shaer & Co	115 96	
	12	"	.....	C. F. A. Henrichs	18 65	
	13	"	.....	H. B. Claflin & Co	57,956 46	
		"	.....	Paton & Co	84 38	
		"	.....	J. S. Barry & Co	1,167 81	
		"	.....	S. B. Chittenden & Co	1,781 28	
		"	.....	Geo. W. Moore	1,752 79	
		"	.....	Wallace, Fitch & Johnson	735 18	
		"	.....	Geo. Bliss & Co	1,473 57	
		"	.....	D. Valentine	101 24	
		"	.....	Low, Harriman & Durfee	3,226 11	
	15	"	.....	Davis, Rhodes & Co	557 11	
	16	"	.....	Haughton, Sawyer & Co	2,035 22	
	18	Note	1356	David Valentine	7,487 60	
	22	"	1295	Sutton, Smith & Co	504 12	
		"	1331	Butler & Pitkin	954 60	
	24	Draft	.....	Paton & Co	272 71	
		"	.....	W. Rothschild & Co	2,679 37	
	25	"	.....	Starr, Bro. & Co	29 37	
	30	"	.....	Mrs. J. B. Gough	1,200 00	
	31	Note	1313	Ourselves, A. T. S. & Co	56,141 21	
						$203,692 25
209						
Feb.	1	Note	1332	Thompson, Langdon & Co	$1,745 12	
	3	"	1329	Arnold, Constable & Co	2,046 50	
		"	1301	Geo. A. Wicks & Co	2,116 95	
	5	"	1292	Mills & Gibb	1,119 24	
	6	"	1290	E. S. Jaffray & Co., due Feb. 7	7,448 19	
	6	"	1309	Geo. Bliss & Co., due Feb. 7	6,432 84	
	7	Draft	.....	S. D. Peters	550 00	
		"	.....	E. S. Jaffray & Co	870 38	
	8		.....	Stamps on drafts	35	
	10	Note	1342	Thompson, Langdon & Co	1,024 95	
		Drafts	.....	Favor of ourselves, to pay Nov. and Dec. net bills	22,326 99	
	13	Note	1288	Herman & Lautenbach	842 50	
	15	Draft	.....	Paton & Co	272 83	
		"	.....	W. B Dana	5 00	
	16	"	.....	Mrs. H. D. Hunn	61 00	
		"	.....	Haughton, Sawyer & Co	3,681 95	
	28	Note	1350	Geo. Bliss & Co	5,000 00	
		"	1279	H. B. Claflin & Co	5,000 00	
		"	1280	H. B. Claflin & Co	5,000 00	
		"	1281	H. B. Claflin & Co	5,000 00	
		"	1282	H. B. Claflin & Co	4,171 52	
		"	1321	Tefft, Griswold & Kellogg	1,135 25	
						$75,871 56
210						
Mar.	3	Note	1357	Thompson, Langdon & Co	$1,152 55	
		"	1366	Wilmerdings & Mount	1,478 43	
		"	1351	Geo. Bliss & Co	7,914 00	
		Draft	.....	C. S. Gardner	150 00	
	5		.....	37 doubs. at $21.58	798 46	
	6	Note	1334	H. B. Claflin & Co	5,000 00	
		"	1335	H. B. Claflin & Co	5,000 00	
		"	1336	H. B. Claflin	5,000 00	

EXHIBIT No. 184—Continued.

1866.	Nos.	Firm-names, etc.	Amounts.	
	Note 1337	H. B. Claflin & Co	5,000 00	
	" 1338	H. B. Claflin & Co	5,000 00	
	" 1339	H. B. Claflin & Co	5,000 00	
	" 1340	H. B. Claflin & Co	5,000 00	
	" 1341	H. B. Claflin & Co	5,000 00	
	" 1342	H. B. Claflin & Co	2,204 81	
7	" 1362	E. O. Taft & Co	643 19	
	" 1364	Tracy, Irwin & Co	1,157 25	
8	" 1346	E. S. Jaffray & Co	5,000 00	
9	.....	Paid freight	159 76	
10	Note 1349	Geo. Bliss & Co	3,219 37	
	" 1375	Geo. Bliss & Co	6,784 00	
	" 1372	H. B. Claflin & Co	5,000 00	
	" 1373	H. B. Claflin & Co	5,000 00	
	" 1374	H. B. Claflin & Co	5,395 44	
	Draft	Wallace, Fitch & Johnson	1,032 40	
	"	Geo. Bliss & Co	964 42	
12	Note 1367	Townsend, Monhant & Co	907 41	
	Draft	Ammidown, Lane & Co	526 95	
	"	G. W. Moore	3,113 36	
13	"	Joseph Lee	70 00	
	"	Harding, Converse G. & Co	1,392 09	
14	Note 1369	D. Valentine	1,552 57	
	.....	Ourselves, m'dise account	10,930 63	
16	Draft	Mrs. H. D. Hume	51 00	
19	.....	Ourselves, m'dise account	10,000 00	
	Draft	Baldwin, Laundon & Co	16 55	
	Note 1347	E. S. Jaffray & Co	6,930 04	
27	Draft	J. Mackey	5 00	
29	.....	Ourselves, m'dise account	5,000 00	
30	Draft	W. Churchill	151 44	
				$128,701 12
211				
April 2	Draft	Paton & Co	$115 34	
3	.....	Ourselves, m'dise account	5,000 00	
	Draft	Butler & Pitkin	371 77	
	"	W. A. Drowne & Co	228 17	
	"	W. S. Thompson, L. & Co	207 39	
4	"	Jordan, Marsh & Co	285 30	
5	Note 1326 ..	E. A. Hoyt & Co	904 00	
	" 1344 ..	George Bliss & Co	2,186 06	
	Draft	Arnold, Constable & Co	78 85	
	"	J. Kent	8 00	
6	Cash		75 00	
9	Draft	H. B. Claflin & Co	10,484 31	
10	Note 1348 ..	E. S. Jaffray & Co	1,354 56	
14	" 1352 ..	E. A. Hoyt & Co., due Ap. 15	3,527 50	
	Draft	E. S. Jaffray & Co	3,297 08	
16	"	W. L. Mason	150 00	
17	.....	Ourselves, m'dise account	12,500 00	
	.....	Ourselves, gold premium	403 00	
	.....	Ourselves, gold premium	111 83	
18	Draft	H. B. Claflin & Co	90 74	
23	"	Butler & Pitkin	22 76	
28	"	E. L. Hess	100 00	
	"	Ourselves	1,321 15	
	"	Ourselves	1,390 11	
30	"	George Bliss & Co	6,869 91	
13	.....	Paid freight	50	
				$51,083 33
212				
May 2	Draft	S. P. Holmes	$325 00	
3	"	George Bliss & Co	912 09	
	"	Paton & Co	391 79	
	"	S. B. Chittenden & Co	2,266 16	
4	.....	Ourselves, m'dise account	216 75	
5	Note 1379 ..	Arnold, Constable & Co	3,813 32	
7	" 1361 ..	George Bliss & Co	1,690 02	
	Draft	H. B. Claflin & Co	10,513 71	
9	Note 1370 ..	H. B. Claflin & Co	3,172 25	
10	" 1365 ..	George A. Wicks & Co	820 50	
11	Draft	E. L. Hess	100 00	
	"	E. L. Hess	1,544 80	
12	Note 1358 ..	E. S. Jaffray & Co	9,764 33	
14	Draft	Mrs. H. D. Hume	56 29	

EXHIBIT No. 184—Continued.

1866.	Nos.	Firm names, etc.	Amounts.	
16	.....	Ourselves, m'dise account	7,580 01	
17	Draft	H. B. Claflin & Co	1,240 80	
	Note 1368 ..	E. A. Hoyt & Co	895 00	
18	Draft	Mason Bros	109 60	
21	.....	Ourselves, m'dise account	2,147 87	
	Draft	George Bliss & Co	2,418 09	
22	"	E. S. Jaffray & Co	881 47	
	"	Paton & Co	62 60	
23	.....	Ourselves, m'dise account	6,000 00	
	Draft	George G. Clarke & Son	64 18	
28	Note 1372 ..	H. B. Claflin & Co	2,463 30	
	Draft	W. L. Mason	200 00	
	"	Lathrop, L. & Co	186 46	
29	.....	Ourselves, m'dise account	2,000 00	
	Note 1380 ..	Paton & Co	1,824 32	
30	" 1375 ..	Kutter, Luckemeyer & Co	2,619 97	
	Draft	J. C. Converse, B. & Co	479 31	
31	Draft	Baldwin, L. & Co	33 93	
	"	Charter Oak Life Ins. Co	800 00	
				$67,593 92
213				
June 2	Note 1378 .	Thompson, Langdon & Co	$491 85	
	Draft	Mrs. H. B. Hume	38 20	
5	"	Mary M. Hopkins	500 00	
7	"	L. C. Hopkins	100 00	
11	Note 1377 ..	A. & E. Wallach	800 08	
	" 1371 ..	E. S. Jaffray & Co	763 13	
	Draft	Jordan, Marsh & Co	270 30	
13	.....	Ourselves, m'dise account	70,000 00	
	.....	Ourselves, m'dise account	8,315 72	
	Draft	George Bliss & Co	5,917 33	
	"	H. B. Claflin & Co	9,385 19	
	"	C. H. Booth & Co	492 37	
	"	John Pratt & Son	139 58	
	"	E. S. Jaffray & Co	479 47	
	"	W. J. Peake & Co	208 00	
	"	Davis, Rhodes & Co	322 14	
16	"	Hamlin, Wheeler & Co	923 50	
19	.....	Ourselves, m'dise account	87 31	
20	Draft	H. B. Claflin & Co	88 96	
	"	W. C. Beardsley, treas'r	500 00	
21	"	Berry, Shaer & Co	441 70	
	"	Wallace, Fitch & Johnson	673 96	
	"	G. W. Moore	117 32	
27	"	W. C. Beardsley, treas'r	1,800 00	
28	"	Paton & Co	48 10	
29	.....	Ourselves, m'dise account	14,376 77	
	Draft	H. B. Claflin & Co	6,784 23	
	"	G. H. Warner	1,165 00	
	"	Berkard & Hutton	263 64	
				$125,493 85
214				
July 2	Draft	G. H. Warner	$40 00	
5	"	W. C. Beardsley, treas'r	640 00	
9	.....	Ourselves, m'dise account	983 88	
	.....	Ourselves, m'dise account	2,561 75	
	Draft	Paton & Co	136 49	
	"	G. W. Moore	199 16	
	"	Wallace, Fitch & Johnson	41 33	
	"	Berkard & Hutton	224 80	
	.....	J. D. Lewis & Co	265 37	
	.....	Eardman, Dayton & B	85 50	
10	.....	H. B. Claflin & Co	7,582 31	
18	.....	Ourselves, m'dise account	15,136 89	
19	Draft	George Bliss & Co	3,451 02	
21	"	H. D. Hume	77 00	
	"	Arnold, Constable & Co	1,252 76	
25	"	H. B. Claflin & Co	100 00	
30	"	W. C. Beardsley, treas'r	225 00	
31	.....	Gold premium	517 12	
				$33,420 38
215				
Aug. 2	Note	Mills & Gibb	$780 51	
	"	E. S. Jaffray & Co	6,000 00	
	"	E. S. Jaffray & Co	6,000 00	
	"	E. S. Jaffray & Co	5,731 78	
	Draft	T. C. Lindsley	50 00	
4	.....	Ourselves, m'dse account	5,485 72	

EXHIBIT No. 184—Continued.

1866.	Nos.		Firm-name, etc.	Amounts.	
		.....	D. Valentine & Co., five notes, $4,000 each	20,000 00	
	Note	.....	David Valentine & Co	2,021 02	
7	"	.....	Geo. Bliss & Co	5,890 75	
8	"	.....	H. B. Claflin & Co	11,413 96	
	Draft	.....	Spotts & Hawk	163 16	
	"	.....	B. F. Turner	50 00	
6	"	.....	Eastman, Bigelow & D	24 23	
	"	.....	L. C. Hopkins	50 00	
10	"	.....	W. C. Beardsley, treasurer	1,830 00	
16	Note	.....		1,676 30	
		.....	Ourselves, m'dise account	8,927 45	
17	Note	.....		1,125 50	
18		.....	Backus & Vail	11 50	
20	Draft	.....	B. F. Turner	210 00	
22	"	.....	W. C. Beardsley, treasurer	30 00	
23	"	.....	Paton & Co	456 00	
25	"	.....	W. C. Beardsley, treasurer	150 00	
28	"	.....	H. D. Hume	30 00	
	"	.....	Geo. Bliss & Co	325 85	
29	"	.....	H. B. Claflin & Co	5,128 41	
31		.....	Ourselves, m'dise account	11,735 04	
16					$95,297 48
Sept. 3	Draft	.....	A. H. Mason	$100 00	
	"	.....	W. C. Beardsley, treasurer	90 00	
10	Note	.....	J. A. Wicks & Co	443 63	
11	Draft	.....	E. Franks	407 29	
13		.....	Ourselves, m'dise account	6,358 04	
		.....	Ourselves, m'dise account	91 27	
	Draft	.....	E. L. Merrifield & Co	31 70	
14	"	.....	Wallace, Fitch & Johnson	1,397 05	
	"	.....	Eastman, Bigelow & D	536 04	
15	"	.....	C. B. Woodworth & Co	163 91	
	"	.....	W. C. Beardsley, treasurer	450 00	
		.....	Gold, $824.41 at 144½	1,191 27	
17	Draft	.....	Note, Berkard & Hutton	529 63	
		.....	Ourselves, m'dise account	11 11	
20	Draft	.....	W. C. Beardsley, treasurer	150 00	
21	"	.....	B. F. Turner	100 00	
22	Note	.....	Thompson, L. & Co	1,605 52	
	"	.....	D. Valentine & Co	2,087 29	
24		.....	Ourselves, m'dise account	5,686 73	
	Draft	.....	Berry, Shaer & Co	693 92	
	"	.....	Ottenheimer Bro's	271 23	
	"	.....	W. C. Beardsley, treasurer	270 00	
25		.....	Ourselves, m'dise account	1,940 00	
	Note	.....	S. B. Chittenden & Co	1,379 92	
	"	.....	S. McLean & Co	1,595 09	
	"	.....	Lathrop, L. & Co	702 01	
	Draft	.....	Berry, Shaer & Co	168 66	
26	Note	.....	W. J. Peake & Co	518 61	
28	Draft	.....	B. F. Turner	300 00	
217					$29,269 92
Oct. 4	Draft	.....	George Bliss & Co	$11,082 54	
6	"	.....	Paton & Co	100 00	
	Note	1401		903 19	
9		.....	Ourselves, m'dise account	12,066 22	
	Draft	.....	W. C. Beardsley, treasurer	30 00	
10	Note	.....	Mills & Gibb	915 06	
	Draft	.....	Butler & Pitkin	153 83	
11	"	.....	Jordan, Marsh & Co	275 00	
	"	.....	W. C. Beardsley, treasurer	2,085 00	
13	"	.....	W. C. Beardsley, treasurer	120 00	
	"	.....	W. C. Beardsley, treasurer	30 00	
	"	.....	Baldwin, Laundon & Co	8 45	
15	"	.....	H. D. Hume	44 00	
	"	.....	D. Valentine & Co	16 50	
	"	.....	Townsend & Yale	847 50	
16	"	.....	Paton & Co	260 00	
	"	.....	Ottenheimer Bro's	535 80	
	"	.....	Eastman, Bigelow & D	1,223 36	
17		.....	Ourselves, m'dise account	7,572 97	
	Draft	.....	J. Pratt & Son	1,057 61	
	"	.....	J. Pratt & Son	50 00	
	"	.....	Kutter, Luckemeyer & Co	303 95	
	"	.....	W. C. Beardsley, treasurer	240 00	
20	"	.....	G. P. Frick	159 57	
22	Note	.....	D. Valentine & Co	3,000 00	
	"	.....	D. Valentine & Co	4,210 86	
27	"	1407	L. L. & Co	758 47	
218					$48,049 88

EXHIBIT No. 184—Continued.

1866.		Nos.		Firm-name, etc.	Amounts.	
Nov.	3	Draft	.....	H. B. Claflin & Co., four notes, $5,000 each	$20 000 00	
		Note	.....	H. B. Claflin & Co	4, 069 73	
		"	.....	H. B. Claflin & Co	1, 236 96	
		Draft	.....	Mrs. H. D. Hume	66 10	
	9	Note	.....	E. S. Jaffray & Co	5, 000 00	
		"	.....	E. S. Jaffray & Co	5, 630 51	
		Draft	.....	G. H. Warner	1, 823 32	
	10	"	.....	Paton & Co	220 00	
		"	.....	Townsend & Yale	515 00	
		"	.....	Zinn, Aldrich & Co	252 11	
		"	.....	Ottenheimer Bro's	141 08	
	12	Note	.....	W. A. Drowne & Co	1, 679 55	
		"	.....	H. B. Claflin & Co	13, 055 26	
		"	.....	Baldwin, Laundon & Co	16 74	
			.....	Gold, $256.08 at 144¼	369 40	
	17		.....	Ourselves, m'dise account	1, 857 25	
	19	Draft	.....	Geo. Bliss & Co	7, 334 53	
		"	.....	Arnold, Constable & Co	907 97	
	22	"	.....	J. Pratt & Sons	294 02	
		"	.....	J. Mackey	5 00	
	23	"	.....	Arnold, Constable & Co	28 08	
	26	"	.....	Starr Bro's & Co	24 23	
		"	.....	W. C. Beardsley, treasurer	36 00	
		"	.....	Charter Oak Life Ins. Co	800 00	
	27	"	.....	Equitable Life Ins Co	294 60	
						$65, 651 44
219						
Dec.	1	Draft	.....	L. C. Hopkins	$250 00	
	3	"	.....	Tiffany & Co	1, 540 00	
		Note	.....	Due December 2d	3, 612 41	
	6	"	1440		3, 863 06	
	7	"	1413		6, 000 00	
		"	1414		6, 000 00	
		"	1415		6, 235 46	
	8	"	1433		5, 000 00	
		"	1434		5, 000 00	
		"	1435		5, 000 00	
		"	1436		5, 000 00	
		"	1437		5, 000 00	
		"	1438		5, 000 00	
		"	1439		3, 752 16	
	11		.....	Ourselves, m'dise account	2, 337 07	
		Draft	.....	Ottenheimer Bros	203 54	
	12	"	.....	George Bliss & Co	101 50	
	15		.....	Bill for plate glass	927 50	
			.....	Bill for plate glass	265 00	
		Draft	.....	Paton & Co	220 00	
	17	"	.....	Jackson & Cooper	22 37	
	18	"	.....	Burton & Willis	250 00	
	19	"	.....	Arnold, Constable & Co	4, 434 11	
	20	"	.....	W. Rothschild & Co	95 00	
	22	Note	1428		495 28	
		"	1464		1, 280 16	
	24	Draft	.....	Mrs. Mary E. Gough	800 00	
		Note	1474		4, 083 86	
	26	"	1422		601 13	
			.....	Ourselves, m'dise account	5, 270 27	
	27		.....	Duden, Frees & Co.—gold	148 75	
			.....	Berry, Shaer & Co.—gold	221 83	
			.....	Gold premium	117 66	
	29		.....	Er. in credit of cash, Dec. 8	498 57	
	31	Draft	.....	W. C. Langley & Co	309 56	
		"	.....	Wallace, Fitch & Johnson	477 15	
		"	.....	Eastman, Bigelow & D	165 30	
						$84, 478 70

220 SUMMARY.

Dates.				Amounts.	
Payments,	January,	1866		$203, 692 25	
Do.	February,	do		75, 871 56	
Do.	March,	do		128, 701 12	
Do.	April,	do		51, 083 33	
Do.	May,	do		67, 593 92	
Do.	June,	do		125, 493 85	
Do.	July,	do		33, 420 38	
Do.	August,	do		95, 297 48	
Do.	Sept'mber,	do		29, 269 92	
Do.	October,	do		48, 949 88	
Do.	November,	do		65, 651 44	
Do.	December,	do		84, 578 70	
					$1, 008, 703 83

221

Exhibit No. 185.

Detailed statement of payments by A. T. Stewart & Co. for account of L. C. Hopkins & Co., Cincinnati, O.

		Nos.		Firm names, etc.	Amounts.	
1867.						
Jan.	2	Draft	.....	Geo. A. Wicks & Co	$527 08	
		"	.....	Seligman & Macy	126 00	
	3	"	.....	E. S. Jaffray & Co	88 48	
	4	"	.....	W. C. Beardsley, treasurer	300 00	
	5	"	.....	Ourselves, m'dise account	1, 296 00	
		"	.....	Ourselves, m'dise account	7, 046 79	
	7	"	.....	Tracy, Irwin & Co	224 90	
		"	.....	Mason & Hamlin	111 98	
		"	.....	W. C. Beardsley, treasurer	60 00	
		"	.....	Chickering & Sons	892 50	
	8		.....	Ourselves, m'dise account	120 00	
		"	.....	Arnold, Constable & Co	631 95	
		"	.....	D. W. Smith	40 00	
	9	"	.....	E. S. Jaffray & Co	40 54	
	10	"	.....	Mason & Hamlin	420 00	
		"	.....	Scharfenberg & Lier	218 50	
	11	"	.....	H. D. Hume	58 35	
		"	.....	Benton & Willis	4 65	
	14	"	.....	L. H. Cohen	1, 000 00	
	17	"	.....	W. C. Beardsley, treasurer	90 00	
	18		.....	Evening Post, subscription to Dec. 12, 1867	12 00	
	19	Note	1462	Due Jan. 21, Sorchan, Allien & Diggellmann	1, 825 14	
		"	1481	Due Jan. 21st, Thompson, Langdon & Co	1, 131 05	
	22	Draft	.....	J. W. Fiske & Co	164 90	
	21	"	.....	Dweiggain & Thompson	26 68	
	23	"	.....	Ourselves, m'dise account	56, 832 95	
		"	.....	W. T. McAllister	706 36	
	24	Note	1451	Jordan, Marsh & Co	1, 431 16	
	28	Draft	.....	A. H. Mason	125 00	
	31	"	.....	D. Valentine & Co	54 90	
222						$75, 707 86
Feb.	4	Draft	.....	H. D. Hume	$44 57	
		"	.....	Beebe & King	1, 000 00	
		Note	1457	Sorchan, Allien & Diggellmann	229 65	
	6	"	1469	George Bliss & Co	1, 224 48	
		"	1419	Kutter, Luckemeyer & Co	7, 674 40	
		Draft	.....	Geo. Bliss & Co	2, 771 36	
	7	"	.....	W. C. Beardsley, treasurer	800 00	
		"	.....	W. C Beardsley, treasurer	60 00	
	9	"	.....	Geo. Bliss & Co	113 12	
		"	.....	Mills & Gibb	105 00	
		"	.....	Nortrup, Tayler & Co	38 41	
		"	.....	E. S. Jaffray & Co	443 76	
		"	.....	Butler & Pitkin	22 92	
		"	.....	Sullivan, Randolph & Budd	44 66	
		"	.....	Lathrop, L. & Co	70 03	
		"	.....	Lee, Bliss & Co	330 55	
	11	"	.....	George H. Warner	425 00	
		Draft	.....	D. Valentine & Co	483 15	
	14	"	.....	Paton & Co	62 60	
	15	Note	1472	Due Feb. 16, Tracy, Irwin & Co	387 50	
	16	"	1421	Due Feb. 17, D. Valentine & Co	3, 143 67	

EXHIBIT No. 185—Continued.

		Nos.		Firm-names, etc.	Amounts.	
1867.						
		Note	1432	Due Feb. 18, Paton & Co	1,832 04	
	18	Dratt	.....	Jordan & Martins	50 56	
	21	"	.....	Mrs. H. D. Hume	32 50	
	23	"	.....	B. F. Turner	200 00	
	23	Note	1430	Mills & Gibb	3,136 81	
	26	Draft	.....	W. B. Dana	5 00	
						$24,731 74
223						
Mar.	2	Note	1430	Due Mar. 4, Jaffray & Co	$3,890 74	
		"	1431	Due Mar. 4, Jaffray & Co	3,890 74	
		"	1442	Due Mar. 4, Claflin & Co	5,000 00	
		"	1443	Due Mar. 4, Claflin & Co	5,000 00	
		"	1444	Due Mar. 4, Claflin & Co	5,000 00	
		"	1445	Due Mar. 4, Claflin & Co	5,000 00	
		"	1446	Due Mar. 4, Claflin & Co	5,000 00	
		"	1447	Due Mar. 4, Claflin & Co	2,652 61	
		Draft	.....	Chickering & Sons	1,050 00	
	4	"	.....	J. M. Knapp, secretary	610 00	
	5	Note	1429	Due Mar. 6, Kutter, Luckemeyer & Co	1,604 49	
	8	"	1498	Due Mar. 9th, Thompson, Langdon & Co	337 75	
		Draft	.....	Chickering & Sons	21 00	
	13	"	.....	W. T. McAllister	16 80	
	18	Note	1460	Due Mar. 19, Valentine & Co	4,000 00	
		"	1461	Due Mar. 19, Valentine & Co	4,224 38	
	19	"	1456	Due Mar. 20, Hoyt & Co	1,687 34	
	20	"	1450	Due Mar. 21, Geo. D. Frick	1,784 85	
		"	1466	Due Mar. 21, Claflin & Co	5,000 00	
		"	1467	Due Mar. 21, Claflin & Co	5,000 00	
		"	1468	Due Mar. 21, Claflin & Co	6,734 33	
		Draft	.....	Tiffany & Co	128 00	
	21	Note	1449	Due Mar. 22, Kutter, Luckemeyer & Co	946 01	
	22	"	1453	Due Mar. 23, Kutter, Luckemeyer & Co	2,252 28	
		"	1452	Due Mar. 24, A. E. Wallach	285 50	
		"	1459	Due Mar. 24, Paton & Co	789 37	
		"	1465	Due Mar. 24, Geo. Bliss & Co	3,839 98	
		"	1470	Due Mar. 24, Jaffray & Co	4,500 00	
		"	1471	Due Mar. 24, Jaffray & Co	4,853 10	
		"	1485	Due Mar. 24, D. Valentine & Co	550 30	
	23	"	1454	Due Mar. 25, Kutter, Luckemeyer & Co	2,252 27	
	27	"	1458	Due Mar. 28, G. P. Frick	800 58	
		Draft	.....	J. J. Campion & Co	44 27	
		"	.....	Jordan & Martins	48 61	
	30	Note	1463	Due Mar. 31, E. A. Wallach	672 38	
						$89,407 68
224						
April	1	Note	1445	Kutter, Luckemeyer & Co	$414 97	
	3		.....	Paid Berry, Shaer & Co. $215.25 gold, prem. $73.72	288 97	
		Draft	.....	E. S. Koats	50 00	
	5	"	.....	Wallace & Fitch	552 12	
			.....	Cash paid Wheeler & Wilson M'f'g Co	19 00	
	10	Draft	.....	W. C. Beardsley, treasurer	83 33	
	13	"	.....	W. C. Beardsley, treasurer	100 00	
	11	Note	1479	Due Ap'l 12, Jaffray & Co	3,835 37	
	15	Draft	.....	Mrs. H. D. Hume	78 75	
	19	Note	1473	Due Ap'l 20, Paton & Co	527 43	
		Draft	.....	D. Pratt & Sons	102 70	
	20	"	.....	Ourselves, m'dise account	46,252 45	
		"	.....	W. C. Langley & Co	839 99	
	24	"	.....	L. H. Cohen	500 00	
	22	Draft	.....	Wallace & Fitch	368 55	
	23	"	.....	E. A. Hoyt & Co	166 73	
	26	Note	1484	Due Ap'l 28, Mills & Gibb	423 13	
		"	1487	Due Ap'l 28, Claflin & Co	5,000 00	
		"	1488	Due Ap'l 28, Claflin & Co	5,000 00	
		"	1489	Due Ap'l 28, Claflin & Co	5,000 00	
		"	1490	Due Ap'l 28, Claflin & Co	2,777 53	
	27	Draft	.....	Ourselves, m'dise account	27 23	
	29	Note	1492	Due Ap'l 30, Hoyt & Co	1,254 58	
						$73,655 83
225						
May	1	Note	1475	Due M'y 2, H. B. Claflin & Co	$679 31	
	4	"	1480	Due May 6, Valentine & Co	1,362 26	
		Draft	.....	W. C. Langley & Co	1,209 54	
		"	.....	Ourselves, special account	25,000 00	
	6	"	.....	J. S. Barry & Co	449 43	
	7	"	.....	Butler & Pitkin	232 42	
		"	.....	West, Bradley & Co	1,035 19	
	8	"	.....	John Pratt & Son	250 00	

EXHIBIT No. 185—Continued.

		Nos.		Firm-name, etc.	Amounts.	
1867.						
		Draft	.....	American Ex. Nat. Bank	5,980 19	
		"	.....	Margaret Hess	100 00	
	10	Note	1483	Due May 11, Paton & Co	2,292 79	
		"	1477	Due May 12, Kutter, Luckemeyer & Co	2,500 00	
		"	1478	Due May 12, Kutter, Luckemeyer & Co	2,406 42	
		Draft	.....	Knight & McCoy	75 00	
	11	Note	1482	Due May 13, Claflin & Co	2,026 68	
	13	Draft	.....	George Bliss & Co	11,224 12	
		"	.....	George Bliss & Co	4,775 33	
	14	"	.....	Paton & Co	440 00	
	15	"	.....	Ourselves, m'dise account	18,003 28	
		"	.....	Ourselves, m'dise account	34 50	
		"	.....	E. S. Jaffray & Co	61 68	
		"	.....	E. S. Jaffray & Co	65 00	
		"	.....	A. & E. Wallach	264 23	
		"	.....	Arnold, Constable & Co	5,275 47	
	16	"	.....	Wallace & Fitch	572 95	
		Cash	.....	To L. C. Hopkins, draft	208 35	
	17	Draft	.....	W. C. Beardsley, treas'r	700 00	
		Note	1497	Due May 18, Geo. Bliss & Co	2,359 14	
	20	Draft	.....	Mrs. A. H. Mason	100 00	
	23	"	.....	Ourselves, m'dise account	189 03	
	24	"	.....	Samuel H. White, sec'y	800 00	
	25	"	.....	J. Pratt & Sons	200 00	
	27	"	.....	D. W. Smith	16 00	
226						$90,908 31
June	1	Draft	.....	J. Pratt & Sons	$700 00	
	3	"	.....	J. S. Barry & Co	3,175 80	
		Note	1494	Due June 4, Paton & Co	438 00	
	4	Draft	.....	Wallace & Fitch	780 09	
		"	.....	J. Pratt & Sons	158 44	
	7	"	.....	Paton & Co	220 00	
		Note	1496	Due Ju'e 9, A. & E. Wallach	517 13	
		"	1491	Due June 9, Claflin & Co	4,227 06	
	8	"	1486	Due June 10, Jaffray & Co	1,811 05	
		"	1493	Due Ju'e 11, Valentine & Co	755 48	
	11	Draft	.....	J. Pratt & Sons	800 00	
	13	"	.....	Ourselves, m'dise account	15,333 76	
		"	.....	Ourselves, m'dise account	27,064 65	
	14	Note	1505	Due June 15, Claflin & Co	5,000 00	
		"	1506	Due June 15, Claflin & Co	5,000 00	
		"	1507	Due June 15, Claflin & Co	4,873 68	
	15	Draft	.....	Mrs. A. B. Burke	55 50	
	20	Cash	.....	Paid Davis, Rhodes & Co	714 76	
	22	Note	1533	Due June 24, G. Bliss & Co	4,000 00	
		"	1534	Due June 24, G. Bliss & Co	4,547 02	
		"	1540	Due June 23, Thompson, Langdon & Co	611 85	
	24	Draft	.....	W. C. Langley & Co	1,130 50	
		"	.....	J. & B. Auchincloss	327 75	
		"	.....	Paton & Co	200 00	
		"	.....	Tracy, Irwin & Co	304 44	
	25	"	.....	E. S. Barry & Co	486 97	
	26	"	.....	A. & E. Wallach	303 14	
	29	"	.....	Wallace & Fitch	193 90	
		"	.....	John Pratt & Sons	21 00	
						$83,751 97

227 SUMMARY.

Dates.	Amounts.	
Payments, January, 1867	$75,707 86	
Do. February, do	24,731 74	
Do. March, do	89,467 68	
Do. April, do	73,655 [illegible]	
Do. May, do	90,908 31	
Do. June, do	83,751 97	
		$438,223 39

228 EXHIBIT No. 187.

CINCINNATI, *June* 10, 1867.

Messrs. A. T. STEWART & Co., *New York:*

DEAR SIRS: Inclosed you will please find our checks, 234 and 5, on A. T. Stewart & Co., N. Y., for forty-two thousand three hundred ninety-eight $\frac{44}{100}$ dollars, in settlement of merchandise bills, as per statement below.

Yours, respectfully,

L. C. HOPKINS & CO.,
By C. W. TAYLER.

Net bills to March 27th, inclusive	$27,064 65
Time bills, October, 1866	9,760 94
November 6, 1866	529 28
" 8, "	639 21
" 8, "	1,009 50
" 8, "	2,452 33
" 9, "	942 50
	$42,398 41

We don't agree as to amount N. Y. bills. Please send No. each bill, date, and amount, that we may ascertain where the difference is, by return mail.

H.

229 EXHIBIT No. 193.

No. 14.] CINCINNATI, *June 9th*, 1866.

Messrs. A. T. STEWART & Co., *New York:*

Pay to the order of H. B. Claflin & Co., nine thousand three hundred eighty-five 19-100 dollars.

$9,385 19-100. L. C. HOPKINS & CO.

EXHIBIT No. 194.

No. 13.] CINCINNATI, *June 9th*, 1866.

Messrs A. T. STEWART & Co., *New York:*

Pay to the order of George Bliss & Co., fifty-nine hundred seventeen and 33-100 dollars.

$5,917 33-100. L. C. HOPKINS & CO.

EXHIBIT No. 195.

NEW YORK, *February* 7, 1866.

Messrs. A. T. Stewart & Co., New York, to S. D. Peters, Dr.

One double truck constructed for L. C. Hopkins & Co..... $550 00
Rec'd payment.

S. D. PETERS.

EXHIBIT No. 196.

$100,000.] NEW YORK, *June* 6, 1866.

On demand, after date, I promise to pay to the order of Messrs. Alex. T. Stewart & Co. one hundred thousand dollars, with interest from date at the rate of seven per cent. per annum, payable quarter yearly until paid, for value received.

L. C. HOPKINS.

MAY 4, 1867.—Rec'd $25,000 on acc't of the above.

A. T. S. & CO.,
P'r H. H.

230 The plaintiffs having offered the foregoing testimony, and rested their rebuttal, the defendants offered the following evidence, part as omitted in chief, and by way of rebuttal:

Testimony of L. C. HOPKINS, who, being recalled, was examined by Mr. PUGH, and testified as follows:

Q. I want to call your attention to a statement made by Mr. Libbey—which you may have heard in the reading of his deposition—did you, or not, at any time, state to him, or any other of the plaintiffs, that you would appropriate the proceeds of the sale of any particular articles of personal or real property to the payment of any purchases of cash goods, or time goods, made in the year 1867?

A. I did not make the statement in that shape. I sent word to Mr. Libbey, through my agent, Mr. Turner, who was acting as my agent, that I would remit the amount to him—not the proceeds of any particular articles. I did not say I would remit the proceeds of these identical goods, but that I would remit the amount of those goods.

Q. That is what I wanted to get at—whether it was to make remittances in payment, or undertaking to remit the proceeds of any particlar articles?

A. Not the proceeds of any particular articles, but I did promise him I would send the payment right along for those goods—cash goods.

Q. Now, I wan't to call your attention, also, to an interview between Mr. Libbey and yourself, here in Cincinnati, on the 2nd day of January, 1868. Had you, before that, sent this telegraphic dispatch, requesting a meeting with your creditors in New York?

A. I had not.

Q. It was on the morning of the 2nd of January that Mr. Libbey was here, was it?

A. I think it was.

Q At what time in the day did you first see him?

231 A. In the forenoon.

Q. Now state, as nearly as you can recollect it, the conversation between Mr. Libbey and yourself on that occasion.

A. The conversation was very brief. Mr. Libbey came into the store, and I think we went up stairs in the second story. I don't remember how the conversation started, but he asked me the question, what I had done for them—"What have you done for us?" My answer was, "Nothing; I could not do anything for any one, because it would be a preference in bankruptcy." Then I made the remark to Libbey that I had remitted to them the entire amount of the mortgage loan—mentioning the amount, some $58,000—that I had remitted the entire amount of that in order to pay that debt, and have my property free.

Q. What did he say, if anything?

A. He replied, at once, that he would not receive it in that way.

Q. Did he say anything else, except that he would not receive it in that way?

By the COURT:

That he did not, or would not?

A. That he "would" not. He said that it had not been received before he left.

By Mr. PUGH:

That it had not been received?

A. Yes, sir. I told him that I had remitted it, and he said that he had no evidence of that; that I had promised to remit him money in payment of cash bills, and had deceived him, and had not done so, and that he did not know that my statement, in this regard, was true. I told him that I had sent it in payment of this mortgage note. I told him what I sent it for—to pay that mortgage note; and he reiterated that he would not receive it in that way.

Q. Did you make any remark then in reply to him?

A. I think that in his statement—I am of the impression that he may have said that part of it had come before he left—but I will
232 not be positive as to that. I have an idea that he did say something about the $10,000. It was sent in two sums.

By Mr. JORDAN:

That is your impression?

A. Yes, sir; although I cannot remember of his designating that.

By Mr. PUGH:

Did he say anything more upon the subject; what should or should not be done with those remittances?

A. Yes, sir; he spoke of them, saying he would apply them on open account.

Q. What, if anything, did you say to that?

A. I did not say anything.

Q. Did you assent, or dissent?

A. I did not say anything; I simply had made the statement that I had sent the money to pay for those mortgages and loans, and I wanted them returned to me, and asked them to do so—that is, the life policies—the insurance on my life.

By the COURT:

You recollect that, in his testimony, he said that you said that that would knock you endways, etc. Is that according to your recollection?

A. I do not remember of using those expressions at all. They are not expressions that I use.

By Mr. PUGH:

They are not your style of conversation?

A. I may have a style that is worse than that, but I don't use those expressions.

Q. Have you any recollection of what you did say, or whether you said anything?

A. Nothing different from what I have said.

Q. Did you assent to any change in the application of the money, upon that occasion?

A. I did not. I said just what I have stated; that I had sent the

money for the payment of the mortgage loan, in order to have my property free.

233 Q. Did you, in the course of that conversation, assent to any change of the application already made?

A. I did not.

Q. Did you, at the time of that conversation in the morning with Libbey, know that the mortgages had been recorded.

A. I did not.

Q. Did he say anything about the mortgages, whether he had them recorded, or no?

A. He did not.

Q. He made no remark?

A. I don't remember.

By Mr. JORDAN:

What time of day was that?

A. It was in the forenoon.

By Mr. PUGH:

When did you first hear that the mortgages were recorded, and from whom?

A. I first heard during the day from Mr. Reese.

Q. Who was he?

A. The recorder of the county at that time.

By the COURT:

When?

A. The same day.

Q. Where did he tell you?

A. He came to the store.

Q. You did not come up here to look for him, but he came to you, and told you the mortgages were recorded?

A. Yes, sir.

Q. Give his language, if you can.

A. I cannot do that. He may have been in buying goods; I don't know.

Q. Did he speak of any specific mortgages?

A. No, sir; merely the fact that a large number of mortgages had been recorded against me. I had known him for a number of years, and I suppose he came and told me, as a friend would.

Q. That was the first notice you had of it?

A. Yes, sir.

234 Q. Did you see Mr. Libbey again on that day?

A. If it was known that Mr. Libbey was in town two days—I could not be positive, but I have an impression that he was—if he was in town two days, it might have been the next day.

Q. You did have a conversation after you learned of the recording of the mortgages?

A. Yes, sir.

Q. What was the conversation between you and him on that occasion?

A. I expressed my surprise at his recording the mortgages.

Q. What did he say?

A. I then reiterated that I had sent the money, and he told me that he had no evidence of that.

Q. Did he say anything else on that subject?

A. He simply said, "I don't know whether to believe you or not. You have deceived me in the other matter," and that was all.

Q. Because he had been disappointed in remittances in the other matter, he affected not to believe you, and justified himself in that way?

A. That is what he said to me.

By Mr. JORDAN:

In regard to Exhibits 166 and 167, that were referred to in the testimony of Libbey, and which he says were in your handwriting; are those in your handwriting?

A. No, sir; they are not. He has made an error.

Q. In whose handwriting are they?

A. Mr. Warner's.

Q. Was Mr. Warner in New York at the time you were there?

A. No, sir.

Q. If they were made, were they made here or in New York?

235 A. They were made here. Mr. Warner was my bookkeeper. I asked him to give me a statement of what I was worth. I could not tell. It would be very natural for any one to be deceived, for Mr. Warner and I write very much alike; but I have no doubt that these are the statements that I took to Mr. Libbey, and that I gave him. Mr. Libbey makes one error that I would like to correct; an error of statemant, there, where he states somewhere that I said to him that I would send him money because I had no payments to make to other parties. He clearly has forgotten, because each month we sent to him a list of payments to be made the succeeding month; and they would have from a week to ten days in their possession a list of our payments to be made, which they would pay from our cash account and charge up to us—payments to other merchants in New York for indebtedness to them.

By Mr. PUGH:

Did you state it in the form that you were not making any payments in New York, except through them?

A. No, sir; I could not because I was buying generally in the market. He has clearly made a mistake there, and, furthermore, in this exhibit here—these two papers that he says are mine; one of them states a merchandise indebtedness of over $100,000, and that is more than the indebtedness to them, so that he has clearly made an error. This indebtedness was owing then, but it did not accrue until subsequently. There was an indebtedness in New York, admitted on this paper, of $307,500.

By Mr. PERRY:

That was in 1866?

A. June 1st, 1866. I only want to draw that distinction; that he has forgotten some of the little points in that way.

By Mr. PUGH:

A statement of all the payments that were made by Stewart & Co. for you, or your account—was that paper, or a copy of it, ever sent to you or shown to you?

A. No, sir.

236 Q. These accounts that purport to be taken from the books of Stewart & Co.; were they ever shown to you?

A. I cannot tell. They may have come in the statements that they have rendered to us.

Q. But, in this form? They purport to be transcribed out of their ledger?

A. No, sir; it is not customary to do that.

By Mr. JORDAN:

Will your books show the amount of money that you sent to Stewart & Co., from June 1st, 1866, up to the end of your business?

A. My books ought to show every dollar that A. T. Stewart & Co. paid out for us, if my bookkeeper kept them properly, and I suppose he did; and the letter-book will show the letters and notes sent on for payment.

By Mr. PUGH:

Were you ever advised by them of this entry made in their merchandise account on the 4th of January?

A. That was January, 1868—No, sir.

Q. Did they ever send you a copy of it, or notify you of any such application of that fund?

A. No, sir; that was after I ceased intercourse with them in a business way. I don't remember that they sent me a full account in 1868. I may have received such account in detached portions, from time to time, but never in that shape.

Q. Was that document rendered to you as an account stated?

A. I don't remember as ever having received it. It would not be apt to come in that form, because it would not all be there.

Q. Did they ever render you a final account?

A. In 1868?

Q. Yes.

A. Never to me; at least I don't remember of ever receiving it.

237 Cross-examination by Mr. PERRY:

If I get your language correctly, you authorized Mr. Turner to say to Mr. Libbey, that if he would furnish you with those goods, you would pay him right along. Is that it?

A. Yes, sir.

Q. What meaning had you in mind, and what meaning would it convey to a merchant—he furnishing the goods, and you furnishing the cash right along?

A. It would mean the remittance of a corresponding sum at once.

By Mr. PUGH:

At once, or in thirty days?

A. It was necessary in my business that I should have those goods. It was necessary to help to sell the goods there was a profit in. I was doing a very large business, and there was a great deal of talk about me at that time. The market had broken down and we were all losing money, and I was losing money, and it was known in the market that business generally was bad, and I told Turner to say to Libbey that if he would send me the goods I would send him the cash.

Q. In thirty days, or on receipt of the goods?

A. No, sir; it meant to send it right along.

By Mr. PERRY:

That if he would let you have the goods you would send him the cash right along?

A. Yes, sir. "Tell Mr. Libbey that if he will send me those goods I will send him the money right away."

Q. Right away or right along?

A. Right off—that is what it meant.

By Mr. JORDAN:

That he would get his money?

A. That he would get his "spondulicks."

By Mr. COLLINS:

That is an expression that you do use?

A. Yes, sir.

Q. (By Mr. PERRY.) When he came to see you, if I understand you correctly, you told him that you had sent him the $10,000, and the $48,000, to be applied on the note?

238 A. I don't know that I separated the amounts; I told him that I had sent the balance on the note.

Q. He told you he would not apply it on the note?

A. He did.

Q. But he would apply it on open account? I am repeating what I understood to be your language?

A. I think he stated that he had left orders to have it applied on my open account.

Q. If I understand you, you do not recollect of having made, at that interview, any reply to that beyond that?

A. No, sir; I did not, more than to express my surprise, as I have stated. I was astonished at his position, that he had said that. It took me aback; it surprised me. I told him almost in the first of the conversation, that, with the great pressure upon me, I was obliged to succumb and that I had been disappointed in my own position, supposing that I was stronger than I was.

Q. Did that take place then?

A. Yes, sir; at that time.

Q. Did he say that to you?

A. When Mr. Libbey first came in up stairs with me, I gave him some reason for my failure. It was but just that I should, and I briefly recounted the troubles that I had been through, and that I had been forced to yield. Then I remarked to him, "but I have sent your loan—your money;" and then was the time he said to me immediately, "I won't take it—we won't receive it;" and after a few remarks he told me that he discredited my statement.

Q. He told you he would apply it on open account?

A. Yes, sir.

Q. And, as I understand you, you do not recollect of having said anything in reply to that statement of his at that interview?

239 A. No, sir; I did not. Let me correct myself. I don't think he said he would apply it on open account, but that he had left instructions at home to apply it on open account; implying that it came in his absence.

Q. And to that you made no specific reply?

A. No; only I may have said it would knock me endways. I was knocked endways about that time.

Redirect examination by Mr. PUGH:

You did not assent to any change?

A. No, sir.

Q. Did you give him any reason why you desired the application of the money on that mortgage note?

A. I will state in answer that I have already answered that same question.

Q. I know you did state it in chief, but I don't think you stated whether you told Mr. Libbey so?

A. I have answered it definitely. It is there (referring to the testimony).

Q. Repeat it. Did you in that conversation state any reason, and if any, what was it, to Mr. Libbey, why you wanted the money applied on the mortgage note?

A. I told him I wanted to leave my property unincumbered.

L. C. HOPKINS.

Deposition of WILLIAM LIBBEY, who, on being recalled, and examined on the part of the defendants, testified as follows:

Q. Did the firm of A. T. Stewart & Co. have any correspondence, by letter, with any person or persons in Cincinnati relative to the debt due the firm by L. C. Hopkins & Co.?

A. They did.

Q. With whom?

A. With our lawyers there, Thompson & Nesmith.

Q. With any one else?

A. I think not; I don't remember any one else.

240 Q. Did A. T. Stewart & Co. keep copies of the letters on their part in that correspondence?

A. As far as I know, they did.

Q. Have A. T. Stewart & Co. still copies of those letters?

A. I presume they have.

Q. Will you produce those copies?

Counsel for A. T. Stewart & Co. proposes to show here, by this witness, that all communications of the kind referred to, with Thompson & Nesmith, were made to them in their professional capacity as attorneys and counsellors at law, in the employ of A. T. Stewart & Co. as such, and therefore all communications to and with them were and are privileged.

Counsel for defendants insist upon an answer to the question.

Counsel for the plaintiffs directs the witness not to answer the question until he has examined him upon the subject referred to, to show that the communications are and were privileged.

Question repeated.

A. Under advice of counsel, I decline to answer as to these privileged communications.

Q. Have you with you the copies kept by A. T. Stewart & Co. of the letters that have been spoken of?

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(Inquiry objected to by counsel for plaintiffs, as referring to or calling for privileged communications.)

Q. Mr. Libbey, did you have a man in your employ, in *in* the years 1867 and 1868, by the name of Merritt?

A. Yes.

Q. In what capacity?

A. He was an assistant—a writing assistant in the office.

Q. Do you know where he is now?

A. I do not.

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Q. You reside in the city of New York, sir?

A. Yes, sir.

Q. Your business is a merchant?

A. Yes, sir.

Q. Of what firm are you a member?

A. Escher & Co., of New York, who are creditors of Lewis C. Hopkins & Co.

Q. When did that firm first sell goods to L. C. Hopkins & Co.?

A. They sold him in 1867, on the 11th of September.

Q. Had they sold him any previous to that, sir?

A. Yes; three times before that.

Q. Now, what was the date of the last sales to Hopkins, or L. C. Hopkins & Co., previous to September, 1867?

A. It was in February, 1864; on the 12th of February, 1864.

Q. What was the amount of the bills you sold him at that time, and previous to that time?

A. The last time—on the 12th of February, 1864—was $608.59, and the previous sale was $3,332.94, on the 6th of February, 1864.

Q. Any other sale about that time?

A. Yes, sir; one on the 5th of February, 1864, of $4,338.51.

Q. During the interval between February, 1864, and February, 1867, you did not sell him anything?

A. Nothing at all.

Q. What was the date of this sale in 1867, in September?

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Q. Repeat it. Did you in that conversation state any reason, and if any, what was it, to Mr. Libbey, why you wanted the money applied on the mortgage note?

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Q. During the interval between February, 1864, and February, 1867, you did not sell him anything?

A. Nothing at all.

Q. What was the date of this sale in 1867, in September?

A. On the 11th of September.

Q. Now, state the circumstances attending that sale. Who called upon you at the time, in reference to this purchase by Hopkins & Co., in September, 1867?

A. Mr. Hopkins himself, on September 11th, 1867.

243 Q. Now state what he said to you at that time—what purchase he desired to make, and what he said with regard to his position and condition?

A. He selected his goods. I told him it was rather a large amount, and I should like to have some references. He says, "well, you can go and see A. T. Stewart & Co., and Jaffray & Co., and Claflin & Co., and," says he, "they will tell you all about me."

Q. Did he say anything himself as to what property he owned?

A. Yes, he did; he said he had $100,000 in his business, and $200,000 outside of his business in real estate, unencumbered.

Q. What was the amount of the purchase which he proposed to make; what was the amount of the bill?

A. $68,000. It was $68,427.

Q. Did you go to A. T. Stewart & Co.'s?

A. Yes, sir.

Q. Who did you see at A. T. Stewart & Co.'s?

A. Mr. Hardenbrook.

Q. Tell the court who Mr. Hardenbrook was?

A. He was the credit clerk. I knew him personally, and that was the reason I called on him.

Q. How long had you known him?

A. About three years.

Q. What did you ask Mr. Hardenbrook?

A. I asked him if he knew anything about Mr. Hopkins. He told me he did; I told him it was rather a large amount he was purchasing. He says, "well, Mr. Hopkins owes our house now over a hundred thousand dollars for goods. Mr. Stewart is in Europe, and he left instructions to sell him anything he might want."

Q. Can you state what your question to him was?

A. Well, I distinctly asked him if he could tell me anything about the standing of Mr. Hopkins.

244 Q. Did he say anything in regard to any security which Stewart & Co. had for the $100,000, or any other debt which was due by Hopkins to them?

A. Not a word.

Q. Did you sell that bill of goods to Mr. Hopkins?

A. Yes, sir.

Q. Now state whether you sold that bill of goods on the recommendation which you had received?

A. It decided me mainly to do it.

Q. Have they ever been paid for?

A. No; not a cent.

Q. If you had known or had been informed that A. T. Stewart & Co. had the mortgages for $100,000 on the real estate of L. C. Hopkins, what would have been your course with reference to the proposed purchase?

A. I would not have sold it.

Q. With reference to this Mr. Hardenbrook, how long had he been in the employment of A. T. Stewart & Co., according to your knowledge of him?

A. I could not tell.

Q. How long had you known him to be there?

A. Oh, I suppose ten years. I could not tell exactly.

Q. Were you present at the examination of Mr. Hardenbrook by A. T. Stewart & Co., before the notary in New York?

A. Yes, sir.

Q. Did you recognize that person, then examined, as the person who was in A. T. Stewart's store, who had made to you that statement?

A. Yes, sir.

Q. Where did you first become acquainted with him?

A. I first became acquainted with him going up North River on a steamboat.

Q. Where did he reside, and where did you reside?

A. I resided in Dobb's Ferry during the summer, and so did he; I sat on the upper deck of the steamboat, and we commenced conversation together; I never knew him before; we got acquainted
245 in that way. He told me he was with Mr. Stewart, and what his business was; he was the credit clerk.

Q. You said he said he was the credit clerk, and you knew him to be such from your intercourse with Stewart's store; what is a credit clerk, Mr. Doerler?

A. To find out the standing of customers.

Q. To find out the standing of customers? Is it a principle in trade, in New York, for merchants to enquire of other merchants as to the standing of parties by applying to the credit clerks? Are they known in business, in New York, as the persons from whom such information is to be obtained?

A. Certainly, if the principal is not present. If Mr. Stewart had been there himself, I might have gone to Mr. Stewart. Mr. Stewart being in Europe, I went to the credit clerk.

Cross-examination:

Q. Where was Mr. Libbey when you went there?

A. I did not know Mr. Libbey, personally; I knew there was a Mr. Libbey in the house, but I did not know him.

Q. Did you see him there?

A. Not that I recollect. There was a gentleman there, but I don't know whether it was Mr. Libbey.

Q. Was he in that general office where Mr. Libbey had his business?

A. It was the office towards the park in Mr. Stewart's office.

Q. You did not enquire for Mr. Libbey, and did not see him?

A. No.

Q. Mr. Stewart, you was informed, was absent?

A. Yes, sir.

Q. Hopkins also referred you to Jaffray & Co., and Claflin & Co.?
246 A. Yes, sir.

Q. Did you enquire of either of those houses?

A. I went to Mr. Jaffray's, also. He spoke very highly of him. He repeated exactly what Mr. Hopkins had said to me; that he, Hopkins, had $100,000 in the business, and $200,000 outside, on unincumbered real estate; and therefore it was only a repetition of what Mr. Hopkins had said.

Q. You saw Mr. Jaffray himself?

A. Yes, sir; I saw him. I saw Mr. Jaffray himself.

Q. You never went to Claflin's?

A. No, sir; I didn't care about going there for information; I didn't have much faith in them; I had the most confidence in the first statement I heard.

Q. You learned they were all selling him freely?

A. Oh, yes; they laughed at me when I spoke of $68,000 being a large amount to sell to Hopkins.

Q. Don't you know it to be a fact that the New York merchants, in that line of business, were selling Hopkins freely?

A. Certainly.

Q. Did you not ascertain that fact?

A. Yes, sir.

Redirect examination:

Q. Do you know whether Mr. Stewart was absent in Europe at that time?

A. I did not know it until Mr. Hardenbrook told me.

Q. Do you remember when he returned?

A. Yes, sir.

Q. About when?

A. He returned in the Scotia, on the 2nd of October, I believe.

247 EGBERT A. THOMPSON, being called as a witness, testified as follows:

Q. Look at the letters handed you, and state if you received the same from A. T. Stewart & Co.?

A. I did. The letters are offered in evidence by defendants, and make part of my testimony.

Q. How did you receive them?

A. A part of them through the post-office, and Mr. Prothero brought one to the office in person.

Q. Who is Mr. Prothero?

A. He was the accountant of Stewart & Co., and he came here to examine the books of Hopkins & Co., in connection with the committee that came out at that time.

Q. The committee of which Mr. Phillips was chairman?

A. Yes, sir.

Q. How long had you been acquainted with Stewart at that time?

A. Some fifteen years; and we had charge of all Stewart's western business.

Q. Have you been in Stewart's establishment, and are you familiar with it?

A. Yes, sir; I knew it formerly. I knew the down-town store.

Q. Did you know how it was divided?

A. Yes, sir; I have looked through the store and counting-room and sales-rooms, and saw how they were divided.

Q. Do you know this Mr. A. C. Merritt?

A. I suppose I knew him; I don't remember him. There was a room off of Mr. Stewart's, where the correspondence was generally done.

Q. Did you get letters from Stewart & Co., signed by Mr. Merritt?

A. Yes, sir; most all of them were signed by him.

Q. Would you know his handwriting?

A. Very well, I think.

248 Q. Look at this document, being letter of Jan. 20, 1868, from A. T. Stewart & Co. to Thompson & Nesmith, and tell us in whose handwriting the body of it is?

A. In Merritt's, I think.

Q. In whose handwriting is the signature?

A. I think that is Mr. Libbey's. Mr. Libbey wrote a peculiar hand.

Q. Did you see Libbey here on the 2nd day of Jan., 1868?

A. I did.

Q. What time in the day did you see him first?

A. I think he came to my office about 10 o'clock in the morning. He came into the office and told me he wanted me to go with him. He had a carriage there, and I went down with him to the street, and he put me in the carriage and told me to drive to the court-house. I told the driver to go there.

Q. This court-house, here?

A. Yes, sir; and on the way up he took a package of papers out of his pocket, containing ten mortgages, all given to secure a note of $100,000.

Q. Did you see the note?

A. No, sir; he said the note was in New York. He was excited, and he excited me considerably. He said something was going to happen, and he wanted to go to the court-house as soon as possible.

(Plaintiff's counsel object to any proof of this conversation on the ground of its being privileged.)

Q. What did he tell you was going to happen? Out with it; let us have the whole story.

A. He said he feared some trouble with Hopkins.

Q. What mortgages were those he showed to you?

A. They were signed by L. C. Hopkins and his wife to A. T. Stewart.

Q. The conversation related to those papers?

A. Yes, sir. I had not time to examine them; we were driving rapidly.

249 Q. Tell us what he said on the way up?

A. He said something was going to happen; Hopkins was going to fail. That is my impression that that was his language.

Q. Tell us, as near as you can remember, what he said.

A. That Hopkins was going to fail, or something was going to happen to him. He led me to believe he was in a shaky condition.

Q. What did you do when you got here?

A. I never opened the mortgages at all; I had not time to examine them. I took the packages and opened one of them, and found they were each for $100,000. I asked him about it, and he said there was a note of $100,000 secured by those ten mortgages. I believe I did not pass a very complimentary remark upon the person who drew them up. I did not notice at first that they did not have any stamps on. I handed them to the recorder, and I believe Mr. Reese found that fact out when he came to record them. We had a little private conversation—Mr. Reese and myself—and I think Mr. Libbey did not hear that.

Q. What did you and Mr. Reese agree to do?

A. I wanted the mortgages recorded, and they had no stamps on them; and he was not allowed by the internal revenue law to record them without stamps; and I made a private bargain with him, that the mortgages should be filed as at that moment—half-past 10 o'clock, or whatever time it was—and that he should record the mortgages before they were certified as having been recorded, and I was to bring the stamps there and put them on.

Q. Did you get the stamps?

A. I told him I did not want to take the mortgages away from the recorder, and Mr. Reese agreed to mark them filed, and we were to go down town and get the stamps, and we found we could not get any stamps of that size in Cincinnati. They were all small stamps. There was nothing but $5 and $10 stamps.

250 Q. How much did you want?

A. We wanted $1,000 in stamps.

Q. Why?

A. There were ten mortgages for $100,000 each. I told him he could do as he pleased. He told me the note was not stamped.

Q. Who told you?

A. Mr. Libbey. He said the note was not stamped. I asked him, and he told me he thought it was not stamped. I told him that it wanted a stamp for $1,000; that a stamp for $100 might do. There might be a question about that, however. If he wanted to be on the safe side, he could put a $100 stamp upon each of these mortgages. I told him I would not take the responsibility, and the recorder told him he would not record them unless they were stamped. The note was not here. We could only get, I think, three $50 stamps in Cincinnati; we went everywhere.

Q. Where did you go for them?

A. We went to both the collectors' offices, and to all the places where they sell stamps. The banks had only a few dollars' worth.

Q. Where did you get the money to buy them?

A. He then drove me down to Shillito's, and went in and got $1,000, and came out, and we went to buy the stamps. We took it down and left it with Len. Harris, and he sent for the stamps.

Q. Where?

A. To Washington.

Q. How long did Libbey remain here? Did you put the stamps on the mortgages?

A. No, sir; Mr. Libbey went home late that night. I think he came to my office two or three times in the afternoon, and then in the evening he came there, and we had a long talk. He exhibited all his claims against Hopkins, and wanted me to go over to Covington and get
251 out an attachment against his Covington property. I had left the ten mortgages, for $100,000 each, and I supposed they were all on Cincinnati property, and so did he; but it turned out, afterwards, that Mr. Reese told us three of them were on Covington property, and he sent them back because they were on Covington property; but that night, before Libbey went home, he came to my office and wanted me to attach the Covington property of Hopkins that night before I went to bed. I told him it would be very difficult, but if he insisted upon it, I would do it.

Q. Why did he want to do it that night; what reason did he give?

A. He wanted to get ahead of everybody else.

Q. What did he say about Hopkins?

A. His general impression was that Hopkins had failed.

Q. Did he say he had failed?

A. I am not certain about that. My impression is that he said he was about to fail, or was going to fail. He may have said he had failed; I am not certain but that he did. He had been up to Hopkins' all day, and came back in the evening, and I am not certain but he did say he had failed, or would fail to-morrow, and he wanted the attachment in Covington made that night. He had a claim for $170,000, I think, and I told him that was too big a claim—he would have to give a bond for double the amount, as they require a bond where a man is a non-resident. We separated the accounts—my clerk and all of us went to work and separated the accounts of one month, and we took the merchandise account of some particular month.

Q. November, the record shows?

A. I have forgotten the month. We took that out of the balance of the accounts against Hopkins, and then I went over to Covington and

got Governor Fisk, and made out the papers, and got the clerk up, and got the attachment issued, and got the sheriff and got it levied
252 that night, and gave a bond of double the amount—perhaps $50,000. Mr. Fisk and the clerk and myself went on the bond.

A. You got the sheriff waked up before daylight?

A. I didn't see it levied, but the sheriff told me that he would have it levied.

Q. Was this done by Libbey's instructions?

A. Yes, sir; certainly it was.

Q. When did he leave for New York?

A. That night he went right off to New York on the evening train.

Q. Do you know what time Mr. Libbey arrived here?

A. He came in on the morning train and went back that evening. He was here one day.

Q. When did he leave New York?

A. I don't know what time he left New York, but he came here on the morning train, and had just gone to the Burnet House and brushed the dust off and got breakfast and came right over.

Q. Do you know what day it was?

A. It was the 2nd of January, 1868. The mortgages are marked on the back, "Left for record five minutes after twelve."

Q. What do you know about that?

A. My impression is that I had been up to court, and he had been in the office before I came back; and he was very particular that I should attend to the business. He didn't want Brother Nesmith, my partner, to know it.

Q. Did he, in his conversation with you in the afternoon of that day or evening, when he was urging you to take out this process of attachment in Kentucky, tell you anything upon the subject of the mortgages; whether or no they had been paid?

A. There was a good deal said about the mortgages. He read a letter here about the application of payments, and wanted to know all the facts about that. He told me there was a $10,000 and a $48,000
253 payment, and there was no application made by Hopkins. He said Hopkins had made no application. I told him if a man paid a debt and made an application he had a right to do it, if he did it all at once; but if he sent a part of a debt, and then sent some more, and did not make an application, he might go home and make it himself.

Q. Did he say anything about entering it on the books?

A. He said he did not know whether the entry had been made on the books or not, but if it had not been made he would make the application on the merchandise account.

Q. I believe it is stated in one of the letters read by Mr. Jordan that you made some examination of the records as to the state of Mr. Hopkins' property; did you make such an examination for Mr. Libbey?

A. Yes, sir, I did; he said he wanted to have Hopkins' matters unearthed from the beginning, and he wanted a memorandum of every deed, mortgage, and conveyance from and to Hopkins from 1860 to that date.

Q. Is that the memorandum that is referred to in that letter?

A. Yes, sir. I spent a good deal of time in the recorder's office, and hired a young man, who worked two nights, I believe, to help me to get it done in time. He wanted it there before the meeting of the creditors; and by sending it by express he got it there in time.

Q. When did you make your examination?

A. The next day after he was here; I went right at it. He knew

there was going to be a meeting of the creditors, and he wanted it to get there before the meeting of the creditors, so that he could be posted and know how to act. That is the reason we had to work all night to get it done.

254 Cross-examination:

Q. Was that young man Mr. Reese's son that you employed?

A. I don't know who he was; I don't remember; it was some young man.

Q. Some one in the office, so you think?

A. I think so; but I am not certain of that.

The following letters from A. T. Stewart & Co. to Thompson & Nesmith are those mentioned in the foregoing testimony of E. A. Thompson:

NEW YORK, *Jan.* 4, 1868.

Messrs. THOMPSON & NESMITH, *Cincinnati, O.:*

GENTS: This will be handed you by Mr. Robert Prothero, our accountant, who is now in your city investigating the accounts of Mr. L. C. Hopkins. He may need your advice on our behalf; please confer with him to the fullest extent, and oblige,

Yours truly,

ALEX. T. STEWART & CO.,
Per HENRY HILTON.

NEW YORK, *Jan.* 7, 1868.

E. A. THOMPSON, Esq., Messrs. THOMPSON & NESMITH, *Cin.:*

DEAR SIRS: We return you memorandums of deeds and mortgages by and to Mr. H., but which, of course, we can get no information from, as they don't designate the pieces of property they affect. We should like to have, at your earliest convenience, a statement showing the condition of each piece of property on which we have a mortgage, adding your estimate of its value and a brief description of its character. We have not yet heard from Mr. H., and depend upon your
255 good judgment in dealing with him, so as to be able to report to us anything which you may consider interesting to us.

We are, dear sirs, very truly yours,

A. T. STEWART & CO.

Please address your letter on this subject, as heretofore, to our Mr. L.

NEW YORK, *Jan.* 8, 1868.

E. A. THOMPSON, Esq., *Cincinnati:*

DEAR SIR: A meeting of the creditors of L. C. H. & Co. was held to-day, and the action taken was merely the appointment of a committee of three to visit Cincinnati and make an examination of the books. Mr. Thos. M. C. Paton was chairman of this committee, and the party leave to-night for Cincinnati, in company with Mr. H. Please keep us advised all you can. We telegraphed you to-day, "if mortgages are for payment of note alone, withdraw them and return stamps to collector, getting money for them," which we explain as follows: If the mortgages in question are for the payment of the $100,000 note, of which you are aware, and hence will not need to be recorded, we wish to have the

money refunded to us which was paid for stamps, as the payment has been completed on this note.

Very respectfully, etc.,

A. T. STEWART & CO.,
By A. C. MERRITT.

NEW YORK, *Jan.* 11, 1868.

Messrs. THOMPSON & NESMITH, *Cincinnati, O.:*

DEAR SIRS: On looking at our mortgages you will find, we think, that they are given expressly for the payment of the note; we wish it was otherwise, and yet if your courts have decided that a debtor has not an absolute right to appropriate payments to specific debts, we would like very much to know it. Here our courts have held uniformly,
256 we understand, in favor of the debtor's right to do so, without reference to the consent of the creditor. We certainly will never agree to apply the remittances on the mortgages if we can be sustained by your courts in our refusal. As this is an important point, please give us full information respecting it, referring us to the authorities considered favorable. Meanwhile allow the stamps and mortgages to remain as Mr. Libbey left them, if they can be so postponed without injury to our interests and without jeopardizing our right to repayment for stamps not used.

Very respectfully, etc.,

A. T. STEWART & CO.,
By H. H.

NEW YORK, *Jan.* 20, 1868.

Messrs. THOMPSON & NESMITH, *Cincinnati, O.:*

GENTLEMEN: We have to thank you for your favors of the 11th and 16th inst. Mr. Prothero was mistaken in the manner in which Mr. H. made his various payments on the note. Each was accompanied by a letter directing the specific application of the amount enclosed, and in each instance, except the last two of $10,000 and $48,000, we assented to its being so applied by crediting that amount on our books, and our subsequent account rendered showed that we had so applied the money. The payment of $10,000 was on Dec. 31st, 1867, and which we declined to apply as requested, same as the payment of $48,000, Jan. 2nd, 1868, both of which Mr. Libbey, on arriving in Cincinnati, informed Mr. H. we would not apply on the note, but would apply it to his cash and merchandise account, past due. Therefore, if your courts will hold that, as these payments were not sufficient to discharge the debt or the note with interest, we were not obliged to apply them as directed, it seems to us we are in quite a favorable position. In addition, we notice that the note was for $100,000, payable to order of A. T. Stewart &
257 Co., and the mortgages, we think, were given to A. T. Stewart individually. Please look to this fact, and see whether anything in our favor can be made out of it, the money having been sent to the firm. We understand that the committee will report favorable to accepting Mr. Hopkins' proposition, but we have not, as yet, signified our views. Of course their plan assumes that we will relinquish the lien of our mortgages, and whether we will or not depends upon the advice we may have from you. As yet we have not had an opportunity of consulting Mr. Prothero but very generally on this business, but expect to do so this afternoon.

Yours truly,

A. T. STEWART & CO.

Messrs. THOMPSON & NESMITH, *Attorneys, Cincinnati, O:*

NEW YORK, *Jan.* 25, 1868.

GENTS: We have yours of the 22nd inst., and regret that we cannot feel the confidence in our position that you seem to indicate, it always having been our understanding of the law that a debtor had an absolute right to have his payments applied as directed; and if a creditor accepts and retains money thus paid, he cannot afterwards apply it otherwise. Our counsel here advises us that the law on that point is not varied by the case in 11th Ohio Reports, to which we have been referred; and, besides, we have so long understood and acted upon the law as we have stated it, that we hesitate entertaining or acting upon any other view. What course we shall adopt, under all the circumstances, we have not finally decided upon, although we have not objected to H. understanding that we did not regard the note as unpaid, or the mortgages as outstanding. We are informed he has so stated at the meeting of the creditors; and thus we are, it seems, left to such reliance as there may be, if any, upon our attachment in Covington, of which we would like to be informed as to its grounds, conditions, etc., and whether, if Hopkins should go into bankruptcy, the
258 attachment would be regarded as a prior lien to that of other creditors. You have never informed us as to whether the stamps on the mortgages have been canceled, because, if they have not, we wish you would send them to us uncanceled, that the value of them may be saved, at least. The mortgages, also, send us when obtained from record, leaving the attachment suit to stand as it is until further advised.

Respectfully yours,

A. T. STEWART & CO.

P. S.—Withdrawing our stamps will not, as we understand it, affect the mortgages, because the note we hold, and which they were given to secure, being stamped, there probably was no absolute necessity for stamping the mortgages at all.

A. T. S. & CO.

NEW YORK, *June* 27, 1868.

Messrs. THOMPSON & NESMITH, *Cincinnati:*

DEAR SIRS: We have your favor of 25th inst., and note from it that the case against Crane & Breed cannot now be tried till your October term. This is most provocative after the trouble and delay which we have all been subject to in order to bring it to its present ripe state. What is the purpose of the defendants regarding this and similar suits? Do they show no disposition to meet the responsibility, and thus avoid the cost of further litigation? And what is about the amount of the various claims against them upon this business now in suit?—you never informed us. L. C. Hopkins & Co., regarding this matter we supposed, of course, it was by collusion that he was put into bankruptcy. Before being able to direct what to do in the matter we must have the mortgages sent us which were left for record. Please do this, and meanwhile have the motion postponed. Hopkins having left the country, we should be allowed time to examine him on the subject of collu-
259 sion, etc. Our recollection is that our mortgages covered the Kentucky property.

Very respectfully, etc.,

A. T. STEWART & CO.,
By A. C. MERRITT.

NEW YORK, *July* 3, 1868.

Messrs. THOMPSON & NESMITH, *Cincinnati:*

DEAR SIRS: We have your favor of 1st inst. We trust you will be able to show that Hopkins procured the petition in bankruptcy to be filed against him, as we have not the slightest doubt that such was the fact. Respecting the mortgages, we want them. We have for some time desired them for examination, so as to determine upon the course we should pursue. We have no copies of them, and you do not need the originals for any purpose, the records being at all times accessible. Please forward them. As to any proceedings by the assignee in bankruptcy, we will, on receiving and examining the mortgages, at once make up our minds whether we will not take the aggressive instead of awaiting his action. Please do not appear for us, or give any facilities for speeding the proceedings of the assignee, in the event of any suit being commenced; but do not fail to advise us forthwith on anything being done.

Very respectfully, etc.,

A. T. STEWART & CO.,
By A. C. MERRITT.

NEW YORK, *July* 11, 1868.

Messrs. THOMPSON & NESMITH, *Cincinnati:*

DEAR SIRS: We have your favor of 7th inst., enclosing the Hopkins mortgages. We return herewith the three Covington mortgages to be recorded at once. We think this should have been done before. We perceive that the stamps have been returned, and the amount paid for them refunded. We were not before aware of this, and we would
260 be pleased to have an account of the matter. It was a mistake originally to suppose that the mortgages needed stamping—the note having a stamp of a sufficient amount. Upon these Covington mortgages being recorded, please return them to us.

Very respectfully,

A. T. STEWART & CO.,
By A. C. MERRITT.

JULY 17, 1868.

Messrs. THOMPSON & NESMITH, *Cincinnati:*

DEAR SIRS: We have your favor of 15th inst., and we are pleased at the result stated. You say that the court decided as you claimed. Did the court pass upon the question of applicability of payments, or only upon our right to attach, as creditors of a non-resident?

Very respectfully, etc.,

A. T. STEWART & CO.,
H. H.

Deposition of ABRAHAM C. MERRITT, of lawful age, who being first duly examined, cautioned, and solemnly sworn, deposeth and saith as follows, viz:

I reside in New Jersey, and do business in this city. I am an attorney at law; my office is at 41 Pine street.

Q. What was your business or occupation in December, 1867, and January, 1868?

A. I was a clerk in the office of A. T. Stewart & Co.

Q. How long were you a clerk there?

A. About two years altogether.

Q. From what time to what time?

A. I left their employment in December, 1868, and I entered it in May, June, or July, 1867, I think.

Q. Where was the office—in what building—in which you were employed?

A. I was employed in what is called the down-town office, corner Chambers street and Broadway.

261 Q. Is or is not that the place of business of the wholesale department or business of A. T. Stewart & Co.?

A. It is.

Q. As clerk for A. T. Stewart & Co., what was your particular employment?

A. My particular employment was legal correspondence, and some things relating to the collection of debts by law.

(The witness here desires an entry on the record that his voluntary attendance here is by consent of both parties, to avoid the trouble of a subpœna; otherwise he would not have attended.

The counsel for the plaintiffs desires it to appear on the record that he never was asked to give and never gave his consent that the witness should appear; he does not, however, object to the witness attending without a subpœna, and, for convenience, he has no objection to waiving any form of that kind.

The examination of the witness was then continued on the part of the defendants.)

Q. Were copies taken and preserved of the letters written by you in the correspondence you have mentioned? If so, state in what manner such copies were taken, and how they were preserved.

A. Yes; they were taken and preserved in the usual manner, by duplicate impressions being taken by means of a press, and preserved in a book.

Q. Will you look at the papers now shown you, and marked A, B, C, D, and E, and say from inspecting them whether you are able to recollect the writing of the letters, of which these papers purport to be copies, or letters the same in substance and effect?

(Question objected to by counsel for A. T. Stewart & Co., it appearing that the assumed copies of the letters referred to appear to have been written to E. A. Thompson, or Thompson & Nesmith, of Cincinnati, Ohio, who, Mr. Libbey testified, were the employed attorneys

262 and legal advisers of A. T. Stewart & Co., at Cincinnati, all communications to whom being confidential, and not entitled to be exposed; further, that it is incompetent and improper to put papers of this length and character in the hands of a witness, and to ask him the general questions proposed, especially as the letters appear to have been written several years ago.

Answer insisted on.

(Witness declines to answer for the first ground of objection mentioned.)

Q. Do you recollect writing any letters whilst employed by A. T. Stewart & Co. in regard to the indebtedness of L. C. Hopkins & Co. to A. T. Stewart & Co.?

(Question objected to—same objection.)

Witness declines to answer on the ground of the objection.)

Q. Do you recollect, whilst employed by A. T. Stewart & Co., writing a letter, in substance and effect as follows: "A meeting of the creditors of L. C. Hopkins & Co. was held to-day, and the action taken was merely the

appointment of a committee of three to visit Cincinnati and make an examination of the books. Mr. Thomas M. C. Paton was chairman of this committee, and the party leave to-night for Cincinnati, in company with Mr. Hopkins. Please keep us advised all you can. We telegraphed you to-day, 'If mortgages are for payment of note alone, withdraw them, and return stamps to collector, getting money for them'—which we explain as follows: If the mortgages in question are for the payment of the $100,000 note, of which you are aware, and hence will not need to be recorded, we wish to have the money refunded to us which was paid for stamps, as the payment has been completed on this note"?

(Same objection as before.)

A. I decline to answer, on the first ground of the objection.

263 Q. Did you write a letter, the substance of which I have just stated, on the 8th day of January, 1868?

(Same objection, and also that the question is leading.

Answer insisted on.)

A. I decline to answer.

A. C. MERRITT.

The defendants, having offered the foregoing testimony, rested, and the plaintiffs offered and read in evidence the following deposition:

The deposition of BENJAMIN C. HARDENBROOK, who, being sworn on behalf of plaintiffs, said:

I am employed in the credit office of A. T. Stewart & Co., having general charge of investigation of credits therein and revision of the information obtained, and reporting it to Mr. Libbey, one of the partners, with my opinion.

Q. How long have you held your present position?

A. Since the beginning of 1866.

Q. Where has been your business office located during that time?

A. On the first floor of the building or warehouse corner of Broadway, Reade, and Chambers streets, in the city of New York. Prior to August, 1869, my office was on the Reade-street side; since that, on Chambers-street side, about two hundred feet distant from the former office.

Q. Do you know James Doerler? If so, how long have you known him by sight?

A. I have known Mr. Doerler, now present, some three or four years. I didn't know that his name was James Doerler.

Q. Did Mr. James Doerler, now present, in or about the month of September, 1867, call upon or converse with you respecting Lewis C. Hopkins or Lewis C. Hopkins & Co., of Cincinnati, as to responsibility or otherwise?

264 A. He may have called upon me, but I never saw Mr. Doelrer upon that business.

Q. Or any other?

A. Nor any other business, in the store or anywhere.

Q. Did you ever, at that time or at any time, say to Mr. Doerler that Mr. Hopkins owed the house—meaning A. T. Stewart & Co.—over $100,000 for goods at that time; that Mr. Stewart was in Europe, but had left instructions to sell Mr. Hopkins anything that he wanted?

A. I never did.

Q. Did you ever say anything to him or anybody to that effect?

A. I never did.

Q. Have you at any time lived at Dobbs' Ferry? If so, when?

A. I have spent a part of the time there for four or five years past.

Q. Did you ever tell Mr. Doerler that you was the credit clerk or gentleman in the store of A. T. Stewart and Co.?

A. I never told him I was the credit gentleman. I may have said that I was the credit clerk, but have no recollection of it now.

Q. Did Mr. Doerler ever call upon you, to your knowledge, at the store of A. T. Stewart & Co., to enquire respecting the responsibility of any person?

A. Not to my knowledge. He never did during the period I have stated that I have known him—four or five years.

Cross-examination by Mr. DAYTON:

What is your age?

A. Thirty-two.

Q. Where do you live?

A. New York City.

(Question repeated.)

265 A. Age, 32; residence, New York City. Do you wish the street and number?

Q. Where do you live?

A. 258 West 21st street, New York City.

Q. Do you keep house?

A. The house keeps me. I am a single man, and board.

Q. What is the name of the person with whom you board?

A. Miss Maria Pope, an English lady of some sixty odd summers. My father and mother board in the same house with me.

Q. According to your best knowledge and recollection, where were you born?

A. In Chambers street, New York City.

Q. How long have you been in the employment of A. T. Stewart & Co.?

A. Since the first day of September, 1861.

Q. In what capacity were you first employed by that firm?

A. Revising and digesting the information obtained respecting the responsibility of their customers.

Q. What had been your employment immediately previous to your employment by A. T. Stewart & Co.?

A. In the employment of Bowen, McNamee & Co. and their successors, Bowen, Holmes & Co., for eight or nine years, investigating the standing and responsibility of their customers.

Q. When did you first go into the employment of Bowen, McNamee & Co.?

A. September 1st, 1852.

Q Had you been in the employment of any other firm previously to that?

A. Never in the employ of any other concern.

A. And you commenced your employment on the first of September, 1852, with Bowen & McNamee, investigating the responsibility and standing of their customers, did you?

266 A. I commenced the investigation of their customers about one year after I first went with them.

Q. Then you commenced the business or occupation of investigating the standing and responsibility of the customers of that house when you were fourteen years old?

A. Fourteen or fifteen; I did.

Q. What salary did they pay you for attending to that business?

A. $300, if I remember rightly.

Q. And what salary did A. T. Stewart & Co. pay you when they employed you?

(Witness asks counsel for A. T. Stewart & Co. if that is material. Counsel informs him he don't think it is, but he can do as he pleases about answering.)

A. I decline to answer.

Q. What salary did A. T. Stewart & Co. pay you in 1867?

A. I decline to answer.

Q. Have A. T. Stewart & Co. paid you any salary from the time of their first employment of you down to the present time?

A. They have.

Q. What salary do they pay you now?

A. I decline to answer.

Q. Was Mr. A. T. Stewart in Europe in the fall of 1867?

A. I wasn't in Europe at that time, and it would be very difficult for me to answer. I understood that he was, in the summer of 1867. He returned, I think, in the early part of September, if my recollection serves me.

Q. Did you spend any portion of the summer of 1867 at Dobbs' Ferry?

A. I was there at short intervals during that summer.

Q. Did you meet Mr. Doerler on your way to or from Dobbs' Ferry during that summer?

267 A. I am not positive as to that summer. Have met him either then or since, going to and returning from Dobbs' Ferry.

Q. When did you first meet Mr. Doerler?

A. I cannot say.

Q. When did you first meet him, according to your best recollection?

A. Some three or four summers since.

Q. Can you not state the time more precisely?

A. I cannot. I think I can state the place. I think Mr. Colville introduced me to him at the landing at Dobbs' Ferry.

Q. Can you not state when that was?

A. Not more definitely than I have done.

Q. Where does Mr. Colville live?

A. St. James Hotel, New York City—Mr. John Colville.

Q. Are you certain that Mr. A. T. Stewart returned from Europe in the early part of September, 1867?

A. No; as I said before, I think so.

Q. When, according to your recollection, did Mr. Stewart return from Europe?

A. In the early part of September, 1867.

Q. Can you say that you saw him in New York in the early part of September, 1867?

A. I cannot say any more than I have.

Q. How long had Mr. Stewart been absent?

A. I think he left New York about the middle of July.

Q Do you ever answer inquiries made by other persons dealing with customers of A. T. Stewart & Co., as to the standing and responsibility of such parties?

A. I do.

Q. Frequently?

A. Daily.

Q. Was that your practice in 1867?

A. Occasionally.

Q. Were you not as much in the practice of answering such questions in 1867 as you are now?

268 A. Not as much.

Q. Why not?

A. A. T. Stewart & Co. were not so willing to give the information; there were not so many inquiries made of them. The more important cases were referred to Mr. Libbey.

Q. Were you in any way prohibited, at that time, from answering such inquiries?

A. I was, to some extent.

Q. In what way?

A. The house did not, at that time, seem to be so willing to impart information as since.

Q. Do you recollect having any conversation, on any subject, with Mr. Doerler in the summer or fall of 1867?

A. I think I do.

Q. State what subject or subjects of conversation you recollect having with him.

A. The beauties of the Hudson, state of trade generally, and the condition of the weather.

Q. Do I understand you now that you recollect conversing with him upon those subjects in the summer and fall of 1867?

A. I cannot state the time, but that was the purport of all the conversation I ever had with him; that was the sum and substance of it.

Q. Have you any recollection of any conversation with Mr. Doerler in the summer or fall of 1867?

A. I cannot state the time.

Q. Can you state, from distinct recollection, the subject of any conversation which you had in the summer or fall of 1867 with Mr. Doerler?

A. I cannot state the time when.

(Question repeated.)

A. I cannot say, positively, that I had any conversation with him in that summer. The conversation, if any, was of such a general nature as not to fix itself upon my memory.

269 Q. Did you not state, only a few moments ago, that you did recollect having had conversations with Mr. Doerler in the summer or fall of 1867, the subjects of which were the beauties of the Hudson, the state of trade, and the condition of the weather?

A. Either that summer or since, I had such conversation with him.

Q. Is there any other person in the establishment of A. T. Stewart & Co. employed in investigating the condition and standing of persons dealing with the concern?

A. Several.

Q. Were there in 1867?

A. There were.

Q. State the names of the persons so employed in 1867.

A. John D. Wilson, Thomas Staunton, and others; I cannot give the names just at that period.

Q. Do you recollect what, in the summer and month of September, 1867, was the standing of L. C. Hopkins & Co. with A. T. Stewart & Co.?

A. A little uncertain.

Q. What do you mean by that? Do you mean by that that it was a little uncertain?

A. That is my recollection.

Q. Do you recollect any cause for the standing of L. C. Hopkins & Co. with A. T. Stewart & Co. being a little uncertain, or at all uncertain, in the summer and month of September, 1867?

A. Because of the reports concerning them on the streets.

Q. Do you recollect any reports concerning them on the streets?

A. I do.

Q. At what time?

A. In the spring and summer of 1867.

Q. From whom did you receive such reports?

A. I decline to answer.

270 Q. How many such reports can you state that you received?

A. I cannot say positively; two or more.

Q. When did you receive these reports?

A. In the spring and summer of 1867.

Q. Can you state, positively, that they were previously to September, 1867?

A. They were.

Q. What were they?

A. The fact that they had sold considerable quantities of goods at auction with heavy loss, and that they were striving to undersell their neighbors, were the principal ones.

Q. Are you positive that you heard those reports about L. C. Hopkins & Co. in the spring and summer, and previous to September, 1867?

A. I am quite positive.

Q. Are you as positive about that as you are of anything that you have sworn to on this examination?

A. Read the testimony through, and I will answer.

(Question repeated.)

A. There may be some facts that I am not positive about. Read the testimony through, and I will designate them.

Q. Can you not recollect what you have testified to on the stand here to-day, so as to be able to answer that question without having the testimony which you have given read over to you?

A. I might fail to remember one or two facts, it is getting so long, though I think they would be unimportant ones.

Q. And yet you are able to recollect, positively, that you did not have any conversation with Mr. Doerler in the summer or month of September, 1867, in relation to the standing or credit of L. C. Hopkins & Co. with A. T. Stewart & Co. Is that so?

A. Had any such conversation occurred, it would have been of
271 so important a character that I should certainly have remembered it, more especially as I think, at that time, I was socially acquainted with Mr. Doerler.

Q. Then it is because you think that a conversation of that kind was of so great importance that you would have recollected it if it had occurred, that you now swear positively that such a conversation did not occur?

(Question objected to by counsel for A. T. Stewart & Co. as immaterial.)

A. I should have conversed, if at all, respecting L. C. Hopkins & Co. with such caution that it, without doubt, would have impressed itself upon my memory, and can now therefore positively swear that no such conversation took place.

Q. Did you communicate to A. T. Stewart & Co. these reports which you heard in the spring and summer of 1867, that L. C. Hopkins & Co.

were underselling their neighbors and sending their goods to auction to be sold?

A. I don't think they attached as much importance to them as others did.

Q. Who is there to your knowledge who did attach importance to those reports?

A. I did myself.

Q. Any one else?

A. Those who reported them to me.

Q. And those who reported them to you, you decline to name?

A. I do; they were of a confidential nature.

Q. Did you not know that during all that spring and summer A. T. Stewart & Co. were selling and shipping large quantities of goods to L. C. Hopkins & Co.?

A. I know that they did prior to July, 1867; I cannot say that they did after that.

BENJ. C. HARDENBROOK.

272 The plaintiffs also offered and read in evidence the following letters and telegraphic dispatch:

CINCINNATI, *Sept.* 27, 1867.

Messrs. A. T. STEWART & Co.:

GENTLEMEN: We have this day drawn upon you for a few open accounts as follows, with the exception of some small sums:

Wm. C. Langley & Co	$781 40
Wm. A. Drowne & Co	1,245 09
Sorchan, A. & D	3,605 25
Cooper & Co	3,560 48
Wm. J. Peake & Co	586 00
Lathrop, Ludington & Co	14,050 36
J. M. Billings & Co	2,313 80
	$26,142 38

We are in receipt of your valued letter referring to our account, and can only say that our bills payable for November and December do not amount to over the sales of one good week, and during these months we expect to pay you almost if not the entire amount of our indebtedness. The approaching month is pretty heavy for us, but not more than our sales for two weeks, and we shall give you every dollar of surplus. We have to thank you for your uniform kindness, which we assure you is appreciated.

Very respectfully, yours, truly,

L. C. HOPKINS & CO.

CINCINNATI, *Nov.* 21, 1867.

Messrs. A. T. STEWART & Co.:

GENTLEMEN: We have to-day drawn upon you for several bills of not very large sums, to close open accounts and net bills of domestic goods. After this week we hope to send you almost our entire receipts, to be used in liquidation of indebtedness. Our entire bills pay-
273 able for December do not exceed $30,000. We may order a few goods for immediate sales; if so, please fill to best advantage. With thanks for your kind forbearance,

Yours, truly,

L. C. HOPKINS & CO.

["J. M. H.," in lead pencil.]

Telegraphic dispatch.

CINCINNATI, O., *Dec.* 1, 1867.

A. T. STEWART & CO.:

Owing to temporary absence of bookkeeper the December list of bills payable was forgotten; has been sent by mail to day; will reach you Tuesday morning. We have note due Tuesday at Metropolitan Bank for twenty-five hundred seventy dollars ninety-eight cents ($2,570.98); will send remittance Monday, and daily thereafter.

L. C. HOPKINS.

274 *Docket & journal entries.*

Sup. court, Cin'ti.

STATE OF OHIO,
Hamilton County, City of Cincinnati:

Be it remembered that in the records of the superior court of Cincinnati, county and State aforesaid, appears the following docket and journal entries, to wit:

Collins & H.

ALEXANDER T. STEWART, FRANCIS WARDEN, George Fox, and William Libbey, partners as A. T. Stewart & Co., pl'ffs,
vs.
LEWIS C. HOPKINS AND MARIA W. HOPKINS, his wife, Isaac M. Jordan, and George Maxwell, trustees, defendants. } 23513.

To Sept. 14, 1868.
Pet. filed " 3, "
Summons in action for foreclosure of mortgage on real estate.
Amount claimed, $85,361.73, and interest at 7 per cent. from Jan'y 2d, 1868.
1868, Sept. 3.—Summons issued.
" " 5.—Six copy mortgages filed.
" " 14.—Summons returned 1868, Sept. 12.

Served the within named Lewis C. Hopkins and Maria W. Hopkins each by leaving a true copy hereof at their usual place of residence; also served Isaac M. Jordan & George Maxwell, trustees, each with a true copy hereof personally.

H. SCHLOTMANN,
Sheriff,
By JNO. D. KUNKEL,
Dep'ty.

1868, Oct. 3.—Default for answer as to all.
" " 6.—Min. 81. Leave to answer by 26 October. A. T. Stewart & Co. vs. Lewis C. Hopkins.
275 On motion, leave is given to answer or demur*rer* within twenty days.
1868, Oct. 26.—Min. 156. Leave to answer by 9 November. A. T. Stewart & Co. vs. L. C. Hopkins et al.
On motion, leave is given to answer within two weeks.

1869, May 22.—Motion filed for a decree.

" " 24.—Min. 325. Rule to ans. by 25 May, at 10 a. m. A. T. Stewart & Co. vs. L. C. Hopkins et al.

On motion, the defendants are ordered to answer before ten o'clock to-morrow morning.

1869, May 25.—Answer of Geo. Maxwell & I. M. Jordan, trustees, filed.

1871, Ap'l 13.—Depositions filed.

" June 7.—Amended answer & counter claim filed. Reply to same filed.

1871, June 26.—Min. 616. Reserved to g. term.

A. T. STEWART & Co.
vs.
GEO. MAXWELL ET AL.

This cause having been submitted to the court, and it appearing that there are many and important questions in this case, the court do hereby reserve this cause to the general term of this court for hearing and determination upon the certified statement of all the case which is signed and made a part of the record.

1871, June 20.—7 mortgages filed.

276 1872, June 20.—Min. 426. G. t. Decree final.

Final decree.

A. T. STEWART, FRANCIS WARDEN, GEORGE Fox, and William Libbey, partners as A. T. Stewart & Co.
vs.
LEWIS C. HOPKINS, MARIA W. HOPKINS, HIS wife, Isaac M. Jordan, and George Maxwell, trustees.

This cause came on for trial on the petition of plaintiffs, the answer and counter claim defendants Isaac M. Jordan and George Maxwell, trustees, and the reply thereto by plaintiffs, exhibits and testimony in writing as certified by the judge sitting in special term, and the premises being submitted to the court, on consideration thereof, the court find that said defendant, Lewis C. Hopkins, did on the 6th day of June, 1866, at the city of New York, borrow from said plaintiffs the sum of $100,000.00, and gave his note therefor of that date, payable on demand, with interest from date, at the rate of seven per cent. per annum, payable quarter-yearly until paid, and that the legal rate of interest in New York was then, and ever since has been, 7 % per annum.

The court further find that said Hopkins made to plaintiffs the
277 following payments on said note, viz:

On May 4th, 1867	$25,000 00
On Nov. 12th, 1867	10,000 00
" Dec. 23, 1867	17,000 00

And that there is now due to plaintiffs on said note the sum of $57,924.16, with interest at the rate of seven per cent. per annum, from Dec. 23d, 1867, making to the third day of June, 1872, (the 1st day of this term) the sum of $75,956.06.

The court further find that in order to secure to plaintiffs the pay-

ment of said note, defendants, Lewis C. Hopkins and Maria W. Hopkins, his wife, did on the 22d day of June, 1866, execute and deliver to said Alexander T. Stewart, one of said plaintiffs, the six certain mortgages described in the petition, and on the premises therein described; that said mortgages were left for record with the recorder of Hamilton County, where said premises are situate, on the 2d day of January, 1868, and were duly recorded in book 290, page 472, and following of the records of mortgages.

And the court further finds that on the 30th March, 1868, said defendant, Lewis C. Hopkins, on the petition of his creditors, was adjudged to have become a bankrupt before the filing of said petition, to wit, upon the 29th February, 1868, in the district court of the United States for the southern district of Ohio, and that said defendants, Isaac
278 M. Jordan and George Maxwell were duly appointed his trustees in bankruptcy on the 30th day of April, 1868, and thereby became entitled to all the property and estate of the said Hopkins for the benefit of his creditors.

And the court find that said mortgages are the first and best lien on the premises therein described for the amount so found due and remaining unpaid on said date.

It is therefore considered and adjudged that unless said defendants pay or cause to be paid to plaintiffs said sum so found due, with interest from the 3d day of June, 18.2, within 180 days from the entry of this decree, said premises shall be sold, and an order of sale shall issue to the sheriff of Hamilton County, directing him to sell said premises as special master commissioner, and as upon execution at law, and to bring the proceeds into court for the satisfaction of the amount so found due to plaintiffs, and for further order in the premises.

And the court, further proceeding to adjudge the rights of said defendants I. M. Jordan and George Maxwel lon their counter claim, find that said L. C. Hopkins did remit to said plaintiffs, besides the sum of $25,000.00 credited on the 4th day of May, 1867, the following sums of money, and the same were received by plaintiffs on the following dates, viz:

	1867, Nov. 12	$10,000 00
279	1867, Dec. 23d	17,000 83
	" " 31st	10,000 00
	1868, Jan'y 2d	48,025 00

That plaintiffs consented to credit the first three of said remittances on their mortgage notes aforesaid, and the same are proper credits thereon, as hereinbefore found; that when said Hopkins made the last two remittances it was with the intent and express instruction in writing that they should be applied in discharging said mortgage claim, but that said plaintiffs refused and had a right to refuse so to apply them.

And the court find that the plaintiffs assumed to apply and did apply the two last mentioned remittances, namely, $10,000.00 on 31st December, 1867, and $48,025.00 on the second day of January, A D. 1868, to the credit of said Hopkins on the plaintiffs' general account for merchandise and cash of a larger balance due to said plaintiffs.

But the court find that said Lewis C. Hopkins did not authorize or consent to such application of said several sums by the plaintiffs, and that plaintiffs had no right to make such application; and that the two said sums of money remained in the hands of plaintiffs, as the monies of said Lewis C. Hopkins, subject to his order from the several

280 days of their payment until the 29th day of February, A. D. 1868, when the title of Isaac M. Jordan and George Maxwell, trustees as aforesaid, attached thereto. And that the two said several sums are not subject to any claim of set-off or cross demand as of mutual debts or credits on the part of plaintiffs, under section twentieth of the bankrupt act or otherwise.

It is therefore considered and adjudged that said Jordan and Maxwell, trustees, recover from said plaintiffs the said several sums of money, to wit, ten thousand dollars, with interest at seven per cent. per annum from the 31st day of December, A. D. 1867, and forty-eight thousand twenty-five and $\frac{50}{100}$ dollars, with interest at seven per cent. from January 2d, 1868, making to the 3d day of June, 1872, being the first day of this term, the sum of $75,981.36, and execution is awarded therefor, but stayed for 120 days.

It is further ordered that each party pay one-half of the costs herein.

And plaintiffs except to the judgment of the court on said counter-claim, both as to the principal and interest as allowed; also to so much of the judgment on the petition as allows to defendants the credits on said mortgage claim of $10,000, of date Nov. 13th, 1867, and $17,000.00, of date Dec. 23d, 1867.

281 The defendants, George Maxwell and Isaac M. Jordan, trustees, except to so much of the foregoing judgment as finds that the several mortgages therein specified were legally executed, were valid, and accepted in good faith, and that any sum of money is due on account of them, or either of them, or of the promissory note therein described. Also, to so much as finds that Lewis C. Hopkins borrowed one hundred thousand dollars or any other sum from the plaintiffs, or any of them. Also to so much as awards judgment for the plaintiffs in any sum whatsoever; also to the refusal of the court to give judgment in favor of these defendants for the amount, with interest of all the sums of money remitted by said Hopkins to the plaintiffs.

Said George Maxwell and I. M. Jordan, trustees, except to each and every finding of the court above which is any way prejudicial to their interest, or in any way affects their rights.

1872, June 20.—Motion for a new trial filed by pl'ff.

" " " " " " " " " " Maxwell & Jordan.

" " " —Min., 429. Motion for a new trial overruled.

Bill of exceptions allowed, &c.

A. T. STEWART & CO.
vs.
L. C. HOPKINS ET AL.

282 This day came on to be heard the motion of George Maxwell and Isaac M. Jordan, defendants, to set aside the findings and judgment of the court and to grant a new trial, which motion the court hereby overrules.

To which ruling and decision the said defendants except.

Also came on to be heard the motion of plaintiffs to set aside the finding and judgment of the court and to grant a new trial, which motion the court also overrules. To which ruling and judgment the plaintiffs except.

And both parties, the plaintiff and the said trustees, Maxwell and Jordan, present to the court their bill of the exceptions taken at this term, allowed, signed, and sealed by the judges, which the court allow, and order to be made a part of the record.

STATE OF OHIO,
Hamilton County, City of Cincinnati, ss:

I, Lewis G. Bernard, clerk of the superior court of Cincinnati, county and State aforesaid, do hereby certify that the above and foregoing is a true and correct transcript of case No. 23513, A. T. Stewart & Co. vs. L. C. Hopkins et al., as the same appears from the docket and
283 journals of said court now in my office.

Witness my hand and the seal of said court, at Cincinnati, this 14th day of January, A. D. 1879.

[SEAL.] LEWIS G. BERNARD,
Clerk of Superior Court of Cincinnati, Ham. Co., Ohio,
By EMIL HOFFMAN, *Deputy.*

And thereupon on the said day and year first aforesaid, to wit, on the 10th day of December, A. D. 1872, came the said defendants, and by leave of court first had and obtained, filed the following petition in error, to wit:

Cross pet. in error.

Supreme court of the State of Ohio.

GEORGE MAXWELL AND ISAAC M. JORDAN, trustees in bankruptcy of Lewis C. Hopkins, plaintiffs in error,
against
ALEXANDER T. STEWART, FRANCIS WARDEN, Geo. Fox, and William Libby, partners as A. T. Stewart & Co., defendants in error.

The said plaintiffs in error complain of the said defendants in error, for that at the June term, A. D. 1872, of the superior court of Cincinnati, Ohio, in general term sitting, certain findings were
284 made and a judgment was rendered by the consideration of said court in several particulars in favor of said defendants in error and against the said plaintiffs in error, in a certain action then pending in said court, wherein the said plaintiffs in error were defendants and the said defendants in error were plaintiffs, an authenticated transcript of the docket and journal entries and of the final decree made out and entered in the case, together with a printed copy of the pleadings and testimony in the case agreed to by counsel as being true and correct copies thereof are filed herewith, marked Exhibit A, and made part of this petition.

And said plaintiffs in error aver that there is error in said proceedings, findings, record, judgment, and decree in this, to wit:

First. That the court erred in finding and decreeing that said Lewis C. Hopkins did on the 6th day of June, 1866, borrow from said A. T. Stewart & Co. the sum of $10,000.00, and gave his note for said borrowed money.

Second. That said court erred in finding and so decreeing that there was due said A. T. Stewart & Co. on said note the sum of $57,924.16, with interest on the note the rate of seven per cent. per annum from Dec. 23d, 1867, making to the 3d day of June, 1872, $75,956.16.

Third. That the court erred in finding and decreeing that said
285 Lewis C. Hopkins on June 22d, 1866, executed and delivered to

said A. T. Stewart & Co. six mortgages, described in the petition in this case, and in finding and so decreeing that said mortgages were the first and best liens on the real estate described therein *from* the amount found due said A. T. Stewart & Co., or any other sum.

Fourth. That the court erred in decreeing the sale of real estate in the petition described unless the said amount so found due said A. T. Stewart & Co. should be paid.

Fifth. That the court erred in finding and so decreeing that said A. T. Stewart & Co., defendants in error, refused and had a right to refuse to apply the sum of $10,000, received Dec. 31st, 1867, and $48,025, received Jan'y 21st, 1868, on said mortgage claim.

Sixth. That the court erred in finding and so decreeing that said A. T. Stewart & Co., defendants in error, assumed to apply the said sum of $10,000, received Dec. 31st, 1867, and $48,025, received Jan'y 21st, 1868, to the credit of said Hopkins in their general merchandise account and large balance of cash account.

Seventh. That the court erred in not finding and decreeing that the said notes and mortgages were made in fraud of the provisions of the bankrupt law passed March 2d, 1867.

Eighth. That the court erred in not finding and adjudging the
286 several sums of money found to have been paid on said note and mortgages were made in fraud of the provisions of the said bankrupt law, and to give said A. T. Stewart & Co. a preference over other creditors of said Hopkins.

Ninth. That the court erred in not setting aside said finding and decree as prejudicial to said plaintiffs in error, and in refusing to grant them a new trial as demanded.

Tenth. For other reasons appearing on the face of the proceedings and record in this case.

Said plaintiffs in error, George Maxwell and Isaac M. Jordan, trustees, pray that the said findings, judgments, and decree in the particulars mentioned may be reversed, and that they may be restored to all things they have lost by reason thereof.

GEORGE E. PUGH AND ISAAC DAYTON AND
JORDAN, JORDAN & WILLIAMS,
Att'ys for Maxwell & Jordan, Trustees, Plaintiffs in Error.

Endorsed on said petition in error was the following, to wit:

Waiver of process.

We hereby waive the issuing of process for the defendants in error, A. T. Stewart & Co., and enter their appearance in this case.

PERRY & JENNEY,
For A. T. Stewart & Co.

287 Afterwards, on the ninth day of March, A. D. 1875, the following journal entry was made in our said supreme court, to wit:

Motion to take cause 270 gen'l docket out of its order.

A. T. STEWART AND CO.
vs.
L. C. HOPKINS.

Ordered that the motion be, and the same is hereby, overruled.

Thereafter, to wit, on the seventh day of November, A. D. 1877, the following journal entry was made in this cause, to wit:

Judgment of affirmance.

Error to the superior court of Cincinnati.

A. T. STEWART & CO.
vs.
L. C. HOPKINS.

On suggestion of the death of A. T. Stewart, one of the partners of the firm of A. T. Stewart & Co., plaintiffs in error in this cause, it is ordered that this action proceed in favor of the surviving partners of said firm of A. T. Stewart & Co., being plaintiffs herein, and this cause coming on to be heard upon the petition in error and the cross petition in error as well as upon the transcript of the record of the superior court of Cincinnati was argued by counsel. On consideration whereof it is ordered and adjudged by this court that the judgment of the said
288 superior court be, and the same is hereby, affirmed.

It is further considered that each party pay one half of the costs herein expended to be taxed.

Ordered that a special mandate be sent to the superior court of Cincinnati to carry this judgment into execution.

And afterwards, to wit, on the 26th day of April, A. D. 1878, came the said plaintiffs, A. T. Stewart and Co., and filed in our said supreme court here the following motion, to wit:

Motion to modify judgment entry.

In the supreme court of Ohio.

A. T. STEWART AND CO.
vs.
LEWIS C. HOPKINS ET AL.

Now comes said A. T. Stewart and Co., by counsel, and move this court to modify the entry hereinbefore made in this, to wit, to make said entry conform to the findings of fact and law declared by the court in its decision by showing that plaintiffs' mortgages were paid by remittances made by L. C. Hopkins.

COLLINS & HERRON,
A. F. PERRY, *Att'ys.*

Attached to said motion was the following, to wit:

Notice.

I. M. JORDAN, Esq.,
Assignee in bankruptcy of L. C. Hopkins:

You will take notice that counsel for A. T. Stewart and Co. have filed the above motion, and will ask to be heard thereon by the supreme court commission on Saturday, the 27th inst.

Apr. 17th, 1878.

Service of above notice acknowledged.

ISAAC M. JORDAN.

said A. T. Stewart & Co. six mortgages, described in the petition in this case, and in finding and so decreeing that said mortgages were the first and best liens on the real estate described therein *from* the amount found due said A. T. Stewart & Co., or any other sum.

Fourth. That the court erred in decreeing the sale of real estate in the petition described unless the said amount so found due said A. T. Stewart & Co. should be paid.

Fifth. That the court erred in finding and so decreeing that said A. T. Stewart & Co., defendants in error, refused and had a right to refuse to apply the sum of $10,000, received Dec. 31st, 1867, and $48,025, received Jan'y 21st, 1868, on said mortgage claim.

Sixth. That the court erred in finding and so decreeing that said A. T. Stewart & Co., defendants in error, assumed to apply the said sum of $10,000, received Dec. 31st, 1867, and $48,025, received Jan'y 21st, 1868, to the credit of said Hopkins in their general merchandise account and large balance of cash account.

Seventh. That the court erred in not finding and decreeing that the said notes and mortgages were made in fraud of the provisions of the bankrupt law passed March 2d, 1867.

Eighth. That the court erred in not finding and adjudging the
286 several sums of money found to have been paid on said note and mortgages were made in fraud of the provisions of the said bankrupt law, and to give said A. T. Stewart & Co. a preference over other creditors of said Hopkins.

Ninth. That the court erred in not setting aside said finding and decree as prejudicial to said plaintiffs in error, and in refusing to grant them a new trial as demanded.

Tenth. For other reasons appearing on the face of the proceedings and record in this case.

Said plaintiffs in error, George Maxwell and Isaac M. Jordan, trustees, pray that the said findings, judgments, and decree in the particulars mentioned may be reversed, and that they may be restored to all things they have lost by reason thereof.

GEORGE E. PUGH AND ISAAC DAYTON AND
JORDAN, JORDAN & WILLIAMS,
Att'ys for Maxwell & Jordan, Trustees, Plaintiffs in Error.

Endorsed on said petition in error was the following, to wit:

Waiver of process.

We hereby waive the issuing of process for the defendants in error, A. T. Stewart & Co., and enter their appearance in this case.

PERRY & JENNEY,
For A. T. Stewart & Co.

287 Afterwards, on the ninth day of March, A. D. 1875, the following journal entry was made in our said supreme court, to wit:

Motion to take cause 270 gen'l docket out of its order.

A. T. STEWART AND CO.
vs.
L. C. HOPKINS.

Ordered that the motion be, and the same is hereby, overruled.

Thereafter, to wit, on the seventh day of November, A. D. 1877, the following journal entry was made in this cause, to wit:

Judgment of affirmance.

Error to the superior court of Cincinnati.

A. T. STEWART & CO.
vs.
L. C. HOPKINS.

On suggestion of the death of A. T. Stewart, one of the partners of the firm of A. T. Stewart & Co., plaintiffs in error in this cause, it is ordered that this action proceed in favor of the surviving partners of said firm of A. T. Stewart & Co., being plaintiffs herein, and this cause coming on to be heard upon the petition in error and the cross petition in error as well as upon the transcript of the record of the superior court of Cincinnati was argued by counsel. On consideration whereof it is ordered and adjudged by this court that the judgment of the said
288 superior court be, and the same is hereby, affirmed.

It is further considered that each party pay one half of the costs herein expended to be taxed.

Ordered that a special mandate be sent to the superior court of Cincinnati to carry this judgment into execution.

And afterwards, to wit, on the 26th day of April, A. D. 1878, came the said plaintiffs, A. T. Stewart and Co., and filed in our said supreme court here the following motion, to wit:

Motion to modify judgment entry.

In the supreme court of Ohio.

A. T. STEWART AND CO.
vs.
LEWIS C. HOPKINS ET AL.

Now comes said A. T. Stewart and Co., by counsel, and move this court to modify the entry hereinbefore made in this, to wit, to make said entry conform to the findings of fact and law declared by the court in its decision by showing that plaintiffs' mortgages were paid by remittances made by L. C. Hopkins.

COLLINS & HERRON,
A. F. PERRY, *Att'ys.*

Attached to said motion was the following, to wit:

Notice.

I. M. JORDAN, Esq.,
Assignee in bankruptcy of L. C. Hopkins:

You will take notice that counsel for A. T. Stewart and Co. have filed the above motion, and will ask to be heard thereon by the supreme court commission on Saturday, the 27th inst.

Apr. 17th, 1878.

Service of above notice acknowledged.

ISAAC M. JORDAN.

289 Thereafter, to wit, on the 1st day of May, A. D. 1878, the following journal entry was made in this cause, to wit:

Motion to modify overruled.

Motion to modify judgment rendered in cause No. 80 of the December term, A. D. 1876.

A. T. STEWART & CO.
vs.
L. C. HOPKINS.

Ordered that the motion be, and the same is hereby, overruled.

Afterwards, to wit, on the 31st day of May, A. D. 1878, came the said plaintiffs in error and filed their petition for a new trial and to modify judgment, which petition was in the words and figures following, to wit:

Pet. for new trial.

In the supreme court of Ohio.

WILLIAM LIBBY AND GEORGE FOX, SURVIVORS of Alex. T. Stewart, former partners as A. T. Stewart & Co.,
vs.
ISAAC M. JORDAN, SURVIVOR OF GEORGE Maxwell, trustee, and Lewis C. Hopkins & Maria W. Hopkins, his wife.
} Petition for a new trial.

Plaintiffs respectfully represent that since the decision was rendered in this case in the month of October or November, A. D. 1877, they have discovered grounds for a new trial, which without any negligence on their part, they were not before aware of, and which they did not
290 discover before, because there was nothing in the issue made or in the record as presented, which made it necessary before said trial to investigate the facts relating to the grounds on which a new trial is now asked, to wit, that the issues in the case in the court below and in this court were, first, whether plaintiffs ever had or acquired a valid lien against the real estate of said Hopkins, in their petition described, by virtue of the mortgages in their petition described; second, whether if plaintiff ever had such lien, the same had been paid and satisfied in full, by certain remittances amountingto $58,025.00, made by said Hopkins to plaintiffs in the latter part of December, 1867, for the purpose of paying said mortgages and of an amount sufficient to pay said mortgages; and, third, if said mortgages were valid liens and were not paid by said remittances, had said J. M. Jordan, surviving trustee in bankruptcy of said Hopkins, a right to recover under his cross petition, against plaintiffs, the amount of said remittances with interest, as so much money paid by said Hopkins to plaintiffs, in fraud of the bankrupt act of the United States. That it was not material in determining whether said mortgages were valid, to consider the value of the real estate described in them, and no question was made, but it was understood by both parties to this suit that at the time said remittances were
291 made to pay off said mortgages, said real estate was worth a considerable amount more than the amount of said remittances,

and was regarded by said Hopkins to be worth at least double the amount remaining due on said mortgages.

The court below decided that plaintiffs were not bound to apply said remittances to the satisfaction of said mortgages, and that said mortgages were valid and unpaid, and thereupon rendered a decree or judgment in favor of plaintiffs as in their petition sought for $75,956$\frac{06}{100}$, with interest from 3d day of June, 1872, against the said lands, and at the same time found that said defendant, I. M. Jordan, trustee, was entitled to recover from plaintiffs the amount of said remittances as paid in fraud of the bankrupt act of the United States, and rendered judgment in his favor therefor, against plaintiffs personally, for the sum of $75,981$\frac{36}{100}$, with interest from the 3d day of June, A. D. 1872. That this court in its decision found that both of said judgments of the superior court were erroneous, as well that rendered on the cross petition as that rendered on the petition, but entered of record that both of said judgments be affirmed and not reversed, assigning as a sole reason for such entry that it was no prejudice to plaintiffs to have said judgment rendered against them when at the same time they had a judgment for an equal amount against the lands in the petition described in their favor.

292 This court adjourned a short time after said decision was rendered, and plaintiffs or their counsel did not see the text of said decision nor the entry that was made thereon of record until after the close of the term at which said decision was rendered.

Plaintiffs further show, that residing in a distant State, they had no knowledge of the value of real estate in Cincinnati, and that as soon as they found that the present value of the real estate in question was material, they caused enquiry to be made as to the value thereof, and as to the amount of incumbrances thereon, for ground-rent and otherwise, and found that said incumbrances were an annual charge of nine thousand dollars, or a gross sum of one hundred and fifty thousand dollars; which deducted from the present market value of said lots, leaves their present value, subject to said incumbrances, no more than about sixty thousand dollars; although in 1870, and before the present depreciation in real estate had taken place, said lots were worth, even subject to said incumbrances, about eighty thousand dollars.

Plaintiffs further show that the present amount of said judgment againt plaintiffs is, with interest, about $103,334.52, or $40,000.00 more than the present market value of said real estate.

Plaintiffs therefore say, that by reason of the premises great injustice results to them from that part of the decision of this court which
293 held that plaintiffs are not prejudiced by allowing said judgment against them in said lower court to stand unreversed; that owing to facts which were not in issue, nor apparent from the record, and which with all reasonable diligence were not discovered by plaintiffs until after the term at which the judgment was rendered in this court had closed, and about which there was a common mistake on the part of the plaintiffs and of the court, such part of said decision is wholly repugnant to the other and more substantial parts thereof.

Wherefore plaintiff prays for a new trial, and that said decision in this court may be so modified as to reverse said judgment of the lower court against plaintiffs, as well as said judgment in favor of plaintiffs on their said mortgages, and for such other relief as in law and equity they may be entitled to.

COLLINS & HERRON,
A. F. PERRY,
Att'ys for P'ffs.

STATE OF OHIO,
Hamilton County:

Isaac C. Collins, being duly sworn, says that plaintiffs in the foregoing petition are not residents of the State of Ohio, and are now absent from the State; that affiant is their att'y in this behalf and believes the statements of the foregoing petition are true.

ISAAC C. COLLINS.

Sworn to before me and subscribed in my presence this 28th day of May, A. D. 1870.

[SEAL.] DANIEL HENDERSON,
Notary Public, Ham. Co., O.

40c. p'd by pl'ffs' att'y.

294 Attached to said petition was the following, to wit:

Precipe.

In supreme court of Ohio.

WILLIAM LIBBY AND GEORGE FOX, SURVIVORS of Alexander T. Stewart & Co.,
vs.
LEWIS C. HOPKINS, MARIA W. HOPKINS, HIS wife, and Isaac M. Jordan, trustee, survivor.

Petition for a new trial and to modify judgment.

The clerk will issue summons to sheriff of Hamilton County against above defendants, according to law (Code, sections 301 and 534 and 542).

COLLINS & HERRON AND
A. F. PERRY, *Att'ys for Pl'ffs.*

Thereupon, on the 3d day of June, A. D. 1878, there issued out of our said supreme court the following summons, to wit:

Summons.

THE STATE OF OHIO,
City of Columbus:

To the sheriff of Hamilton County:

You are hereby commanded to notify Lewis C. Hopkins, Maria W. Hopkins, his wife, and Isaac M. Jordan, trustee, survivor, that William Libby and George Fox, survivors of Alexander T. Stewart & Co., have filed a petition in the clerk's office of the supreme court of the State of Ohio, asking for a new trial of a case entitled A. T. Stewart & Co. vs. L. C. Hopkins, error to the superior court of Cincinnati,
295 and asking that the judgment of our supreme court rendered in said case at the December term, A. D. 1867, be so modified as to reverse the judgment of the superior court against said plaintiffs, as well as said judgment in favor of said plaintiffs on their mortgages; and that unless the said Lewis C. Hopkins, Maria W. Hopkins, his wife, and Isaac M. Jordan, trustee, survivor, attend forthwith before the judges

of our said supreme court said new trial may be granted and said judgment modified.

You will make due service and return this writ forthwith.

Witness my hand and the seal of said supreme court this third day of June, A. D. 1878.

[SEAL.] RICHARD J. FANNING,
Clerk of the Supreme Court of Ohio.

And thereafter, on the 11th day of June, A. D. 1878, said summons was returned to this court, endorsed as follows, to wit:

Return.

1878, JUNE 7TH.—Served the within named Lewis C. Hopkins and Isaac M. Jordan, trustee, with a true copy hereof, delivered personally, and Maria W. Hopkins, by leaving a true copy hereof at her usual place of residence.

W. P. WALLACE,
Sheriff of Hamilton County, Ohio,
By M. T. ANTRAM, *Deputy.*

Wallace, H. C., fees: 90, 1.20, 60, 50—$3.50; paid by Collins & Herron, att'ys.

296 Thereupon, on said 11th day of June, A. D. 1878, came the said defendants and filed their demurrer to said petition, which demurrer was in the words and figures following, to wit:

Demurrer.

Supreme court of Ohio.

WILLIAM LIBBY ET AL.
vs.
LEWIS C. HOPKINS ET AL. } Demurrer.

Said defendants say, by way of demurrer, that the statements of the petition in this case do not constitute facts sufficient to justify the relief demanded, and therefore demand that they have judgment accordingly.

J. A. JORDAN AND
JORDAN, JORDAN & WILLIAMS,
Att'ys for Defendants.

Thereupon, on the 2d day of October, A. D. 1878, the following journal entry was made in this cause, to wit:

Dem. overruled.

Error to the superior court of Cincinnati.

A. T. STEWART & CO.
vs.
L. C. HOPKINS. }

This cause came on to be heard upon the petition filed herein for a new trial and to modify the judgment herein rendered at the last term,

and the demurrer thereto by defendants, and was argued by counsel. On consideration whereof, the court, at the request of counsel for plaintiffs, treating this as an application by the plaintiffs for a writ of
297 error coram nobis to review a question of fact arising dehors the record, overrules said demurrer.

Whereupon the case is set for hearing Wednesday, October 30th, 1878, at which time the defendant is required to appear and show cause why said application should not be granted.

Afterwards, to wit, on the 26th day of October, A. D. 1878, came the said defendant and filed in our said supreme court the following answer, to wit:

Answer.

Supreme court of Ohio.

A. T. STEWART & Co. *vs.* ISAAC M. JORDAN, TRUSTEE OF L. C. HOPKINS.	Answer.

Said Isaac M. Jordan, trustee, saving and reserving all objection on account of the irregularity of this proceeding, says:

1st. That at the time the original action was instituted in 1868, and for a number of years thereafter, said real estate mortgaged to said A. T. Stewart & Co., by said Hopkins, was worth and would have sold for more than sufficient to pay said entire mortgage indebtedness. That before bringing said action said Isaac M. Jordan, trustee, demanded of said A. T. Stewart & Co. that they should apply said $58,000 sent
298 to them by said L. C. Hopkins in payment of said mortgage indebtedness, and that said mortgage should be cancelled to enable said trustee to sell and dispose of said real estate at a time when it would sell to advantage, but said A. T. Stewart & Co. refused so to do, but persisted in bringing said action to foreclose said mortgage, and to assert said claim, claiming that it was still unpaid. And thereupon said trustee filed his answer in said action withdrawing consent to such application, and claiming that said mortgage was invalid, and that said A. T. Stewart & Co. still hold said $58,000 unappropriated and unapplied, and demanding that they be ordered to pay the same to said trustee.

That said A. T. Stewart & Co. had full knowledge, from actual examination, of all said property, its condition, character, and value, and their attorneys representing them in this case resided in Cincinnati, where said property is located, and had so resided for many years, and were and are men of large experience and know the value and condition of said property and the tendency of the price and value of real estate, and yet they continue to insist and demand that said court should not apply said $58,000 in payment and cancellation of said note and mortgage, and yet continued to hold said money. And said trustee says that if any damage has resulted to said A. T. Stewart & Co., by reason
299 of said depreciation in the value of said property, it is because they refused to allow it to be brought to sale at the proper time, and refused to yield to the demands and requirements of said L. C. Hopkins and his said trustee.

Said trustee says that there has been no change in the value of said

property from the time the said cause was argued, presented, and submitted to said supreme court for its decision at the December term, 1876, until the time said A. T. Stewart & Co. took exceptions to the finding and judgment of said supreme court. And they knew of the decision of said court, its finding and judgment, and its bearing and legal effect, and particularly of said 16th syllabus, long before said court adjourned its December term, 1876, and immediately after said decision was made, and yet took no exceptions thereto but acquiesced therein until long after said court adjourned its said term, and until long after a mandate had issued upon said judgment to said superior court and been entered upon the record of said superior court. Said trustee says that if said A. T. Stewart & Co. had consented or allowed said property to be brought to sale in 1868, as said trustee desired and insisted should be done, the same would have been sold and would have realized as much as $200,000, and produced a large surplus to apply to the general
300 creditor, and by reason of their unwarrantable and persistent refusal to make said application of said $58,000, in cancellation of said note and mortgage which they are now demanding shall be done, said trustee in the interest of said general creditor has sustained a damage of over $100,000. The claims of the general creditor who would be entitled to such proceeds exceed the full amount thereof, and said estate of L. C. Hopkins is insolvent.

Said trustee says also that certain property secured by said mortgage situated on 4th st., in Cincinnati, Ohio, at the location of Hopkins Hall, was worth at the time said suit was commenced and remained for some time thereafter, worth $60,000, and said trustee was offered that amount therefor, and notified A. T. Stewart & Co. thereof, and requested and urged them to consent to a sale of the same for that sum and to allow the proceeds of sale to be invested and remain to abide the final judgment in this case, which they refused to do. Said property is the part which has most depreciated in value, and all the depreciation claimed is upon that parcel of property.

Said trustee therefore says that there is no accident or surprise, and said A. T. Stewart & Co. knew at the time said decision was made all they now know about the facts and circumstances urged as a ground for a new trial.

301 Said trustee says that a mandate issued from said supreme court to said superior court before any objection was taken to the judgment of said supreme court, and was forthwith entered on the journal of said superior court and made part of the record of this cause.

Said trustee says that the same ground and reason now urged for a new trial has been in this case urged on motion made by said A. T. Stewart & Co., and the same was overruled by said supreme court commission.

J. A. JORDAN,
Attorney for Isaac M. Jordan, Trustee.

STATE OF OHIO,
Hamilton County, ss:

Isaac M. Jordan, being duly sworn, says he believes the statements of the foregoing answer to be true.

ISAAC M. JORDAN.

Sworn to before me by Isaac M. Jordan and signed by him in my presence this October 23, 1878.

[SEAL.] JNO. P. BOCOCK,
Notary Public for Hamilton County, Ohio.

40c. due notary.

Thereupon, to wit, on the 6th day of November, A. D. 1878, the following journal entry was made in this cause, to wit:

Application for modification refused.

Error to the superior court of Cincinnati.

A. T. STEWART & CO.
vs.
L. C. HOPKINS.

302 On consideration of the application for the modification of the judgment heretofore rendered in this case, it is ordered that said application be and the same is hereby refused.

Afterwards, to wit, on the 18th day of December, A. D. 1878, the following journal entry was made in this cause, to wit:

Journal entry.

Error to the superior court of Cincinnati.

A. T. STEWART & CO.
vs.
L. C. HOPKINS.

And now, on motion of said plaintiffs in error, the court orders it to be certified and made a part of the record in this case, and of the judgment and entry of affirmance, that the personal judgment rendered in said superior court against said plaintiffs in error in favor of J. M. Jordan and George Maxwell, trustees, and affirmed in this court, was founded on the claim set up in the cross-petition of said trustees in bankruptcy to recover certain remittances made by said L. C. Hopkins to said firm of A. T. Stewart , prior to the time when said Hopkins was adjudged a bankrupt; and that said plaintiffs in error claimed and asked this court to decide that under the twentieth section of the bankrupt act of the United States, passed March 2d, 1867, said monies could not be recovered back, but were to be held as a set off under the provisions of said section as to "mutual debts" against a larger sum, which
303 said Hopkins was owing at the time of said remittances, and at the time when the rights of said trustees in bankruptcy accrued to said firm of A. T. Stewart & Co.

But this court decided that said plaintiffs in error, survivors of the firm of A. T. Stewart & Co., were not entitled to have said remittances or monies set off against the said larger indebtedness to them under the said twentieth section of the bankrupt act, and affirmed the judgment of said superior court in favor of said trustees in bankruptcy, and against plaintiffs in error, to wit, for the sum of seventy-five thousand nine hundred and eighty-one $\frac{36}{100}$ dollars, and interest from June 3d, A. D. 1872.

And it is hereby further certified that this court is the highest court of law and equity in the State of Ohio, in which a decision of this case can be had.

I, Richard J. Fanning, clerk of the supreme court of the State of Ohio, hereby certify that the foregoing is a true, correct, and complete copy of the record in said case.

Witness my hand and the seal of said supreme court, at the city of Columbus, this 5th day of February, A. D. 1879.

[SEAL.] RICHARD J. FANNING,
Clerk of the Supreme Court of Ohio.

304 United States of America to Lewis C. Hopkins and Maria W. Hopkins, and to Isaac M. Jordan, trustee in bankruptcy of Lewis C. Hopkins, greeting:

You are hereby cited and admonished to be and appear at a Suprme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Ohio, wherein William Libby and George Fox, survivors of Alexander T. Stewart and Francis Warden, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

This 1st day of February, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] WM. WHITE,
Chief Justice of Supreme Court of Ohio.

Filed Mar. 13, 1879, in supreme court.

305 Rec'd this writ at Cincinnati, O., Feb. 15th, 1879, and served the same in Hamilton County, as follows, and on the within-named Isaac M. Jordan, trustee in bankruptcy of Lewis C. Hopkins, by delivering a true copy hereof to him personally, Feb. 19th, 1879, at 9.30 o'clock a. m.; also Lewis C. Hopkins, by delivering a true copy hereof to him personally, Feb. 19th, 1879, at 10.45 o'clock a. m.; also Maria W. Hopkins, by delivering a true copy hereof to her personally, March 8th, 1879, at 10 o'clock a. m.; and Jackson A. Jordan, esq., lawyer, by delivering to him personally a true copy hereof at 9.30 a. m., Feb. 19th, 1879.

CHARLES E. TWIFORD,
Deputy U. S. M.

SOUTHERN DISTRICT OF OHIO, *ss:*

Charles E. Twiford, being by me duly sworn, says he is a general deputy of Joseph C. Ullery, marshal of the United States for said district; and that all the statements in the foregoing "return of service" by him written and subscribed are true.

[SEAL.] THOS. AMBROSE,
Clerk U. S. Courts, S. D. Ohio.

306 *Fees.*

4 services @ $2.00		$8 00
4 copies " 50c		2 00
10 miles " 6c		60
Return		50
Total		$11 10

Paid by pl'ffs in error.

J. C. ULLERY,
Marshal.

(Indorsed:) Citation.

Filed Mar. 13, 1879, in supreme court.

306 *Bond.*

Know all men by these presents that we, James O. Shiras and Isaac C. Collins, are held and firmly bound unto Lewis C. Hopkins, Maria W. Hopkins, and Isaac M. Jordan, surviving trustee, in the sum of five hundred dollars, to be paid to the said Lewis C. Hopkins, Maria W. Hopkins, and I. M. Jordan, their executors, administrators, or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, dated the 30th day of January, one thousand eight hundred and seventy-nine.

The condition of the above obligation is such, that whereas lately at a supreme court of the State of Ohio, in a suit depending in said court between William Libby and George Fox, surviving partners of Alexander T. Stewart, plaintiff in error, and Lewis B. Hopkins, Maria W. Hopkins, and Isaac M. Jordan, surviving trustee, defendants in error, a judgment was rendered against the said William Libby and George Fox; and the said William Libby and George Fox having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to said Lewis C. Hopkins, Maria W. Hopkins, and Isaac M. Jordan, surviving trustee, citing and admonishing them to be and appear at a Supreme Court
307 of the United States to be holden at Washington the first Monday of December next:

Now the condition of the above obligation is such that if the said William Libby and George Fox shall prosecute their said writ of error to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

J. O. SHIRAS. [SEAL.]
ISAAC C. COLLINS [SEAL.]

Signed, sealed, and acknowledged in presence of us—
JOHN P. HOLLAND.

STATE OF OHIO,
Hamilton County, ss:

Isaac C. Collins, being duly sworn, says that he is a freeholder in the State and county aforesaid, and is worth in real estate situate in said county five thousand dollars and upwards; also that his co-surety, James O. Shiras, is a freeholder in the same county and worth in real estate five thousand dollars and upwards.

ISAAC C. COLLINS.

Sworn to before me and subscribed in my presence this 30th day of January, A. D. 1879.

FRED. A. BLANDY,
Notary Public.

The sureties above named are known by me to be good for the penalty of the bond.

THOS. AMBROSE,
Clerk U. S. C. C., S. D. O.

308 I, Richard J. Fanning, clerk of the supreme court of the State of Ohio, hereby certify that the foregoing is truly and correctly copied from the original *on* bond on file in this office.

In witness whereof I have hereunto subscribed my hand and affixed my official seal this thirty-first day of March, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] RICHARD J. FANNING,
Clerk of Supreme Court of Ohio.

(Indorsed:) Copy. Bond. William Libby et al., survivors of A. T. Stewart, vs. L. C. Hopkins, I. M. Jordan, et al. Bond to secure costs in error to supreme court. Approved by W. W. Johnson, ch. judge sup. court com. Wm. White, ch. judge supreme court of Ohio. Copy.

309 Supreme Court of the United States.

WILLIAM LIBBY AND GEORGE FOX, SURVIVORS of Alexander T. Stewart and Francis Warden, plaintiffs in error,
vs.
ISAAC M. JORDAN, TRUSTEE IN BANKRUPTCY of Lewis C. Hopkins, defendant in error.

Now come the said plaintiffs in error, and for an assignment of errors herein say that at the June term, A. D. 1872, of the superior court of Cincinnati, in the State of Ohio, in a certain cause therein pending, in which plaintiffs in error were defendants on a cross petition, and said Isaac M. Jordan, trustee in bankruptcy of Lewis C. Hopkins, was plaintiff in cross petition, a judgment was entered in favor of said Jordan, trustee, and against plaintiff in error, for $75,981.36, with interest from June 5th, 1872, and costs.

And plaintiffs in error further represent that at the December term, A. D. 1877, of the supreme court of the State of Ohio, said judg-
310 ment was by said supreme court of Ohio affirmed; all of which will more fully appear by the authenticated transcript of the record in said case herewith filed.

And plaintiffs in error say that in the rendering said judgment, error intervened to their prejudice, as will appear by said record, and that among the errors so intervening are the following:

1. That said court found that certain monies of L. C. Hopkins remaining in the hands of A. T. Stewart and Co. subject to the order of said Hopkins when said Hopkins was adjudged a bankrupt and when the rights of said Jordan, trustee, attached thereto, were not subject to be set off pro tanto against a larger sum in which said Hopkins at the time he became insolvent was indebted to said A. T. Stewart & Co. for merchandise sold and money advanced in accordance with the 20th section of the bankrupt act of the United States, passed March 2d, 1867, but refusing to allow such set off, said court rendered said
311 judgment in favor of said trustee for the full amount thereof.

2. Other errors apparent upon the record.

Wherefore, plaintiffs in error pray that said judgment may be reversed.

COLLINS & HERRON &
A. F. PERRY,
Att'ys & Solicitors.

(Indorsed:) Supreme Court of the United States. A. T. Stewart & Co. vs. I. M. Jordan, surviving trustee. Assignment of errors.

(Indorsement on cover:) No. 737. William Libby and George Fox, survivors of Alexander T. Stewart & Francis Warden, dec'd, plaintiffs in error, vs. Lewis C. Hopkins and Maria W. Hopkins and Isaac M. Jordan, trustee in bankruptcy of Lewis C. Hopkins. Ohio sup. court. Filed 12th April, 1879.

O

OFFICE SUPREME COURT U. S.
FILED
OCT 3 1881
JAMES H. McKENNEY, CLERK.

Robert Clarke & Co., Printers, Cincinnati, O. [*Sept.*, 1881.

SUPREME COURT OF THE UNITED STATES

William Libby and George Fox, Survivors of Alexander T. Stewart and Francis Warden, deceased.

Plaintiffs in Error,

vs.

Lewis C. Hopkins and Maria W. Hopkins, and Isaac M. Jordan, Trustees in Bankruptcy of Lewis C. Hopkins.

Defendants in Error.

In Error to the Supreme Court of the State of Ohio.

BRIEF FOR PLAINTIFFS IN ERROR.

By AARON F. PERRY,
Of Counsel, etc.

SUPREME COURT OF THE UNITED STATES

William Libby and George Fox, Survivors of Alexander T. Stewart and Francis Warden, deceased.

Plaintiffs in Error,

vs.

Lewis C. Hopkins and Maria W. Hopkins, and Isaac M. Jordan, Trustees in Bankruptcy of Lewis C. Hopkins.

Defendants in Error.

In Error to the Supreme Court of the State of Ohio.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

This is a writ of error from a decree against plaintiffs in error for $75,956.06, made in the Supreme Court of Ohio, on the 7th day of November, 1877. The case is reported in 30 O. S. Rep. 502. It was an affirmance of a decree made in General Term of the Superior Court of Cincinnati, on June 20, 1872, from which both parties appealed to the Supreme Court of the State. The decree of the Superior Court is in the printed record, p. 152. The decree of the Supreme Court is at p. 157. Plaintiffs in error contended for a set-off under Sec. 20 of the bankrupt act of March 2, 1867, which if allowed would have covered the whole amount of the

judgment against them. The object of this writ of error is to take the judgment of this Court upon the question of set-off.

A. T. Stewart & Co., merchants, of New York, on June 6, 1866, loaned Lewis C. Hopkins, a merchant of Cincinnati, $100,000, and took his promissory note; a copy of which is set forth in the record, p. 14.

Payment of the note was secured by a number of mortgages made by Hopkins, covering real estate owned by him in Cincinnati and its vicinity. Six of the mortgages, covering the real estate mortgaged on the Ohio side of the river, are described in the petition filed by plaintiffs in the court below. *Rec.* pp. 14, 15.

Hopkins was at the time, and long had been a merchant in good standing and credit, with whom plaintiffs, in addition to a line of credit on merchandize account, had kept a separate cash or banking account, in which he deposited moneys, and from which he checked for use. *Rec.* 16. He had conceived the purpose of converting real estate to the extent of the note into mercantile capital, as part of a general plan for greatly enlarging his mercantile operations; and of anticipating intended sales of real estate by the loan from A. T. Stewart & Co., whose confidence he enjoyed. He says: "I told Mr. Stewart, when I made the negotiations with him, that I wanted to sell the real estate, and that I would pay the loan from time to time out of the sales of real estate mortgaged to him. I told him I wanted him to hold the mortgages. I mean not to record them; that my transactions were large, and that I would pay the loan in that way." *Rec.* 19.

On January 1, 1868, Hopkins suspended business insolvent (*Rec.* 16, 17). The business had been so managed that none of his paper was dishonored until January 8th and afterwards, and that none of his creditors disturbed him till he was ready. A. T. Stewart & Co. continued to fill his orders for goods so long as he sent orders, and to pay out money to other merchants on his checks so long as he drew checks (*Rec.* 29, 58, 97, 98).

At the time of suspension he owed A. T. Stewart & Co. $231,515.56 on account and unsecured (*Rec.* 114). Not to exceed $1,000 or $1,500 of the real estate had been sold (*Rec.* 20). His plan had been changed and his purpose was to suspend with his real estate disincumbered (*Rec.* 60, 126, 132). He had made five remittances, with directions to apply them on the note secured by the mortgages in this suit, which he claimed were sufficient to pay it. The dates, amounts and receipts of these remittances by A. T. Stewart

& Co. are not questioned. (See findings of the decree below. *Rec.* 152–3.) The first one was indorsed on the note by Mr. Stewart. The next two were credited on the books of the firm as applicable to the note, in the course of business, by clerks. In the Court below it was contended on behalf of A. T. Stewart & Co. that with a full knowledge of facts they would not have credited them as applicable to the notes; that for reasons urged, they could have refused so to apply them, and that they should not be concluded, by the application then made, without knowledge of material facts since discovered. The contention was overruled, and is conceived to be concluded. The last two remittances, amounting to $58,025.51, made up the balance due on the note on January 1, 1868. One was $10,000, made by express and received December 31, 1867; the other was for $48,025.51, consisting of $25.00 in currency and the balance in drafts. This was not received until January 2, 1868. These last two remittances, with interest, constitute the sum now in discussion. When the first of the two was received in New York, Mr. Libbey, one of the appellants, refused to apply it on the note and started immediately to Cincinnati, where he had an interview with Hopkins on the morning of January 2d. Hopkins then told him of the last remittance, which had not arrived when Libby left New York, and Libby informed him that he would not apply either of them on the note, and would have them applied on open account. Hopkins did not consent to the application on account, but made no request or demand that they should be returned, nor did he, or his trustees, then, or at any time, give any other or further directions concerning either remittance. The substance of the interview is stated by Mr. Libby (*Rec.* 60) and by Mr. Hopkins (*Rec.* 12, 31, 126, 127, 130, 131). They do not materially differ.

It was contended in the Court below by plaintiffs that the two remittances so made, and so unapplied upon the note, were moneys of Hopkins in the hands of plaintiffs (without their procurement or design), and subject to be set off under the 20th section of the bankrupt act against the merchandise account owed them by Hopkins.

The same question is presented under this writ of error, except as it is narrowed and limited by the findings and decree below.

The Court below found and decreed (*Rec.* 153) that A. T. Stewart & Co. "refused and had a right to refuse so to apply" these two remittances on the note. It also found and decreed that "Hopkins did not authorize or consent

to such application" (on account) and that A T. Stewart & Co. "had no right to make such application; and that the two sums remained in the hands of plaintiffs as the moneys of said Lewis C. Hopkins, subject to his order, from the several days of their payment until the 29th day of Feb., 1868, when the title" of the trustees in bankruptcy attached (*Rec.* 153–4).

I apprehend that these findings of the State Court would in any event be conclusive. In effect it is a finding and decree that the circumstances were not such as are contemplated by the ordinary rule, which treats a neglect to return the money offered in payment as equivalent to an application of it as requested. To this extent the contention of plaintiffs was sustained.

It also found that the last two remittances were "not subject to any claim of set-off or cross-demand, as of mutual debts or credits, on the part of plaintiffs under section 20 of the bankrupt act."

This is the question now to be considered, in view of the situation in other respects as defined by the State Court.

Defendants in error have filed a motion to dismiss the appeal for want of jurisdiction. The motion is based upon a denial that any question was presented to the State Court requiring the construction of an act of Congress, in which the decision was against plaintiffs. In other words, they deny that a question of set-off under the bankrupt act was presented.

THE PETITION IN THE STATE COURT.

The action was commenced by petition of the plaintiffs, in ordinary form under the code practice, to enforce the mortgage lien, sell mortgaged property, and satisfy the claim secured. (*Rec.* 5 to 7, inclusive.)

ANSWER AND COUNTER-CLAIM.

The defense is comprised in one paper, called "answer and counter-claim," under seven different heads. (*Rec.* 8.) Six of them were directed to denials of the consideration, good faith and validity of the note and mortgages, and of the good faith of the remittances made to be applied in payment. The sixth states the five remittances made with direction to apply them on the note, and alleges that, "therefore, the said note has been fully paid and discharged" The answer contained circumstantial statements bearing on the questions of good faith and validity of the transactions questioned.

The first counter-claim is stated in the fifth head of the

answer. It states all the remittances for principal and interest, and claims to recover them all back, on the ground, not that all or any of the remittances were intended for an unlawful preference, but that all the mortgages themselves were made in contemplation of insolvency, and to prefer A. T. Stewart & Co., and to hinder and delay other creditors. The findings and decree in the Superior Court were a full negation of this and all other contentions based upon *mala fides* or *invalidity* in the original transaction.

The bankrupt act was not passed until about nine months after the execution of the note and mortgage, but none of the five payments intended to apply on the note were made until after the bankrupt act was passed. If I understand the counter-claim correctly in this part of the answer, it was intended to refer to a preference under the state insolvent laws, as distinguished from the bankruptcy act.

Under the seventh head of the answer, the four last remittances are stated to have been made when Hopkins was insolvent; that he had since been adjudged a bankrupt; that the "payments" were made by said Hopkins with a view to give A. T. Stewart & Co. a preference over his other creditors, and that A. T. Stewart & Co. had reasonable cause to believe that the payments were made in fraud of the bankrupt act; and that the trustees are entitled to recover "said several sums."

The prayer for judgment, following the statement in the *seventh* part of the answer, might be mistaken as part of that particular counter-claim; but I understand it as referring to the whole answer. It asks judgment for the aggregate amount of all the remittances, one of which had not been included in the statement in the seventh head of the answer.

The frame of the answer, if I correctly understand it, is a denial of the good faith and validity of the note and mortgages on several grounds, all of which were overruled.

It also alleges payment in full by the several specified remittances, including the two now under discussion, thus affirming and ratifying them for the purpose of defense on the ground of payment. This defense was sustained, except as to the amount of the last two remittances. The answer further claims to receive back all the money remitted to apply on the note, on the ground that the mortgages were intended as a preference under the State insolvency acts. And, again, to receive back all of the last four remittances, on the grounds that they were made as a preference in fraud of the bankrupt act.

Then it closes with a general prayer of judgment for all the remittances, whether applied or unapplied.

The only counter-claim not overruled is based on a claim for unapplied money. And this they would be entitled to under the rulings of the Court, unless plaintiffs are allowed the set-off now contended for.

REPLICATION.

To the several defenses alleged in the answer and counter-claim, a reply was made under five heads. It contained allegations sustaining the good faith and validity of the note and mortgages; admitting the receipt of the five remittances to be applied on the note, and stating reasons why some of them were not applied, and, consequently, why the note was not paid. The *fifth* head of the replication concludes in this language:

"Nor had said L. C. Hopkins any right to so direct the application of either of said remittances, having previously procured the delivery to him of large amounts, to wit, nearly one hundred thousand dollars in value, in cash merchandise, on the express promise that he would appropriate all the surplus proceeds from the sales of the same with other goods, as they should be daily received, towards paying said cash merchandise, and making his account for such merchandise, and for cash paid out by plaintiffs for him to other persons, satisfactory to plaintiffs; *on which account plaintiffs immediately advised said L. C. Hopkins that they would not consent to apply said last two remittances to said mortgage debt; plaintiffs aver that they held all of said remittances subject to the order of said L. C. Hopkins, as they held all other moneys remitted or deposited with them by said L. C. Hopkins, at the time when the rights of said Jordan & Maxwell, trustees, accrued, and subject to such law of set-off as is provided in said bankrupt act.*"

"Plaintiffs deny that said Hopkins made said several remittances with a view to give them a preference over his other creditors, as averred; and aver that his sole motive and purpose were to remove said mortgage incumbrance from his real estate, that he might be able thereby to procure a more favorable settlement with his creditors."

"Neither did plaintiffs believe, or have reasonable cause to believe, at that time, that said Hopkins was insolvent, but, on the contrary, they continued to pay out money for said L. C. Hopkins, during the whole of said month of December, and knew of no paper of said Hopkins going to protest until the 8th day of January thereafter, nor was

said Hopkins adjudged a bankrupt until the 30th day of March thereafter; wherefore, plaintiffs pray judgment as in their petition." *Rec.* 13, 14.

FINAL DECREE IN THE SUPERIOR COURT OF CINCINNATI.

Rec. pp. 152, 153, 154.

"This cause came on for trial on the petition of plaintiffs, the answer and counter-claim of defendants, Isaac M. Jordan and George Maxwell, Trustees, and the reply thereto by plaintiffs, exhibits and testimony in writing, as certified by the Judge sitting in special term, and the premises being submitted to the Court, on consideration thereof, the Court find that said defendant, Lewis C. Hopkins, did, on the 6th day of June, 1866, at the city of New York, borrow from said plaintiffs the sum of $100,000, and gave his note therefor of that date, payable on demand, with interest from date, at the rate of seven per cent. per annum, payable quarter-yearly until paid, and that the legal rate of interest in New York was then and ever since has been seven per cent. per annum."

"The Court further finds that said Hopkins made to plaintiffs the following payments on said note, viz:

On May 4, 1867	$25,000
On November 12, 1867	10,000
On December 23, 1867	17,000

And that there is now due to plaintiff on said note the sum of $57,924 16, with interest at the rate of seven per cent. per annum, from December 23, 1867, making to the 3d day of June, 1872 (first day of this term) the sum of $75,957 06."

"The Court further finds that, in order to secure to plaintiffs the payment of said note, defendants, Lewis C. Hopkins, and Maria W. Hopkins, his wife, did, on the 22d day of June, 1866, execute and deliver to said Alexander T. Stewart, one of the plaintiffs, six certain mortgages, described in the petition and on the premises described therein; that said mortgages were left for record with the Recorder of Hamilton County, where said premises are situate, on the 2d day of January, 1868, and were duly recorded in Book No. 290, page 472, and following of the records of mortgages."

"And the Court further finds that, on the 30th of March, 1868, said defendant, Lewis C. Hopkins, on the petition of his creditors, was adjudged to have become a bankrupt before the filing of said petition, to-wit: upon the 29th of

February, 1868, in the District Court of the United States for the Southern District of Ohio; and that said defendants, Isaac M. Jordan and George Maxwell, were duly appointed his trustees in bankruptcy on the 30th day of April, 1868, and thereby became entitled to all the property and estate of the said Hopkins for the benefit of his creditors."

"And the Court finds that said mortgages are the best and first lien on the premises therein described, for the amount so found due and remaining unpaid on said date."

"It is therefore considered and adjudged that unless said defendants pay or cause to be paid to plaintiffs said sum so found due, with interest from the 3d day of June, 1872, within one hundred and eighty days from the entry of this decree, said premises shall be sold, and an order for sale shall issue to the Sheriff of Hamilton County, directing him to sell said premises as Special Master Commissioner, and as upon execution at law, and to bring the proceeds into Court, for the satisfaction of the amount so found due to plaintiffs, and for further order in the premises."

"And the Court, further proceeding to adjudge the rights of said defendants, Isaac M. Jordan and George Maxwell, on their counter-claim, find that said L. C. Hopkins did remit to said plaintiffs, besides the sum of $25,000, credited on the 4th day of May, 1866, the following sums of money, and the same were received by plaintiffs on the following dates, viz:

1867—November 12	$10,000 00
" —December 23	17,000 83
" —December 31	10,000 00
1868—January 2	48,025 00

That plaintiffs consented to credit the first three of said remittances on their mortgage notes aforesaid, and the same are proper credits thereon, as hereinbefore found; that when said Hopkins made the last two remittances, it was with the intent and express instruction in writing that they should be applied in discharging said mortgage claim, but that said plaintiffs refused, and had a right to refuse so to apply them."

"And the Court finds that the plaintiffs assumed to apply, and did apply the last two mentioned remittances, namely: $10,000.00 on the 31st of December, 1867, and $48,025.00 on the second day of January, A. D. 1868, to the credit of said Hopkins on the plaintiffs general account for merchandise and cash of a larger balance due to said plain-

tiffs.[1] But the Court finds that said Lewis C. Hopkins did not authorize or consent to such application of said several sums by the plaintiffs; and that plaintiffs had no right to make such application, and that the two said sums of money remained in the hands of plaintiffs as the moneys of said Lewis C. Hopkins, subject to his order, from the several days of their payment until the 29th day of February, A. D. 1868, when the title of Isaac M. Jordan and George Maxwell, trustees as aforesaid, attached thereto. ☞ *And that the two said several sums are not subject to any claim of set-off or cross-demand, as of mutual debts or credits on the part of the plaintiffs, under section twentieth of the bankrupt act, or otherwise.*

It is therefore considered and adjudged that said Maxwell and Jordan, trustees, recover from said plaintiffs said several sums of money, to-wit: ten thousand dollars, with interest, at seven per cent. per annum, from the 31*st of December*, A. D. 1867, *and forty-eight thousand twenty-five and fifty one-hundredth dollars, with interest, at seven per cent. per annum, from January* 2, 1868, *making to the* 3*d day of June*, 1872, *being the first day of this term, the sum of* $75,981.36, *and execution is awarded therefor, but stayed for* 120 *days.*

It is further ordered that each party pay one-half of the costs herein. ☞ The foregoing paragraphs in italics are the ones complained of as erroneous.

CERTIFICATE OF THE SUPREME COURT. (*Rec.* 164.)

"And now, on motion of said plaintiffs in error, the Court orders it to be certified and made part of the record in this case, and of the judgment and entry of affirmance, that the personal judgment rendered in said Superior Court against said plaintiffs in error in favor of J. M. Jordan and George Maxwell, trustees, and affirmed in this Court, was founded on the claim set up in the cross-petition of said trustees in bankruptcy to recover certain remittances made by said L. C. Hopkins to said firm of A. T. Stewart & Co., prior to the time when said Hopkins was adjudged a bankrupt; and that plaintiffs in error claimed and asked this Court to decide that under the twentieth section of the bankrupt act of March 2. 1867, said moneys could not be recovered back, but were to be held as a set-off under the provisions of said section as to "mutual debts" against a larger sum, which said Hopkins was owing at the time

[1] The Supreme Court did not concur in this finding. It says: "Neither did they at that time credit those remittances on either the cash or merchandise account of Hopkins & Co., but held them, subject to the further order of Hopkins." 30 O. S. 532.

of said remittances, and at the time when the rights of said trustees in bankruptcy accrued to said firm of A. T. Stewart & Co."

"But this Court decided that said plaintiffs in error, survivors of the firm of A. T. Stewart & Co., were not entitled to have said remittances or moneys set-off against the said larger indebtedness to them, under the said twentieth section of the bankrupt act, and affirmed the judgment of said Superior Court in favor of said trustees in bankruptcy, and against plaintiff in error, to-wit: for the sum of seventy-five thousand nine hundred and sixty-one and thirty-six one-hundredth dollars and interest from June 3, 1872."

"And it is further certified that this Court is the highest Court of law and equity in the State of Ohio, in which a decision of this case can be had."

ERRORS ASSIGNED BY APPELLANTS. (*Rec.* 167.)

"And plaintiffs say that in the rendering of said judgment error intervened to their prejudice, as will appear by said record; and that among the errors so intervening are the following:"

"1. That said court found that certain moneys of L. C. Hopkins remaining in the hands of A. T. Stewart & Co., subject to the order of said Hopkins when said Hopkins was adjudged a bankrupt, and when the rights of said Jordan, trustee, attached thereto, were not subject to be set off *pro tanto* against a larger sum, in which said Hopkins at the time he became insolvent was indebted to A. T. Stewart & Co., for merchandise sold and money advanced, in accordance with section 20 of the bankrupt act of the United States, passed March 2, 1867, but refusing to allow such set-off, said court rendered judgment in favor of said trustee for the full amount thereof."

"2. Other errors apparent upon the record."

ARGUMENT.

1. The question of jurisdiction.

Not following the language or order of the brief for the motion, I think the whole argument suggested in it may be comprised in two points.

1st. That the pleadings in the case below did not present a question of set-off.

2nd. That the decree below might have been made without reference to set-off, on the ground that the two pay-

ments in question were made for the purpose of an unlawful preference of appellants over the other creditors of Hopkins, and so would be appropriated to the creditors generally under the State insolvent laws or the Federal bankrupt act.

These points in their order:

1. The petition in the case did not seek relief in relation to the account, but was limited to relief as to the mortgages. The answer alleged payment in full. The reply admitted the receipt of alleged remittances, but denied the obligation to apply them in payment. The alleged contract in regard to cash goods, had it been satisfactorily proved, would, I conceive, have required the remittances to be applied on account by force of the agreement, and without reference to set-off. The question of set-off, also raised by the replication, was argued and decided.

There is no general rule, I apprehend, as to pleading set-off. Where an account is required to be filed, Mr. Waterman says, pp. 626–7, "The sole object of such account seems to be to put on the record notice to the plaintiff that the defendant intends to avail himself of such set-off. The account may be expressed in most general terms (*Waterman on Set-off, pp.* 626–7).

Sec. 5085 of he Revised Statutes of Ohio is Sec. 117 of the original code. It was in force when the present action was brought, and is as follows:

"When the action, counter-claim or set-off is founded on an account, or on a written instrument as evidence of indebtedness, a copy thereof must be attached to and filed with the pleadings; and if not so attached and filed, the reason for the omission must be stated in the pleading."

Sec. 5088 Rev. St. of Ohio reads: "When the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the Court may require the pleading to be made definite and certain by amendment."

This section was part of the original code, and was in force at the time of trial.

In this case the account was not attached to the replication nor the reason of its absence assigned in the pleading. By a motion to the Court, it would have been ordered to be attached, or the reason stated. The record of the case omits the certificates showing the dates when the depositions were taken or filed, but it is obvious the account, which was voluminous and would have been cumbrous in a pleading, was filed in the case as an Exhibit to Mr. Libby's deposition long before the trial (*Rec.* 61, 62). The marks on

the Exhibits show the accounts to have been put in evidence on *Dec.* 6, 1869 (*Rec.* 63).

Proof was made on both sides, at the trial, covering the relations between the parties; the condition of the merchandise and cash accounts between them when the loan was made, when Hopkins suspended business, and during the time between those two events.

The fifth head of the answer alleged that Hopkins was largely indebted to A. T. Stewart & Co., on account, in the sum of about $150,000 when the pretended loan was made. *Rec.* 9, 10. On the trial Hopkins testified to a balance due A. T. Stewart & Co., at the date of the loan, of about $137,500. *Rec. p.* 18.

Hopkins was the first witness put on the stand by the trustees at the trial below. *Rec.* 15. In his testimony in chief, he exhibited an account with A. T. Stewart & Co., showing a balance due them on account on December 14, 1867, of $216,486.55, subject to interest adjustment. The object was to show that the remittance of November 9th for $10,000, and of December 20th for $20,000, made to be applied on the *note*, had never been applied on the *account*. There was no question of the correctnesss of the account. *Rec.* 26. The deposition of Mr. Libby (one of the plaintiffs proved and exhibited the accounts between A. T. Stewart & Co. and Hopkins. *Rec.* 61, 62. These accounts are Exhibits 170–171, beginning *Rec. p.* 98, ending *p.* 114, showing balance due A. T. Stewart & Co. on *account*, January 4, 1868, of $231,515.51, and showing that if the two remittances under discussion were deducted, it would leave a balance of $173,490.06. The correctness of the account was not denied. These accounts also show a varying but always large balance on merchandise account between the date of the loan and suspension of business.

The answer and counter-claim of defendants was not filed, as appears by the jurat, until June 7, 1871, and was probably prepared with the accounts of A. T. Stewart & Co. before counsel (*Rec.* 12). If the replication did not attach the account or state the reason, the reason is nevertheless apparent. The going to trial without requiring it to be attached at the time was a waiver of it. It affords no ground of demurrer or error (*Trustees, etc., vs. Odlin*, 8 *O. S.*, 293).

The decision in this case on the question of set-off, is conclusive to the point, that under the Ohio practice the question was so presented as to call for a decision.

2. Might the decree below have been made without reference to set-off, and was it in fact so made?

Let us see on what grounds the counter-claim is asserted? This inquiry is now to be made in the light of the findings and decree below. The good faith of the original loan, the validity of the mortgages and the *bona fides* of every-thing done by plaintiffs in relation to them, are conclusively found. The opinion delivered in affirmance of the decree below is strong to that extent.

In 30 O. S. 529, JUDGE DAY, in delivering the opinion, says:

"When, however, the loan and mortgages were made, Hopkins was solvent, and none of the parties contemplated the reverses that followed. All their subsequent transactions show that the confidence of Stewart & Co. in the solvency and integrity of Mr. Hopkins continued until about the time of his failure."

"The evidence does not establish, but rather rebuts any fraudulent intent in making the mortgages," and more, which I do not quote.

Again, p. 530: "The object in making the mortgages was not to hinder or delay creditors, nor to procure false credit; but was to secure a loan of money, made in good faith, to pay debts and buy increased quantities of goods for the enlargement of a supposed prosperous business. The money was so applied." More not quoted.

Again, discussing the two payments next preceding the two remittances now in question, this language is used, p. 531:

"It is quite apparent from the evidence that these payments were not made by Hopkins with a view to give preference to the plaintiffs; but were made for the purpose of relieving his real estate from what was regarded by him, and was in fact, a valid mortgage incumbrance, so that it might be more available, both to himself and his creditors. Nor is it at all clear that the plaintiffs, when these two payments were made, believed, or had reasonable cause to believe, that Hopkins was insolvent. But the assignees can not recover under this section, without establishing, both the intent of the debtor to give a preference and that the creditor had reasonable ground to believe him to be then insolvent. *Mays* v. *Fritton*, 20 Wall 414; *Clark* v. *Iselin* 21 Wall, 360; *Little* v. *Alexander*, Ib. 500. But the payment of a mortgage debt, where the mortgage, as in this case, is full security for the debt, is not a preference within the meaning of the bankrupt act." This last point is elaborated and authorities cited.

The Court then proceeds to discuss the two remittances now in question, and the alleged contract concerning cash

goods, which the Court does not consider proved, and with reference to which, the opinion says—p. 537—

"The acts of the plaintiffs, after the supposed arrangement, were consistent only with the idea that then, as ever before, they were dealing with Hopkins & Co., 'relying implicitly on their integrity and ability to pay,' and are inconsistent with the existence of any special agreement changing the relations and legal rights of the parties. No such supposition appears to have been entertained by the plaintiffs until their implicit confidence in Hopkins was shattered by his unexpected suspension in business, by selling out his stock of goods, which occurred the day before he remitted the first installment of the $58,025.51 now in question. The plaintiffs then, it would seem for the first time, became alarmed, and Mr. Libbey hastened to Cincinnati, put the mortgages on record, and then informed Mr. Hopkins that these remittances would not be credited on the note, but would be passed to his credit on his merchandise account to which Hopkins objected, and there the matter was left until the rights of the assignees attached."

"It was the failure of Hopkins that first brought the plaintiffs to a realizing sense that they were the victims of misplaced confidence, and of the necessity of applying all the funds in their hands to the satisfaction of their unsecured claims; for they continued to pay Hopkins & Co.'s checks in favor of other parties in large sums up to the time that Hopkins sold out and went out of mercantile business, and to that time continued to apply moneys checked or paid to them upon their account, or on the note, as Hopkins might direct."

The Supreme Court looked upon the last two remittances like the two preceding ones, as free from any intention to prefer A. T. Stewart & Co. to other creditors by either party, and deemed it proper that the payments should have been applied, but the Court below, not having decreed the application, the Supreme Court allowed the judgment to stand, on the idea that the cross-judgments given in the Superior Court would bring about the same practical result.

The certificate of the Supreme Court, that the personal judgment in favor of the trustees in bankruptcy, "was founded on the claim set up in the cross-petition of said trustees in bankruptcy to recover certain remittances made by said L. C. Hopkins to said A T. Stewart & Co., prior to the time when said Hopkins became a bankrupt," must be understood as meaning a claim not incompatible with the opinion of the Court as quoted. In this view there is

eliminated from the ground of that judgment every element of bad faith and of intended unlawful preference between creditors. The same conclusion would be reached from other features of the record. The first three remittances applied on the note were held not to be in the nature of unlawful preference. There is no reason, so far as the question of preference goes, why the purpose of Hopkins should not be supposed the same in all of them. The three payments in which A. T. Stewart & Co. concurred were sustained. The only two in question are those in which plaintiffs refused, and, as the Court found, rightfully refused to concur. The only purpose imputed to Hopkins, in regard to these payments, A. T. Stewart & Co. refused to concur in, and the only purpose imputed to A. T. Stewart & Co. Hopkins refused to concur in.

The findings of the Court below show the entire basis of the decree, viz.: the two remittances unapplied to the note. Because plaintiffs were not authorized to apply them on the account, and because "*the two said several sums are not subject to any claim of set-off or cross-demands as of mutual debts or credits on the part of plaintiffs under section twentieth of the bankrupt act, or otherwise.*

It does not find any element of bad faith.

Looking again to the opinion of the Supreme Court, the reason is given, which probably controlled the Court below. 30 O. S. 541.

"In this condition the money was held when the rights of the assignees attached. They succeeded not only to all the rights of Hopkins, but were further endued by law, with power to disregard all payments made by him by way of preference within four months before their rights attached. The payments made by Hopkins to the plaintiffs were within that period. *It is true, he did not make them with a view to a forbidden preference;* but to allow the plaintiffs to apply the money as they seek to do, would be permitting them, with full knowledge of Hopkins' insolvency, to do what the law prohibits both him and them from doing. This would be a preference as clearly in violation of the spirit of the 35th section of the bankrupt law as a voluntary preference made by the bankrupt would be. It would equally defeat the purpose of the law, which is an equal distribution of the bankrupt's estate."

The opinion of the Superior Court is not reported in the reports of that court. So far as I know, it is inaccessible if anywhere preserved. My impression is, the reasoning was substantially the same, and was alluded to in a phrase in a petition for a new trial (p. 159 of the record), which

speaks of the decree as for the amount of remittances "as paid in fraud of the bankrupt act of the United States."

I am aware that these explanations are unnecessary, and, perhaps, irrelevant, because we have to inquire only for error in the decree itself. They serve, however, to make it clear that the language of the decree was intended to mean what is now claimed, and to show the processes by which it was reached.

1. Hopkins did not intend a preference when he made the remittances. 2. A. T. Stewart & Co. did not know of the bankruptcy of Hopkins until the receipt of those remittances, and did not co-operate with him in any unlawful purpose, but rightfully refused to apply the money as he directed. 3. The money being thus innocently in their hands, and rightfully unapplied, it was the money of Hopkins, and subject to his order.

Then the question arises, was it subject to set-off? If it was, a set-off is not against the "spirit" any more than it is against the letter of the bankrupt act.

The Court held it not to be a forbidden preference in fact; but then, if the plaintiffs were allowed to make the set-off, the result would be like the result of a preference. I conceive that the same reason would apply to any set-off, and to all of the recognized circumstances and methods whereby a lawful preference may be obtained. It is unnecessary to cite the cases in this Court relating to such preferences.

THE QUESTION OF SET-OFF.

1. The claim of A. T. Stewart & Co. on account against Hopkins is a claim provable against his estate in bankruptcy.

2. It is not a claim purchased by or transferred to them after the act of bankruptcy upon or in respect of which the adjudication disclosing his bankruptcy was made, nor with a view of making a set-off.

3. The money due A. T. Stewart & Co. on account by Hopkins and the money due his estate in bankruptcy by A. T. Stewart & Co. as found by the decree below, are mutual debts or credits.

The term mutual credits is more comprehensive than the term mutual debts in the statutes relating to set-off. The term credit is synonymous with trust, and the trust or credit need not be money on both sides. Bump on Bankruptcy 85–86. Where there is a deposit of property, on one side "without authority to turn it into money" no debt can arise out of it; but when there are directions to turn it into money it may become a debt. The reason I apprehend,

would be that when turned into money it becomes like any other mutual money debt

The finding of the Superior Court was in accordance with the above: viz "And that the two sums of money remained in the hands of plaintiffs as the moneys of said Lewis C. Hopkins, subject to his order from the several days of their payment until the 29th day of February, A. D. 1868 when the title of Isaac M. Jordan and George Maxwell, trustees as aforesaid, attached thereto." The first of the two remittances is not proved to have been other than money, but it was only $10,000, and its application to the note could not be required. The large remittance was in drafts and their application could not be required. But there was "authority to turn" them "into money."

The Supreme Court not modifying the decree below, was obviously under a misapprehension of fact, in supposing the right of A. T. Stewart & Co. to refuse to apply the money to the note, rested solely upon the ground that neither of the two remittances was large enough to pay the note; but that both being retained made an aggregate large enough to pay it, 30, O. S. 539. This was an inadvertence. The Rec. p. 24 sets forth a computation made by A. T. Stewart & Co. at the request of Hopkins and forwarded to him on Dec. 23, 1867, showing the amount which would be due on the note on January 1, 1868. This computation was accepted by Hopkins, and never has been questioned. The amount thus found, viz: $58,025.51, was the amount of the two remittances. But the remittance of $48,025.51 did not reach plaintiffs, and by ordinary course of mail or express could not have done so until January 2d instead of January 1st. It left one days interest on $48,025.51 unprovided for.

Presumably from the course of business, these drafts were payable to the order of Hopkins, and by him indorsed to the order of A. T. Stewart & Co., who could only obtain money from them by adding their own indorsement. Plaintiffs were Hopkins' bankers in New York. Hopkins might not wish the drafts returned without further instructions. Somebody would have the risk of returning the drafts without collection; or of not presenting them at the proper time. Plaintiffs gave Hopkins prompt notice, and then rested. The situation was in several particulars not the kind contemplated by the rule which makes omission to return offered payments equivalent to an acceptance of them.

In the view which I am endeavoring to present, I have only to deal with the finding of the Court below as a result.

Wherein does the result so found make the situation different from a reception by the plaintiffs of money for the benefit of Hopkins by a direct deposit to his credit, either by himself or another? Wherein do their indorsement and collection of these drafts place them in a different situation from what would be if they had been sent only for collection?

Hopkins was informed on January 2d that A. T. Stewart & Co. would not apply the remittances on the note. The act of bankruptcy, through which the trustees make title, did not happen until the 29th of the same month. During this period the finding is that the money was Hopkins' money, and subject to his order.

The idea of a trust has been, and will be insisted on, but I apprehend that the finding is fatal to it. If there was a trust in any other sense than credit, it was because a party or parties other than Hopkins had an interest in it. The finding declares it to be his money and subjects it to his order.

"A party has the right to have his credit for a deposit in bank set off against his indebtedness as indorser on a note held by the bank and duly protested. *Catlin* v. *Foster*, 3 B. R. 540. So a bank may set off the amount due on a protested draft against a deposit made by a bankrupt, and need not pay such deposit to the assignee. *Winslow* v. *Bliss*, 3 Lans. 220." Bump on Bankruptcy, 8th Ed. 583. One who is debtor to a bank, the funds of which are placed in the hands of commissioners for liquidation, may properly claim a set-off for any thing due to him from the bank at the date of the assignment. *Ib.* 24. *Scammon* v. *Kimball*, assignee, 2 Otto, 362.

Aaron F. Perry
of counsel for plaintiffs in error

Supreme Court of the United States.

WILLIAM LIBBY and GEORGE FOX, Surviving Partners of A. T. STEWART & CO. and FRANCIS WARDEN, Deceased,

PLAINTIFFS IN ERROR.

Against

LEWIS C. HOPKINS and MARIA W. HOPKINS and ISAAC M. JORDAN, Trustee in Bankruptcy of LEWIS C. HOPKINS,

DEFENDANTS IN ERROR.

IN ERROR, TO THE SUPREME COURT OF OHIO.

Brief for ISAAC M. JORDAN Trustee, one of the Defendants in error.

By ISAAC M. JORDAN Trustee,
and J. A. JORDAN of Counsel, etc.

STATEMENT OF CASE.

Prior and up to June 6, 1866, A. T. Stewart & Co. sold goods largely to Lewis C. Hopkins, and as a matter of convenience opened two accounts with him, one cash and one merchandise. They became Hopkin's bankers. All his remittances were sent to them, and were credited to Hopkins in this cash account, and he paid his merchandise debts to A. T. Stewart & Co. and other New York merchants by drafts on this cash account. To replenish the cash account so as to have a large fund to draw on Hopkins had A. T. Stewart & Co. on said June 6 1866 deposit to his credit in this cash account $100,000. This was done by a check drawn by A. T. Stewart & Co., in Hopkins' favor, and he immediately endorsed it, and handed it back to them; and he obtained credit in this cash account for the amount. At this time Hopkins cash balance on deposit was about $5,000—so that it immediately became $105,000. Within three days, June 9, Hopkins' checked out of this cash deposit $78,315.72 in favor of A. T. Stewart & Co. to pay on merchandise account, leaving about $27,000, which was checked out within a short time. When this deposit of $100,000 was placed to Hopkins' credit he gave A. T. Stewart & Co. a note for that amount, and agreed to give them a mortgage on his property to secure it, and did on June 22, 1866 make a mortgage and delivered it to them. It was put in the safe without revenue stamp and remained there until January 2, 1868, one and a half years, when becoming alarmed at Hopkins' condition, it was stamped and left for record. It is admitted that Hopkins paid on this note on

May 4, 1867		$ 25,000
Hopkins remitted	Nov. 12, 1867	10,000
Also "	Dec. 23, 1867	17,000
Also "	Dec. 28, 1867	10,000
Also "	Dec. 30, 1867	48,025
Total		$110,025

By the time these last four remittances were made Hopkins had become insolvent, and within four months from that time, to wit: February 29, 1868, a petition in bankruptcy was filed against him, and he was adjudicated a bankrupt thereon on March 30, 1868, and on April 30, 1868, Isaac M. Jordan was appointed bankrupt trustee, and all of Hopkins' property and assets were transferred to him, subject to all lawful liens.

PETITION.

Soon after this A. T. Stewart & Co. sued in the Superior Court of Cincinnati on the note and for foreclosure of the mortgage, and claimed the full amount of the note, less the $25,000. This is the entire purport of the petition, and it makes no reference to any other claim against Hopkins. It demands an account and sale of property.

THE ANSWER ALLEGES

1st. That the mortgage was given simply to secure a line of credit.

2d. That the note was not duly stamped.

3d. That Hopkins paid the $110.025 in satisfaction of the mortgage.

4th. That the mortgage was not duly stamped.

5th. That the mortgage was to be withheld from record till Hopkins consented it should be filed; which consent was not obtained, and Hopkins had the right to sell and did sell some of the property, and that the mortgage never became valid, and therefore the money sent should be held in trust and paid back.

6th. That the delivery of the mortgage took place when it was filed for record, and was therefore a preference within four months.

7th. That Hopkins was insolvent when said payments were made on the note, and they became a fraudulent preference, &c..

THE REPLY DENIES

all the allegations of the ~~petition~~ answer except what it admits. It admits that Hopkins requested said remittances to be credited on said mortgage debt, and avers that they held all of said remittances subject to the order of Hopkins, and continued to hold them at the time when the rights of said Jordan, trustee, attached, subject to set off, under the bankrupt act. The reply then claims that said 2d and 3d remittances were never credited on the note because Hopkins had promised to send money to apply on merchandise account.

These are all the averments of the pleadings. They raise a number of issues of fact which have been passed upon by the court below. I will leave it for plaintiff's counsel to convince the Court that these findings against A. T. Stewart & Co., are against the preponderance of evidence. They are as follows:

1. That Hopkins requested and directed A. T. Stewart & Co., at the time said remittances were made to credit them as payments on said note and mortgage. This finding plaintiffs admit.

2. That A. T. Stewart & Co., did so credit all of said remittances except said $58,025, and that that is the only amount remaining unpaid thereon.

3. That Hopkins' trustee is entitled to recover from A. T. Stewart & Co., said $58,025, received by them but not applied as directed by Hopkins.

The Court then found that A. T. Stewart & Co. were entitled to recover said $58,025 balance remaining unpaid on said note and to a foreclosure of said mortgage to pay it, and decreed a foreclosure accordingly. And a judgment was then entered against A. T. Stewart & Co. in favor of said Jordan, trustee for said $58,025 so held and not applied as directed.

A. T. Stewart & Co. now seek to reverse this judgment against them, and also the judgment in their favor because it limits the amount to $58,025, claiming that it should be

for $27,000 more. Whether A. T. Stewart & Co. agreed to apply the $27,000 on the mortgage debt as directed by Hopkins is purely a question of fact, and the Court below found they did so agree and the record shows that A. T. Stewart & Co. consented to the decree applying said $27,000 as a payment on said note. I will, therefore, not discuss that question, believing as I do that the finding and judgment of the Court below is supported by a great preponderance of evidence.

The judgment against A. T. Stewart & Co. rests on two grounds:

1st. Either that Hopkins did not owe A. T. Stewart & Co. any other than the mortgage debt, or if he did, that said $58,025 was paid in fraud of the bankrupt law, in contemplation of insolvency, and with good reason to believe that Hopkins was insolvent and that a preference was obtained over other creditors.

The seventh defense alleges the facts of such fraudulent preference, and demands as a counterclaim that it be paid back. This was an issue in the case presented by Jordan, trustee, and on this issue a large amount of evidence was taken, as appears in the record, and if found in favor of Jordan, trustee, entitled him to a judgment for the amount and interest against A. T. Stewart & Co.

The finding of the Court is, that Hopkins, within four months before petition in bankruptcy was filed, did remit to A. T. Stewart & Co. said $58,025, and that they received it, and on January 2, 1868 and applied it to the credit of Hopkins on the general account for merchandise and cash owing by him to plaintiffs.

And the pleadings admit that Hopkins was insolvent at the time. Is not this insolvency, payment of the $58.025, within the four months, and application to the general unsecured claim, a sufficient predicate for the judgment?

If so, then on that ground alone this judgment ought to stand, for it too I claim, is supported by a great preponderance of evidence. And the judgement is good although the

decree shows also another ground for entering it, which is,

2nd. That Hopkins sent the $58.025 to A. T. Stewart & Co., with directions to apply it as a payment on the note and mortgage which they refused to do and did not do, and therefore that they hold it in trust for Jordan, trustee of Hopkins, who is entitled to it.

And although Hopkins directed that it should be so applied, and Jordan, trustee, was willing before the depreciarion of the property to treat it as a payment and in his answer plead it as a payment and demanded its application, yet A. T. Stewart & Co. persistently refused and insisted on a decree for the full amount of the note and mortgage and in violation of Hopkins' instructions—the conditions upon which he sent it—undertook to apply it on their unsecured claim, and now claim that although they cannot apply it in violation of the conditions imposed, that they may hold it to apply on their unsecured claim, and that the bankrupt law of set-off will benignantly, *sua sponte*, so to speak, make the application; that is, that a Court of Equity will allow A. T. Stewart & Co. to violate the confidence Hopkins reposed in them, will permit them to take advantage of their own wrong, and by force and against the consent of Hopkins and in bad faith obtain a preference over other creditors, after they have already obtained a preference for a like amount by the judgment of the Court on a very questionable line of conduct.

The Superior Court in General Term decided that as they had not and would not apply the $58,025 as directed they must pay it back.

The finding and judgment of the Court is as follows;

"That said remittances were made by said Hopkins with the intent and express instructions in writing that they should be applied in discharging said mortgage claim, but that said plaintiffs refused and had a right to refuse so to apply them."

And then after finding that said A. T. Stewart & Co. applied said sum on their unsecured claim, found also "that said Hopkins did not authorize nor consent to such applica-

tion of said several sums by the plaintiffs, and that the plaintiffs had no right to make such application. And that the said two sums of money remained in the hands of plaintiffs as the moneys of said Hopkins subject to his order from the several days of their payment until the 29th day of February, 1868, when the title of said * * * Isaac M. Jordan attached. And that the two said several sums are not subject to any claim of set-off or cross demand, as of mutual debts or credits on the part of the plaintiffs under section twentieth of the Bankrupt act or otherwise." And entered judgment against A. T. Stewart & Co. for the amount.

The only question now for consideration, is, whether A. T. Stewart & Co. can by way of set-off set up the claim due to them on the mortgage against the claim that accrues against them for the $58,025 by reason of their receipt of the money and their failure to apply it as directed. We claim not. So the Superior Court held. And so the Supreme Court of Ohio held.

The Superior Court placed it on the ground that the $58,-025 sent by Hopkins became a trust fund in their hands, that it never became a debt owing by A. T. Stewart & Co. to Hopkins, and that it did not arise upon contract. The Supreme Court of Ohio affirmed the judgment on two grounds.

1st. Because no injustice could result to A. T. Stewart & Co. as the mortgage security was sufficient to pay the debt, and therefore was not prejudicial to them, and

2nd. Adopted the theory and ground of the decision of the Superior Court. I refer the Court to the 15th syllabus of the decision in case of Stewart *vs.* Hopkins, 30 Ohio. St. R. 502 and to page 541 of the decision of Day, C. J., and

3d. That any other decision would give a preference to an unsecured claim.

It seems to me that the proposition is sound—that A. T. Stewart & Co. became trustees of this fund, and that it re-

quired their consent to apply it as payment on the mortgage. They had a right to refuse so to apply it as the Court held. They did so refuse in 1867 when the value of real estate was very high, as I will show, and they felt amply secured in their mortgage. They chose then to press their mortgage as an unpaid claim in full force, for the entire $58,025 and brought their suit on that basis, and up to the very hour of judgment against them continued persistently to refuse to apply the money as a payment as required to do by Hopkins, and even repudiated it as a set-off to this mortgage claim. They took it and used it, or kept it, and attempted to apply it on their unsecured claim, and claimed that in law they had a right to so apply it. As A. T. Stewart & Co. did not receive and apply the money as directed, they have not received it at all as A. T. Stewart & Co., but simply as trustees. And the bankruptcy of Hopkins', trusteeship of Isaac M. Jordan, and his demand for the money, is a revocation of their authority to apply it on the mortgage.

They should not be permitted to go into court and contest their obligation to apply it as required to do, and insist on applying it in payment of the unsecured debt in violation of Hopkins' instructions, and keep the matter in litigation until after the panic of 1873, and the subsequent depreciation of property, and then after they are defeated, and by reason of the accumulations of interest and the supposed deficiency in the mortgaged property, claim that the debt may now be paid and cancelled as originally required. When the money was sent, and even down to the time Jordan, trustee, filed his answer asking the application, no injustice would have been done by applying it, but now, after the property has depreciated, we object to the application.

It is urged that the Supreme Court of Ohio was mistaken in supposing that A. T. Stewart & Co., were not prejudiced by assuming that the mortgage property was ample to pay the $58,025. It was natural the Court should think so, and it may still be so. A. T. Stewart & Co. evidently

thought so when they refused to make the application as directed. They chose rather to violate these instructions, wrongfully to hold on to the money, not return it, nor notify Hopkins that they intended to misappropriate it, and to try the experiment of forcing its application, to reduce the unsecured debt by any rule of law they could make available, and to insist upon it by affidavit to the pleadings and evidence in the case, and then in case of defeat claim it as a set-off to the mortgage debt. I think the Court will hardly tolerate such an extraordinary proceeding.

It seems to me that A. T. Stewart & Co. are very slow in finding out whether their failure to apply the money to pay the claim they held against Hopkins has prejudiced them. Nothing is said about it when the case is tried in the Superior Court, nor on motion for new trial; nor when the Supreme Court of Ohio affirmed the judgment; nor until after the Supreme Court adjourned the term ending in 1877, at which the judgment of affirmance was entered. It then occurs to A. T. Stewart & Co. that it is possible the delay they have caused may prejudice them in the depreciation of the value of the mortgaged property, and they would rather have the money sent them applied and the mortgage satisfied than to have such an uncertain security and be liable for the full amount of the money and interest, which was not a subject of shrinkage.

So, after the term of the Supreme Court for 1877 adjourns they commence proceedings thereon at the next term, to wit: May 31, 1878, and file a petition in that Court for a new trial and set up as grounds, among other things, that they are likely to lose on their mortgage if they have to pay the entire judgment against them, that the property has so depreciated. To this petition Jordan, trustee, answered that A. T. Stewart & Co. had caused this delay, that the property was ample to pay originally, that Jordan, trustee, had demanded of A. T. Stewart & Co., that the $58,025 should be applied to cancel the mortgage that he might sell the pro-

perty when it was of very high value, and that they refused, and that they knew the value of said property and the tendency of the market value thereof. That at one time he requested them to consent to let a decree be taken to sell one piece of said property for $60,000 which he was offered for it, but that they refused, and that since then that piece had greatly fallen in value. I refer to the allegations on p. 162 of record.

The possibilities, that mortgaged property might not sell for enough to pay the amount of the mortgage, were cognizant to the Court and lawyers alike, and the argument of counsel and consideration of the Court all contemplate these possibilities. And in these times of depression in the values of real estate it might be considered negligence of parties to fail to admonish the Court that the effect of the affirmance of the judgment might remit them to depreciated values. They were fully aware of the nature and effect of the judgment of the Court below. They should have aided the Court in considering the effect of the judgment of affirmance then, and not waited until the judgment is affirmed. In that case the Court might have considered the case more fully in the light of the equities involved in the decision below.

On the hearing of the issues made by this petition for a new trial and the answer thereto, the Court, on November 6, 1878, adjudged as follows:

"On consideration of the application for the modification of the judgment heretofore rendered in this case, it is ordered that said application be and the same is hereby refused."

There is no bill of exceptions showing on what evidence the Court found and adjudged against A. T. Stewart & Co. on this application. The presumption is that Jordan, trustee, made a meritorious showing and proved the allegations of his answer.

This judgment is therefore conclusive.

If the court should reverse the judgment A. T. Stewart & Co. would have to amend their petition in order to claim that the money in their hands operated as a set-off, or to claim that the debts are mutually cancelled. In fact, we think it would require a new proceeding.

We undertook to claim in our brief on motion to dismiss that the law of set-off, as provided in the 20th section of the Bankrupt Act, "did not enlarge the doctrine of set-off beyond what the principles of legal or equitable set-off previously authorized." And therefore that the decision of the case did not necessarily involve a construction of that act, citing Sawyer *vs.* Hoag, 17 Wall, 610.

The overruling of this motion leads us to the consideration of this statute.

It contemplates "mutual debts and mutual credits," the stating of an "account" and one "debt" to be set off against another.

We can offer no better argument on this question than to refer the court to the language of Chief Justice Day in this case. (P. 541. 30 O. S. R.)

This is the language of the decision of the Superior Court, and, I claim, is sustained by authority. There can be no set-off where there is not a debt and a credit, and this money in the hands of A. T. Stewart & Co. is neither.

Respectfully submitted,

J. A. JORDAN,
of Counsel for Defendant.